Children, Marriage & Divorce:
Protecting Your Client and His Family

PREPARED FOR THE
NFLPA'S REGISTERED FINANCIAL ADVISORS
APRIL 4, 2006

BY:

RANDALL M. KESSLER [1]

KESSLER | SCHWARZ, P.C.
FAMILY LAW ATTORNEYS

CENTENNIAL TOWER
101 MARIETTA STREET, SUITE 3500
ATLANTA, GEORGIA 30303
404.688.8810
WWW.KESSLERSCHWARZ.COM

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[1] *The presenter, Randall M. Kessler is the founder of Kessler & Schwarz, P.C., a twenty person (ten lawyers, ten paralegals) domestic relations law firm in Atlanta, Georgia. Mr. Kessler is the National Chairperson for the Family Courts Committee of the Family Law Section of the American Bar Association, serves on the executive board of the Family Law Sections of the American and Georgia Bar Associations and is the former chair of the Family Law Section of the Atlanta Bar Association.*

INTRODUCTION:

I am honored to be able to present to you, the registered financial advisors for the NFLPA at the NFLPA Financial Advisors conference and hope this paper and the presentations in Miami, Florida and Santa Monica, California can help you guide your clients as they encounter family law dilemmas. Since family laws, as a general rule, are state specific, it is nearly impossible to identify legal principles that are 100% applicable in each and every state (or other countries for that matter). However, there are similar themes and issues that are dealt with in much the same way by each of the 50 United States and neighboring countries. For that reason, these materials and the presentations will focus on general concepts which will help you point your client in the right direction and alleviate many potential problems they would face if they did not have your good guidance and counsel.

The bottom line, is that the old saying: "an ounce of prevention is worth a pound of cure" is as true now as it ever was. Being proactive and protective will avoid, if not eliminate, many of the legal and financial hassles family law matters can present. Such dilemmas often include complicated issues of custody and visitation, child and spousal support, paternity fraud and division of assets between players and their spouses. While the themes for each topic are similar, (an ounce of prevention...), the mechanisms for handling and avoiding them may be specific to the situation. While some of the comments in these materials and presentations may be overly basic, I want to be sure that you are clear on the differences in terminology (such as "paternity" v. "legitimation") so that you can identify what the issues are and so that you may point your clients in the right direction at the earliest possible time. These materials and the presentations will be divided accordingly. The general topics to be covered will include: paternity, legitimation, paternity fraud, DNA testing, prenuptial agreements, divorce, custody, visitation, child support and spousal support. The real bottom line is that as soon as you can identify a potential problem, consult with an expert who handles that particular problem morning, noon and night.

Our law firm, which handles only family law matters and which consists of ten lawyers and ten paralegals in Atlanta, Georgia can certainly help answer any questions you may have, but more importantly, if it is not a matter we can handle, we can point you in the right direction or refer you to an expert in the area of the country for which an expert is needed. There are many complicated rules affecting jurisdiction and they differ based on whether the issue is support, custody or divorce. We post many of our written materials and videotaped presentations on our website (www.kesslerschwarz.com) and they may be viewed by simply clicking the appropriate link.

With all that having been stated, allow me to give you a brief overview of each of the aforementioned topics, so that you can help guide your clients if and when they happen to swim in family law waters.

LEGITIMATION V. PATERNITY:

Typically, the term "paternity" refers to the type of case filed by women seeking child support from fathers of children born out of wedlock. Alternatively, "legitimation" is typically filed by men seeking to declare that a child born out of wedlock is indeed his, and thus entitled to inherit from him. Additionally, once the child is legitimated, the father has the right to seek visitation and/or custody of the child (of course, child support would be an issue in a legitimation case as well). While these two concepts are similar, they are not interchangeable. Some states simply use the word "paternity" for cases filed by the man or woman while in other states "paternity" cases are more routinely filed by women and "legitimation" actions are more routinely filed by men. While there are some minor differences in state laws (some states allow the pursuit of visitation within a legitimation case but not within a paternity case), generally speaking, if you hear that a paternity case has been filed, it likely means a woman has sued to declare that a man is the father of her children so that she can claim child support from him.

The bottom line: if you become aware that your client has had a child out of wedlock (we are presuming that you represent the male client for the advice given in these materials, but, of course, the advice would be the reverse if you were representing the woman, whether the woman is the bread winner or not), the best step is usually to be the first to file and to ask for the child to be declared legitimate. If in fact the child is indeed the father's, (which can be proved by a simple DNA test, to be discussed later), the Court typically will order that the child be declared legitimate if, "such a determination is in the best interest of the child". Of course, if your client has no interest in being declared the father, then he/she may ask for termination or surrender of parental rights (see the next paragraph for a brief discussion on this). The nice thing about filing immediately for legitimation is that for the rest of your client's life, he will appear to have been the one that was proactive and voluntarily sought to ensure that the child was declared his. This practice is probably better psychologically for the child and both parents, as opposed to a paternity case being brought against the professional where he is declared the father by the court and ordered to pay child support. A common problem which you may encounter is that professionals who get along with the mother of their children may feel no need to pay lawyers or accountants to help them with such problems and figure that they can simply handle it themselves. On the contrary, our advice is that it is better to "cut a deal" while the parties get along; rather than to wait until there is a problem and each side is angry. While the parties are amicable, a Consent Order of Paternity and/or Legitimation can be entered which would establish legal rights (such as who the father is and matters of custody, visitation and support) and then the parties can do whatever they want outside of the agreement. The agreement or Consent Order would simply give a base line or default set of rights so that in the event that the parties eventually stop getting along, each side would know what they could insist upon as far as time with the child and support. The right to make decisions on behalf of the child for medical emergencies, educational needs and the like can also be addressed as a part of the agreement.

TERMINATION/SURRENDER OF PARENTAL RIGHTS:

Many people talk about the idea of termination of parental rights as if it is something that can be done easily. If a father does not wish to be a part of a child's life, he cannot simply decide that he would like his rights terminated. If it was that easy for a father to terminate his parental rights, not only would the child be deprived of a father figure, but also the ability to seek support from that parent would be removed. There are, of course, exceptions to this general rule. One exception is when there is a willing new father (such as a new boyfriend or husband of the mother of the child) who is willing to adopt the child as their own. In this case, the request for termination will typically be granted if the new proposed adoptive father is deemed acceptable to the Court. Another occasion where Courts will terminate parental rights is when a father is extremely abusive towards a child, but even then, a Court will be hesitant to terminate the parental rights if there is the ability to seek support from that father. However, a Court may disallow any visitation between the father and the child, but still require support payments.

The bottom line: Surrender or termination of parental rights is seldom a viable option, except in very limited circumstances. You are better off advising your client to talk to an attorney to see how they can minimize their financial obligations (if that is their goal) or how they can cooperatively talk to the mother of their child about the possibility of placing the child up for adoption either by the mother and another man or by a new couple altogether. While this may seem distasteful, if neither parent wants to be a parent, it is better to talk about these things openly and honestly than to ignore that this possibility does exist (that is: two people who have had a child and they wish to not raise that child and prefer to offer the child a life with a couple who does indeed want to care for and raise a child).

DNA:

DNA testing is now considered standard procedure when identifying whether a child is the biological offspring of a man. While DNA testing can never provide a 100% guarantee as to whether a man is indeed the father, it can guarantee 100% that a man is not the biological father. DNA testing can provide reliable results to determine that there is a 99.99% probability that the man is the father. To perform DNA testing, all that is required to determine the compatibility of the father and child's DNA is a swab of saliva from the father and the child. In fact, this can be performed without the mother's knowledge in case the father is questioning paternity, but does not want the mother to know he has a doubt. When the father has the child, he can contact any number of laboratories who can send out a technician to conduct such a test at a minimal cost. The results will usually be available within 24 hours. If it turns out that the test shows the man is not the actual, biological father, then he would be well within his rights to ask the mother to agree to a test so that she has no questions regarding the certainty of the test results the father may have obtained as to whether they were unfair or in some way manipulated. DNA testing is now standard procedure in all paternity and legitimation cases. It is also standard procedure in all paternity fraud cases (see upcoming section on Paternity Fraud). The nice thing about DNA

testing is that it is inexpensive and painless. In the past, blood tests were required and samples from the mother, father and child were needed. There is absolutely no reason for a man who has a child in today's world not to have a DNA test. As a family law attorney, I can confidently say that this applies to married as well as unmarried men. For the few hundred dollars it costs to obtain a DNA sample, it is well worth it. While this may appear unbecoming and somewhat cynical, there are thousands and thousands of men that had no reason to doubt that the mother of their child (even if it was their wife) was in fact telling them the truth about the paternity of their child. Once again, the old adage, "an ounce of prevention..." applies.

PATERNITY FRAUD:

Although "paternity fraud" has been around for many years, it has recently begun gaining nationwide attention in the United States due to the advances in DNA testing. Simply put, "paternity fraud" means that a woman has knowingly deceived a man about whether or not he is the father of her child. Laws are being passed around the country to allow men to go back to Court to undo a declaration of paternity if they find out that they are not the father. The usual prerequisites for such a legal action are that the man believed he was the father and he obtained information to become suspicious of other options fairly recently and acted in a prompt manner in response. While many states have previously determined that it was unfair to a child to allow the father to "delegitimate" a child, public pressure has resulted in the passage of many laws that allow a father to do such. Of course this is the "pound of cure" that could have been avoided if a DNA test had been given at the beginning. While this issue may have not come up for many of you, I wanted you to be familiar with the term and understand the difference between a "paternity" case and a case of "paternity fraud".

GENERAL INFORMATION ON OUT-OF-WEDLOCK CHILDREN:

Custody, visitation and child support are issues which arise in any situation where a child is born. However, once a child is declared legitimate, then these issues are treated the same for children born to a couple who are married, as for children who are born out of wedlock. For this reason, these issues of custody, child support and visitation will be discussed after divorce is briefly covered.

MARRIAGE:
PRENUPTIALS, DIVORCE, CUSTODY, VISITATION & SUPPORT

A marriage, in any state, is a combination of rights and responsibilities. Once two people are married, their legal rights change and the ownership of assets and obligations for debts are severely affected. Divorce can be a very time consuming and a very complex and expensive

way to resolve differences between a couple. However, there are certain things that can be done which can eliminate the need for significant costs of litigation and expenditures of time. One such way is for parties to separate their monies and entrust it to other people whom they trust before they are married. Of course, there are associated risks in that the other people may not return the property, even if they are family members. While there are many other unique mechanisms to hide and shield money or assets legally, the best, easiest and most straightforward is to enter into a prenuptial agreement.

Prenuptial Agreements:

A prenuptial agreement is also known as a premarital agreement or antenuptial agreement. A prenuptial agreement's purpose is to predetermine rights and obligations upon dissolution of a marriage. Certain things cannot be decided in advance such as custody and visitation since those issues must be handled based on the circumstances that exist at the time of the divorce. Nonetheless, parties entering into a prenuptial agreement, can express their preferences such as who would be the better parent to have custody and the courts may thereafter look at those statements to assist the Court in determining who actually has always had an interest in being the primary parent. However, the main goal and purpose of a prenuptial agreement is to eliminate bickering about money. Prenuptial agreements are accepted and enforceable across the United States. The laws of each state differ, but there are some general themes and general ways you can be safe to ensure that the prenuptial agreement is likely to be enforced at the time of a divorce. General concepts which should be applied when a prenuptial agreement is being considered include:

1. *Full Disclosure*: Each side must disclose all of the assets and debts they have at the time they are entering the prenuptial agreement. Otherwise, the party who does not like the prenuptial agreement at the time of a divorce may claim that they would not have entered into the prenuptial agreement had they known all the facts, assets and obligations that each party had at the time they signed the prenuptial agreement.

2. *Fair Representation*: It is highly recommended that each side be represented by a lawyer. This prevents either side from later claiming that they would not have entered into an agreement had they had good legal advice and both sides will be precluded from complaining that the other person's lawyer was advising both parties (which is unethical and not allowable for lawyers to do). Even if the wealthy client has to pay for the other side's lawyer, it will be money well spent as it is a way to help ensure that the prenuptial agreement is more likely to be enforced.

3. *Absence of Fraud or Duress*: Obviously, a prenuptial agreement will not be enforceable if someone was forced to sign a prenuptial agreement under threat of physical harm (such as a gun pointed at their head). But other things can be viewed as fraud and duress such as the groom presenting the prenuptial agreement to the bride as she is walking down the aisle with a statement that he will not marry her unless she signs "then and there". While in many cases, this may not be considered duress since the bride

still had the choice to stop the wedding, it is much wiser for each party to be given the opportunity to review the prenuptial agreement many, many months before the actual wedding ceremony and that it be signed by both parties' months before the ceremony occurs.

Other than the aforementioned principles, there are some general rules of equity that apply when the Courts decide whether to enforce a prenuptial agreement. One such principle is for the Court to determine whether the agreement is or was unconscionable. In other words, does the wealthy multimillionaire keep all of his/her money while the other side has to pay $100,000.00/year in alimony to them. Or, have the facts and circumstances so changed to make the agreement unconscionable at the time it is being enforced. Obviously, a devastating illness or injury affecting somebody's financial needs or financial assets is something that may persuade a Court not to enforce a prenuptial agreement. Additionally, the mere passage of a significant amount of time may make it hard to enforce a prenuptial agreement. To avoid this problem, we counsel our clients to "re-up the prenup", by having each side initial and date the prenuptial every year. This way no one can claim that the agreement is so old that it has lost its relevance.

Additionally, there is such a thing as a "postnuptial agreement". You can determine and agree upon all the same things that would have been agreed upon in a prenuptial agreement after the wedding. The only difference is that the document will be referred to as a postnuptial agreement instead of a prenuptial agreement. Also, prenuptial agreements can be revised. A prenuptial agreement can be transformed into a postnuptial agreement if the parties wish to change things.

The simplest and easiest form of a prenuptial agreement is to determine what each party has and owes before the marriage and to agree that each party will keep those items and obligations upon the demise of the marriage. Of course, prenuptial agreements can be much more complicated than that and can set amounts of alimony. For instance, some prenuptial agreements have called for a certain amount of alimony to be paid based upon the length of the marriage. This can lead to manipulation of the date of filing for divorce; that is, a potential recipient of alimony may wait an extra year or two to file for divorce if the prenuptial agreement grants them more alimony for being married longer.

Another helpful hint is that it sometimes makes sense to acknowledge your client's weaknesses. For instance, if your client has cheated on a previous spouse, it may be worthwhile to mention in the actual prenuptial agreement that the prenuptial agreement will remain enforceable regardless of the cause of the divorce even if it is either parties' adultery that causes the divorce. This will prevent your client's new spouse from claiming that the prenuptial agreement would be acceptable except that he went off and had an affair or vice versa.

Just as in the situation with legitimation cases, your clients may be very hesitant to bring up the topic of prenuptial agreements; however, they will thank you later. The fact is that 50% of all marriages end in divorce and when it happens, people will wish they had a prenuptial agreement. It would be a great idea to put your advice in writing and to explain that it is a way to save a lot of heartache and money down the road in the unlikely event of a divorce. At a

minimum, we advise that you strongly encourage your potential client to meet with a lawyer to explain the pros and cons of a prenuptial agreement and what could happen in the event a divorce occurs without a prenuptial agreement having been executed.

Divorce:

Divorce is the major issue in family law. Within divorce are the issues of custody, child support, paternity fraud, alimony and the like. The presentations and these materials will be too brief to be fully exhaustive on the topic; however, we do have a FAQ page on our website (www.kesslerschwarz.com) which gives a quick overview of divorce, custody, modification, etc. In the event of a divorce, the more that can be agreed upon, even before lawyers are involved, the better. For the purpose of this presentation and these materials, I will focus mainly on the issues of division of property and alimony. Custody and visitation are also covered below.

Property Division:

For property division in a divorce, some states utilize a theory of "community property" while other states utilize a theory of "equitable division". Simply put, community property states basically ensure that property acquired by either of the parties during the marriage is divided evenly upon divorce. Equitable division states ensure that property is divided equitably or fairly. In equitable division states, matters such as the conduct of the parties or monies they had before the marriage or monies they inherited or were gifted during the marriage can play into whether the money is divided between the parties or left with the party who inherited it or had it before the marriage.

Jurisdiction (which state handles the divorce?):

Generally, the divorce must happen where the parties have lived, but if they have lived in different states for many months, the likely result would be that the person suing for divorce must sue where the other person lives. However, creative lawyers can often persuade a Court that the marriage existed in the state of their client's residence and therefore that state has jurisdiction over the divorce. If this is an issue of concern to you in a particular case, please let me know or visit our website and review the materials on UCCJEA or UIFSA which cover the jurisdictional conflicts covering support issues and custody issues.

The bottom line: Divorce settlements are about listening to everyone's concerns and addressing them. Often, a house wife who has not been employed for many years may be more likely to accept an up front cash settlement since that seems to give her immediate security, whereas the best outcome for her may be actually an annuity purchased by the husband which pays the wife a bigger amount but over time. The way we always try to resolve cases is to listen, listen and listen. Once we know what the other side's goals are, we try to address them as best we can while knowing the court may simply divide things 50-50. In other words, we can help

carve up the marital pot with a scalpel or we can leave it to the judge who will use a meat cleaver. Obviously, a scalpel will yield better results for both parties.

Jury Trials and Family Courts:

Very few states allow juries to make decisions in divorce cases; however, a few states such as Texas and Georgia allow juries to be partially involved in the decision making process. Additionally, many states and many cities within states have family court systems where judges hear only family law matters. In these systems, judges are more in tune with the family law rules and can help streamline the process and get people into mediation and into a more amicable resolution than in jurisdictions where the same judge may hear a murder case one day and a divorce case the next. Of course, this depends on where the parties live.

Conduct (does "cheating" matter?):

Adultery is relevant in many states with respect to the division of property and sometimes even with respect to whether a spouse is entitled to alimony.

The bottom line: If there is adultery or other misconduct such as abuse, the victim may well find a way to use that to gain favor with the Court, or at least in settlement negotiations.

Custody:

If a child is born to a couple who is married or if a child has been legitimated by a father who was not married to the mother at the time of the child's birth, both parents will be presumed to have equal rights to custody until a Court determines otherwise. In most states, the Court will determine custody based upon the premise of "what is in the best interest of the children". Some states may still have a presumption (even if it is unofficial) that younger children are better off with a certain parent (usually the mother), but such positions are being quickly outdated. Additionally, many states including Georgia, Texas and others allow children to voice their preferences when they obtain a certain age (11, 12, 13 and 14 are the most common ages). The term "joint custody" is often misinterpreted. The real measure of the outcome of the case is not whether it is called joint custody or sole custody but what the fine print says. In other words, what specific days will the child spend with each parent and who is entitled to make the decisions if the parties cannot agree on important decisions, such as education or medical decisions.

A good suggestion for anyone going through a divorce or a custody dispute is to see a cooperative parenting expert. This person may be a therapist, psychologist or psychiatrist but such a person can encourage the parties to cooperate for the sake of the child and will ensure a better outcome for the child than might otherwise be the case.

The bottom line: Custody is decided based upon what is in the best interest of the child and Courts hate deciding this issue. If the parties can agree upon this issue themselves, for instance, by allotting Dad more time in the off-season, then so much the better. If not, a good, creative legal presentation to the Court will be needed since the case will be different than most the judge sees, and you want to be sure the judge is persuaded to "think outside the box" for this situation.

Child Support:

There are various "guidelines" in each state due to a federal mandate in the late 1980's. Each state has a statute indicating how child support is to be determined, but generally, when a payer of child support earns a few hundred thousand dollars or more, the real question is how much more child support should the recipient receive over and above the basic necessities for the child. One line of thinking is that $3,000.00 per month per child is more than enough to meet the cost to raise any child. The other line of thought amongst divorce lawyers and family law judges is that a person who earns millions of dollars should contribute much more to the upbringing of his child. In such cases, each party will be required to complete a Domestic Relations Financial Affidavit to show the Court the typical and historical spending related to the child. The Court may use this as a guideline to determine how much child support is appropriate, but generally speaking, awards of child support of over five or six thousand dollars a month are rare (which is why you might have read about them in the paper or seen them on the news). When such a result occurs, it is well publicized because it is such a rarity. The main point to consider is that a Court cannot do many things that parties could very well do by agreement. For instance, someone who makes a lot of money can purchase a home for their child and the child's mother (or father) to live in while keeping title in his/her own name. This may be a way to ensure that the money is being spent on something that directly benefits the child. When the child turns eighteen, there are many options available. The owner of the house may sell it or turn the title over to the child. There are other things that can be done by agreement such as agreeing to pay unlimited costs for private school as long as the payor has the right of veto over the choice of such a school. Courts will generally not do this (without an agreement) and will simply require a monthly amount to the custodial parent who will then decide what school system the child attends as well as how the child is raised in other aspects. Another thing that can be agreed upon is a lump sum amount of child support (most courts will not do this unless the parties agree on it). For instance, when a player earns a signing bonus or a significant paycheck at the beginning of the season, perhaps the entire amount of child support for years in advance should be paid so there are no concerns about a check being lost in the mail or other litigation surrounding that child support obligation which might distract the professional from his/her job. Of course, if the player stumbles upon bad times, the money is already gone and likely cannot be recouped, but at least it went for his child, especially if used to purchase a home.

Alimony:

Alimony is on its way out in the United States. While it still exists, it is primarily for women who have been housewives and mothers for a long period of time and at the time of the divorce, it is too late for them to have a reasonable chance at getting reestablished in the workforce and to earning a decent living. While the concept of rehabilitative alimony is alive, this is simply a phrase to suggest that a short term of alimony to allow a recipient time to get trained or educated for a certain job might be appropriate.

"Palimony" is not authorized in the United States. While people file lawsuits from time to time claiming that their boyfriend or girlfriend should pay them support since they were with them with for a long period of time, these lawsuits almost always fail. Unless it can be proven that there was a specific contract or agreement that money would be paid in exchange for the support of a boyfriend or girlfriend, a claim for a "friend support" or "palimony" will not be allowed.

Collaborative Law:

In the event one side or the other feels the need to move quickly and to hire lawyers, please mention to your clients the concept of **collaborative law**. While I know I keep referring to our website, our website does have a quick overview of collaborative law on it. In a nutshell, collaborative law aims for a "no Court" divorce. It is usually more beneficial to the spouse who makes the money since the concept is to keep everyone moving forward using mutual financial experts and mutual mediators to help advance the prospects for settlement without the need for litigation. Unfortunately, not every lawyer is versed in or trained in the art of collaborative law. Therefore, if you can find a way to persuade your client to hire a lawyer who practices collaborative law and to pay for a lawyer for his wife who also is engaged in the practice of collaborative law, you will likely save your client many headaches and thousands of dollars.

CONCLUSION:

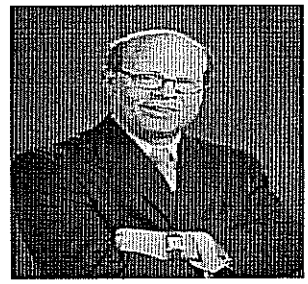
How do you protect your client from divorce, family law or other domestic relations issues? You can't. Unfortunately, these disputes are here to stay. What you can do is to help encourage your clients to address the problems head on by seeking counsel, by obtaining a prenuptial agreement, by getting a DNA test and by seeking to legitimate their out of wedlock children. Dealing with these issues, figuring out what they would like to do in the event there is a future disagreement is really the best advice any lawyer or other advisor can give to a client or potential client. Even when everybody is getting along, the likelihood is strong that there will be disputes. If you can think about potential disputes and agree upon how to handle them, especially at a time when everybody is getting along, parties will be saved thousands and thousands of dollars and hours and hours of mental anguish. Every client that comes to see me with a problem relating to a child, such as custody and support, makes me think "what could the

original lawyer or the client have done to avoid this particular problem?" Thinking ahead and procuring the ounce of prevention is almost always worth it. What's the worst that can happen? A few hundred dollars is lost on obtaining legal advice or a few hurt feelings are created because someone mentions a prenuptial agreement? I think that is our job as professional advisors. Whether it is the financial advisor, the agent, or the lawyer, somebody needs to help clients face reality and the reality is that family law problems will occur and the client will be better off if they have thought about them ahead of time and done everything they can to prevent or at least minimize the dispute.

I appreciate the opportunity to assist and look forward to answering any questions you may have either at the presentation or by email, telephone or regular mail. I am also more than happy to present to your firm or group on any of the above or related topics in more detail.

KESSLER | SCHWARZ, P.C.
FAMILY LAW ATTORNEYS

Centennial Tower
Suite 3500
101 Marietta Street
Atlanta, Georgia 30303
(404) 688-8810
www.kesslerschwarz.com
rkessler@kesslerschwarz.com



Founding Partner - Kessler & Schwarz, P.C.
20 person, **Atlanta** domestic relations' firm
(10 lawyers, 10 paralegals)

Chair - Family Courts Committee of the Family Law Section of the American Bar Association

Council (Exec. Comm.) - Family Law Section, American Bar Association

Exec. Comm. - Family Law Section of the Georgia Bar Association

Former Chair - Family Law Section of the Atlanta Bar Association

Professor - Trial Techniques at Emory Law School

Professor - Family Law at John Marshall Law School in Atlanta

Editor - Georgia State Bar Publication, "Family Law Review"

Named in 2002 as 1 of 15 'Lawyers on the Rise' by The Daily Report

Named a Superlawyer by Atlanta Magazine and Georgia Trend Magazine

Frequent writer and lecturer on Family Law topics such as "Representing the High Profile Client" for various National, State and local Bar Associations.

Active in many other legal and civic associations including the Charles Weltner Family Law Inn of Court, Habitat for Humanity

B.A.-Brandeis Univ. in 1985; J.D.-Emory Law School in 1988.