

## PRACTICE TIPS FOR THE FAMILY LAW ATTORNEY

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### I. **Preface:**

These materials are a compilation of the best strategies, tactics, and tips I have observed in practice. Almost nothing is original. Take it and use it.

### II. **General Tips:**

- a. Charge a substantial retainer. You are worth it, and the work is hard. Clients dislike hourly billing and often equate the caliber of the lawyer with the fee charged. A copy of our contract is attached as Exhibit 1.
- b. Be frank. Tell the client his problems, emphasize weaknesses, and be clear how much he can lose. Then craft your case.
- c. Material allegations are deemed denied in divorce and annulment proceedings. N.C. Gen. Stat. §50-10. The appellate courts have applied the same rule to alimony claims, including alimony without divorce. *Phillips v. Phillips*, 185 N.C. App. 238 (2007); *Koob v. Koob*, 283 N.C. 129 (1973).
- d. Draft pleadings strategically. Allege only what you can prove. There are times to make limited claims, other times full-bodied claims. Insert only enough facts to survive a motion to dismiss. Save your arsenal for trial. Otherwise, opposing counsel will correct the problems. Use basic language or opposing counsel may cross with the pleadings.
- e. Have a judge, not the clerk, sign a show cause order. It requires the contemnor to put up evidence first (allowing cross examination and rendering his Fifth Amendment privilege meaningless), keeps criminal contempt as an option, and allows an order for arrest for enforcement. By contrast, if you call the contemnor, you lose criminal contempt.
- f. In close cases, one or two issue cases, or complicated cases, request a pretrial conference. Limit the issues. Address evidence. Ask for guidance. If the opposing says you are unreasonable, ask the judge. It helps the client, saves time, and carries favor with the judge. Never forget reasonable people can differ.
- g. File a written limited appearance if not fully retained.

- h. Know Rule 3.1 of the General Rules of Practice for Superior and District Courts. Basically, custody, TPR, spousal support, and interim or final ED cases have priority over most superior court matters. Send a letter in advance to the judges when you have a conflict. They decide and instruct.
- i. Communicate scheduling conflicts early with opposing counsel and the trial court administrator.
- j. Come to mediation prepared and with an offer of settlement. Do not use mediation to learn the case and for discovery as it is a waste of time and money for everyone.
- k. Use a trial lens to craft your settlement offer. Go to court with a reasonable settlement offer, but always be prepared for trial.
- l. Never bluff. Once caught, you will never be trusted.
- m. Negotiate for a reasonable period of time, but no longer. Sometimes it is simply best, and easier, to try the case. Moreover, clients sometimes need a judge to decide.
- n. Be the most reasonable person in the courtroom. If you cannot win with one or two material points, you lose. Exercise good judgment. Pick your battles carefully.
- o. Anticipate evidence issues. Dismantle opposing positions. Preparation wins.
- p. Know the local rules. There are several sets. Nuances abound. Did you know certain child support and PSS cases can be referred to FFM? Check the “nccourts.org” website for your county.
- q. Prep witnesses. See my Trial Tips form attached as Exhibit 2.
- r. ECO’s. Be wise when you seek *ex parte* relief. Integrity counts. You develop a reputation with judges and colleagues. If you cannot win the initial hearing, do not file.
- s. Pick-up Orders. Some judges will sign, others will not. Know your judge. N.C. Gen. Stat. §50A-311 (court may issue warrant to take physical custody of child); N.C. Gen. Stat. §50-13.5 (cited as inherent authority of the court to direct law enforcement involvement).
- t. Did I say know your judge? Know the judicial philosophy and leanings of the trial judge. If you do not, ask those who practice regularly before the

judge. When I take cases out of county, I retain experienced local counsel to give me advice, appear at administrative calendars, teach me local rules, and, most importantly, educate me on the judge.

- u. Understand service issues. Read N.C. R. Civ. Pro. 4 and 5. Rule 4 applies to initial service, Rule 5 thereafter. Is service perfected upon the party by serving the attorney? Or by placing documents in the attorney's courthouse box? Beware. Some attorneys object.
- v. Make sure you are released as attorney of record in any final court orders.
- w. Some attorneys say they will obtain an acceptance of service for opposing parties, and the paperwork sits for an extended period of time. It is the "send it to me" spiel. I now send opposing counsel the paperwork with an acceptance of service, tell them I will delay service until a date certain, and then serve the opposing party.
- x. Letters have limited utility. As a general rule, I only send them once: either to invite a peaceful resolution, or to give notice of what lies ahead. Letters are a useful tool in litigation to show your good faith and the opponent's bad faith before the judge.
- y. If you need time, use extensions of time followed by agreements with opposing counsel (reduced to writing).
- z. Ask for bullet point outlines on evidence and witnesses. It simplifies the process.
- aa. If you are unsure of the legal basis, argue inherent authority of the court to do justice, or request a recess and ask advice.
- bb. Motions for a GAL are uncertain. GAL authority for infants or incompetent persons exists in civil, custody, and 50B cases. N.C. R. Civ. Pro. 17(b) and (c); N.C. Gen. Stat. §1A-1.
- cc. For service members, consult *The Military Divorce Handbook* written by Mark E. Sullivan (2006). He has been willing to answer specific questions in the past.
- dd. Case law holds a four year old may be a competent witness. *State v. Rael*, 321 N.C. 528 (1988); N.C Rule Evid. 601. Generally, wishes of a child mean less when young and more with age.
- ee. Send clients to a counselor, accountant, and financial planner as needed.

- ff. A rule to remember in the domestic realm: If possible, do no harm. The Hippocratic oath. As my dad taught me, you have great power. Use it judiciously.
- gg. Know the strengths, weaknesses, and tactics of opposing counsel. Be prepared.
- hh. Fashion your closing argument during trial. Start with a powerful theme. Tell the judge why you win at the outset. Focus on the facts, law, and equity. Say why you win in two or three compelling points. Re-craft the issue and your opponent's presupposition. Show how your position comports with sound public policy. Emphasize common sense and reason. Be passionate, but professional. Close with clout.
- ii. Try to avoid scorched-earth litigation. It distances clients from a resolution, increases costs, and sullies the profession.
- jj. A previous survey of district court judges revealed lack of civility, disorganization, tardiness, wasting time, and taking unfair advantage of unrepresented parties were of chief concern about the bar. Mark E. Galloway, District Court – Suggestions from the Bench 117 (1999).
- kk. Read the rules of evidence and civil procedure quarterly. It refreshes and illuminates. Every time.
- ll. The case is not personal. The facts and law determine the outcome. Tomorrow we change sides.
- mm. Get away from it all. Clients dump their burdens. Suggest a counsellor. Then go exercise, vacation, and enjoy life. Feed your soul.

### III. **Evidence Tips:**

- a. Master the rules and you master the courtroom.
- b. When rules apply. N.C. Rule Evid. 1100 series. Tip: Except for privilege, the rules do not apply in summary contempt proceedings or Rule 104 fact determinations when deciding admissible evidence.
- c. Generally, district court judges admit and filter, and superior court judges are more rule oriented. Adapt to your audience.
- d. Credibility is always at issue with any witness.
- e. You can impeach or refresh recollection with anything.

f. Advise the court in advance of a questionable evidence issue. Obtain a ruling pretrial or before you attempt to introduce the evidence.

g. Common and useful rules:

1. Conditional relevance. 104(b)
2. Judicial notice. 201
3. Rule of completeness. 106
4. Unfair prejudice. 403.
5. Bad acts. 404(b)
6. Character evidence. 405/608
7. Competency. 601
8. Inconsistent statements. 611(b)
9. Specific acts of untruthfulness. 608(b)
10. Refresh recollection. 612
11. Statements for medical diagnosis/treatment. 803(4)
12. Recorded recollection. 803(5)
13. Business record. 803(6)
14. Electronic evidence.
15. Authentication/foundation. 900-902
16. Hearsay. 803(1,2,3,4,5,6,8,18,24)
17. Hearsay declarant unavailable. 804(b)(1,2,3,5)

h. Experts.

1. The rules have tightened. N.C. Rule Evid. 702.
2. Specialized knowledge is the touchstone. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004).
3. Tender an impressive resume as an exhibit.
4. Attack expert testimony if prepared in anticipation for litigation.
5. Review ethical guidelines of counselors and therapists. Particular rules apply for consent of one, or both, parents; disclosing the child's comments while serving as a therapist; and serving as an evaluator versus a therapist.
6. Do not allow testimony outside of one's expertise. There are hundreds of different certifications, degrees, and specialties.
7. Get the facts and data underlying the expert's opinion. N.C. Rule Evid. 705.

8. A social worker may not testify that a victim suffers from PTSD. *State v. Gamez*, 745 S.E. 2d 876 (2013); N.C. Rule Evid. 702.
  9. No expert may testify that a child was sexually abused without physical evidence. *State v. Stancil*, 146 N.C. App. 234 (2001); *State v. Grover*, 142 N.C. App. 411 (2001).
  10. See my expert examination outline attached as Exhibit 3.
- i. With trial exhibits, simply mark, identify, authenticate, and offer it into evidence. Then have fun: read from it, write on it, and use it.

#### IV. **Ethics:**

- a. Does anyone really believe the public or colleagues are impressed with...?
- b. We are to conduct ourselves at all times with dignity and propriety. All personalities and colloquies between counsel should be avoided. Adverse witnesses should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited. Conduct of the lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret testimony, argument, or authority, nor offer evidence he knows to inadmissible. Counsel should yield gracefully to the court, at all times promoting respect for the court. N.C. Gen. R. Prac. Rule 12; RPC 208 (a lawyer should avoid offensive trial tactics and treat others with courtesy).
- c. You must tell the judge of any adverse case law. Distinguish it. RPC 3.3.
- d. A lawyer may not counsel a client to evade service of process. 98 FEO 2.
- e. A lawyer who acquires knowledge of apparent misconduct or a violation of the RPC's, even if from mental impairment or substance abuse, must report the matter to the State Bar. 03 FEO 2; RPC 17.
- f. A lawyer may neither listen to an illegal tape recording nor use the information to advance his client's case. RPC 192.
- g. Tip: Courts and the State Bar have concurrent jurisdiction to decide ethics issues. If someone raises a spurious ethical issue, ask the court to rule on the issue and enter an order. This maneuver forecloses further review by the State Bar.
- h. A client is entitled to his file upon withdrawal of his attorney. CPR 3.

- i. A lawyer may not withhold a client's file to extract money from the client. 98 FEO 9.
- j. A lawyer may not tell a client any fee paid, except a flat fee, is non-refundable. 00 FEO 5. See my contract for acceptable language for fees.
- k. When a lawyer charges a fee for a consultation and accepts payment, an attorney-client relationship is formed for purposes of the RPC's. 06 FEO 14.
- l. After being discharged, a lawyer cannot discuss the client's case with his new attorney without the client's express consent. CPR 300.
- m. An attorney must keep the client's file for six years unless the client consents to an earlier disposition. RPC 209.
- n. If a lawyer is likely to be a necessary witness on a contested issue, the lawyer shall not act as advocate. Minor exceptions exist. RPC 3.7.
- o. When using unsecure methods of communication (e.g., cell phone, email, etc.), the attorney must take steps to minimize the risk of disclosing confidential communications. RPC 215.
- p. Generally, a lawyer has no obligation to return legal fees paid by a third party unless the contract is with the third party. 05 FEO 12.
- q. A lawyer representing a minor owes a duty of confidentiality to the minor, and the lawyer may disclose confidential information without the minor's consent only if the parent is the legal guardian and disclosure is necessary to make a binding legal decision. 98 FEO 18.
- r. An attorney must protect and use reasonable care to prevent disclosure of client information, including metadata, that is stored on a website accessible via the internet or when transmitting electronic communications. 08 FEO 5; 09 FEO 1.
- s. If a client testifies falsely to a material matter, the attorney must call upon the client to correct the testimony. RPC 33 (attorney may not participate in the perpetration of a fraud upon the tribunal).
- t. Generally, an attorney does not need consent of the adverse party to talk to witnesses. CPR 2.
- u. Prior to engaging in an *ex parte* communication, the lawyer must disclose he is about to engage in the same, explain why it is necessary, cite the authority permitting such communication, and provide current information

of attempts to notify opposing counsel or the opposing party if unrepresented. The judge then decides whether *ex parte* discussion is appropriate. 98 FEO 12.

- v. An attorney may interview an unrepresented adverse party and make a demand or propose a settlement. RPC 15.
- w. Generally, a lawyer may not seek to disqualify another lawyer by instructing a client to consult with the other lawyer. RPC 181.
- x. With certain exceptions, a lawyer may enter into a civil settlement agreement including a clause prohibiting the reporting of certain conduct to law enforcement. 08 FEO 15.
- y. One opinion outlines reasonable procedures for a computer based, conflicts checking system. 09 FEO 9.
- z. A lawyer may seek appointment of a guardian for a client believed to be incompetent over his objection if reasonably necessary to protect the client's interest. RPC 157.
- aa. When reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge requiring withdrawal from representation. RPC 223.
- bb. Tip: (1) When an opposing begins a personal colloquy or makes an ad homonym attack, respond solely to the judge. Address the issue respectfully with the judge; (2) If you believe the opposing has misstated a rule or precedent, or you are unsure, ask for a short recess. Your instincts are often right; (3) If the opposing speaks with hyperbole or takes an extreme position, tell the court and show why; (4) If the opposing uses a tactic to get inadmissible evidence before the judge (e.g., he asks to make an offer of proof after the objection is sustained, etc.), request a recess to allow the offer of proof without objection and in the absence of the judge; and (5) If the opposing speaks over you (and the court), be quiet and advise the court you will be glad to advocate your position at the court's pleasure. In short, contrast - and magnify - misbehavior with respect.

#### V. **Subpoenas:**

- a. A subpoena is a court order enforceable by contempt. N.C. R. Civ. Pro. 45(e)(1).
- b. You cannot serve a subpoena out-of-state. RPC 236 (an attorney cannot issue a subpoena which misrepresents one's authority to obtain documents).

- c. You must serve opposing counsel or parties with a copy of all subpoenas. N.C. R. Civ. Pro. 5(b) and 45(b)(2). If you do not, expect procedural due process arguments and a delay in the proceedings.
- d. There is case law holding subpoenas are not to be used in lieu of requests to produce documents. *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644 (2000). Frankly, a distinction without a difference.
- e. Serve the opposing party with a subpoena to bring his medical or mental health records for an *in camera* review by the court. For public records or hospital medical records, serve the provider directly, which allows them to submit the records to the court directly with proper affidavit. N.C. R. Civ. Pro. 45(c)(2).
- f. Be prudent about subpoenaing documents to your office. It is lawful. 08 FEO 4. However, it is offensive, appears arrogant, and is burdensome. It will routinely result in a motion to quash. Subpoena documents to court.
- g. You cannot make someone create a record by subpoena (e.g., “Bring a list of...” etc.).
- h. Caution: you must notify opposing counsel or parties within five business days after receipt of subpoenaed material and allow them a reasonable opportunity to copy and inspect the material. A trap for the uninformed. N.C. R. Civ. Pro. 45(d1).
- i. Failure without adequate cause to obey a subpoena shall subject the party to sanctions in Rule 37(d), including reasonable expenses, attorney’s fees, and the panoply of sanctions in 37(b)(2)(i.e., barring claims, defenses, or evidence; striking pleadings; and dismissing actions).
- j. A written objection and/or motion to quash or modify subpoena must be filed within ten days after service or before the time specified, and they must allege failure to allow a reasonable time for compliance, privilege, undue burden or expense, unreasonable or oppressive, or procedural defect. N.C.R. Civ. Pro. Rule 45(c)(3) and (5).

**VI. 50-B’s:**

- a. Domestic violence protective orders are fraught with collateral consequences (e.g., a prohibitor for gun purchases, collateral estoppel in custody cases, a predicate for enhanced criminal charges, gun seizures, BIP classes, etc.).
- b. Consider a judgment on the pleadings.

- c. Consider a neutral “not assault, harass, etc.” clause in a civil file. However, this type of clause will prohibit the return of weapons. N.C. Gen. Stat. §50B-3.1(f)(2) (disqualifier if defendant is subject to any other protective orders); 18 U.S.C. §922.
- d. Can be renewed for good cause for a fixed period of time not to exceed two years upon motion filed before expiration of the current order by the aggrieved party. Temporary custody may not be renewed beyond the maximum one year period. N.C. Gen. Stat. §50B-3(b).
- e. Statute requires a hearing within ten days of issuance or seven days from service, whichever occurs later. When proper, demand a hearing. N.C. Gen. Stat. §50B-2(c). Continuance requests are viewed favorably if the movant has acted with diligence and good faith and are disfavored when furthering substantial injustice. *Graham v. House*, 170 N.C. App. 196 (2005) (unpublished).
- f. Remedies are legion and include possession of the residence, temporary custody, child support, spousal support, abuser treatment programs, appointment of GAL, and attorney’s fees, among other relief. N.C. Gen. Stat. §50B-3.
- g. As of October 1, 2013, parties may enter into a 50-B order by consent without findings. Appears to be of little value.

**VII. 50-C’s:**

- a. A very narrow statute which essentially mirrors sex crimes and stalking.
- b. The stalking section requires two or more events, without legal purpose, with specific intent, among other elements. N.C. Gen. Stat. §50C-1(6).
- c. Consider a motion on the pleadings.
- d. If you represent the complainant, focus on creepiness, distress, fear, and fairness.

**VIII. PSS/Alimony:**

- a. N.C. Gen. Stat. §§50-16.1A through 50-17.
- b. Illicit sexual behavior by dependent spouse prior to date of separation is a bar. N.C. Gen. Stat. §50-16.3A(a) (alimony statute).
- c. Know your judge. For PSS, one starts at the child support guideline range. Others rule on affidavits. Some are interested in marital misconduct, others

less interested. The statute requires consideration of marital misconduct by the dependent spouse and, if raised, also that of the supporting spouse. N.C. Gen. Stat. §50-16.2A(d). At least one judge does not limit the evidence.

- d. Malpractice Tip: Insure there is a specific date when PSS terminates.
- e. Scrutinize the affidavits. Trim your fluff and expose theirs. Integrity matters.
- f. You can request a jury trial on the issue of marital misconduct in the alimony claim. N.C. Gen. Stat. §50-16.3A(d).
- g. Estate depletion should not be required to maintain a spouse. *Quick v. Quick*, 305 N.C. 446 (1982).
- h. Changed circumstances necessary for modification must relate to financial needs of the dependent spouse or supporting spouse's ability to pay. *Dodson v. Dodson*, 190 N.C. App. 412 (2008).
- i. Attorney fees are recoverable. N.C. Gen. Stat. §50-16.4.
- j. Remember recapture with affluent clients.
- k. Statutory grounds to terminate alimony include reconciliation (resumption of marital relations), cohabitation or remarriage of the dependent spouse, or death of the supporting or dependent spouse. N.C. Gen. Stat. §50-16.9.
- l. A change in income of one party alone, remarriage of supporting spouse, or voluntary assumption of additional obligations of the supporting spouse may not constitute a substantial change in circumstances. *Dodson v. Dodson*, 190 N.C. App. 412 (2008); *Barham v. Barham*, 127 N.C. App. 20 (1997).
- m. Cohabitation has become difficult to prove under recent case law. It requires two adults dwelling together continuously and habitually; a private heterosexual relationship; a voluntary assumption of marital rights, duties, and obligations usually manifested by marital people; and more. N.C. Gen. Stat. §50-16-9.

#### IX. **Custody:**

- a. You may now file a custody action prior to separation if one of the parties intends to separate. *Baumann-Chacon v. Baumann*, 710 S.E. 2d 431 (2011).
- b. A temporary custody order is either entered without prejudice, states a clear and specific reconvening time and the time interval between hearings is

reasonably brief, or does not determine all the issues. *Woodring v. Woodring*, 742 S.E. 2d 295 (2013). If none of the above apply, it is a permanent order. *Id.*

- c. A substantial change in circumstances affecting the welfare of the child may be positive or negative and is a fact intensive inquiry. *Warner v. Brickhouse*, 189 N.C. App. 445 (2008). Relate how new facts affect the child.
- d. A custody order remains in effect after reconciliation until set aside. *Massey v. Massey*, 121 N.C. App. 263 (1996).
- e. Fitness is broad in scope; hence, relevance is wide.
- f. At a minimum, consider nine categories: primary caretaker duties (e.g., homework, doctor, baths, transportation, activities, etc.); fitness of homes; work schedules; support networks; criminal records; substance abuse; mental health; wishes of child(ren); and other important facts (e.g., health issues, vicious dogs, smoking, third parties, etc.).
- g. Support any allegation with facts (e.g., photos, documents, tapes, witnesses, etc.).
- h. Social media is a gold mine (e.g., facebook, instagram, twitter, etc.).
- i. Consider a photo album of home, activities, and family.
- j. Law enforcement are great fact witnesses. Be sensitive to their time.
- k. Be careful alleging parental alienation. If it exists, it may not be in the best interests of the child to be placed with the party who has been alienated.

**X. Child Support:**

- a. The guidelines presumptively apply unless the court specifically finds them inequitable. *See* N.C. Child Support Guidelines; N.C. Gen. Stat. § 50-13.4(c); *Willard v. Willard*, 130 N.C. App. 144 (1998). However, upon request, the court shall hear evidence regarding reasonable needs of the children and relative ability of each parent to pay. *Supra*, Guidelines.
- b. The starting date may be different from date of filing if there is evidence to support same. *Albemarle Child Support Enforcement Agency ex rel. Miller v. Hinton*, 147 N.C. App. 700 (2001).
- c. Child supports vests on the due date. It may only divest if written notice is given to all parties before payment is due and the movant is unable to file

due to disability or other good cause. *Bogan v. Bogan*, 124 N.C. App. 176 (1999); N.C. Gen. Stat. §50-13.10.

- d. Retroactive support can be sought for up to three years preceding the date of filing. *Tidwell v. Booker*, 290 N.C. 98 (1976). The guidelines may be applied although case law requires proof of actual expenses. See N.C. Child Support Guidelines.
- e. Courts may impute income if there is bad faith or deliberate suppression of income. However, courts may not impute income to a parent who is physically or mentally incapacitated or a parent caring for a child less than three years of age for whom support is being determined. See N.C. Child Support Guidelines.
- f. Motions for temporary support require at least ten days' notice. N.C. Gen. Stat. §50-13.5(d).
- g. Child support can be modified upon a showing of changed circumstances. N.C. Gen. Stat. §50-13.7(a).
- h. Without proof of changed circumstances, no modification is allowed unless the order is more than three years old and the guidelines reflect a fifteen percent change from the previous order. *Willard v. Willard*, 130 N.C. App. 144 (1998). The guidelines presume such circumstances constitute a change of circumstances warranting modification.
- i. Notice of deviation must be in writing and served at least ten days before hearing. *Browne v. Browne*, 101 N.C. App. 617 (1991); N.C. Gen. Stat. §50-13.5(d)(1). Deviation examples: (1) If one party pays 100% of the child support obligation and 100% of insurance premium. See N.C. Child Support Guidelines; (2) If a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support agreements; and (3) Alimony may be considered as a reason to vary from the guidelines. *Id.*
- j. The court may reallocate the dependency exemption to the non-custodial parent (e.g., if payee has minimal or no income tax liability, etc.). See N.C. Child Support Guidelines.
- k. In any case, including self-support reserve cases, the court may order uninsured expenses in excess of \$250.00 a year to be paid by either parent, or both parents, in such proportion the court deems proper. See N.C. Child Support Guidelines.
- l. Extraordinary expenses may include a child's particular educational needs and transportation expenses if the court determines they are reasonable,

necessary, and in the child's best interest. However, private school costs are not required. *See* N.C. Child Support Guidelines.

- m. There is a rebuttable presumption of reasonableness for child support established in a separation agreement. *Pataky v. Pataky*, 160 N.C. App. 289 (2003). Tip: Be ready for a continuance and supplemental claim for specific performance if the court considers modification.
- n. Self-support reserve uses only the obligor's income. *See* N.C. Child Support Guidelines. The court may split uninsured expenses.
- o. If social security benefits exceed the child support obligation, no order should be entered without a deviation. *See* N.C. Child Support Guidelines.
- p. When support exceeds the monthly maximum in the guidelines, the award is to be based on particular facts and circumstances, not extrapolation. *Diehl v. Diehl*, 630 S.E.2d 25 (2006). The guidelines also state the court should consider the reasonable needs of the child(ren) and ability of each parent to provide support.
- q. Child support continues until a child attains age eighteen and has graduated from high school or becomes emancipated. Child support may continue until age twenty if a child is making satisfactory progress in secondary school. N.C. Gen. Stat. §50-13.4(c).
- r. Child support terminates upon death of a child, death of the obligor, or a court ordered change of custody. N.C. Gen. Stat. §50-13.10(d).
- s. There is no legal obligation to provide support for a disabled child beyond minority. *Jackson v. Jackson*, 102 N.C. App. 574 (1991). However, the provision for a child making satisfactory progress toward a diploma up to age 20 still applies. *Hendricks v. Sanks*, 143 N.C. App. 544 (2001).
- t. A child support order continues in full force and effect even if the parties reconcile. *Massey v. Massey*, 121 N.C. App. 263 (1996).
- u. A proper child support order will set forth facts existing at the time the order is entered. *Waller v. Waller*, 20 N.C. App. 710 (1974).
- v. Without proof of the original circumstances, no modification of child support is possible unless it meets the three year, fifteen percent change rule. *Id.*
- w. The court may make child support retroactive to the date of filing. *Barham v. Barham*, 127 N.C. App. 20 (1997).

- x. Remedies for enforcement are listed in N.C. Gen. Stat. §50-13.4(f).
- y. Put language in the order that child support shall terminate immediately by operation of law upon a statutory triggering event. N.C. Gen. Stat. §50-13.4(c).
- z. There has been high turnover recently with local DSS child support establishment and enforcement agents. Review worksheets carefully.

**XI. ED:**

- a. Only spouses living separate and apart may file an equitable distribution claim. N.C. Gen. Stat. §§50-20(i) and 50-21(a).
- b. With limited exceptions, an absolute divorce judgment bars the right to file an equitable distribution claim. A written claim is required; an oral motion is insufficient. *Webb v. Webb*, 188 N.C. App. 621 (2008).
- c. Other bars include written agreements executed before, during, or after marriage. In other words, prenuptial, separation, and postnuptial agreements may bar a claim. N.C. Gen. Stat. §50-20(d).
- d. A claim may be asserted after death of either party so long as the parties were living separate and apart at the time of a spouse's death. N.C. Gen. Stat. §50-20(l)(1).
- e. Pretrial remedies and protective measures include *lis pendens* and injunctive relief. N.C. Gen. Stat. §50-20(h) and (i).
- f. A TRO is an emergency measure issued without notice before a hearing on a preliminary injunction. TRO's are granted only where the need is immediate and harm irreparable. *Lambe v. Smith*, 11 N.C. App. 580 (1971). TRO's must be followed by notice and a hearing to determine whether a preliminary injunction should issue. Personal jurisdiction, Rule 5 service, and actual notice are required. N.C. R. Civ. Pro. 65; *Helbein v. Southern Metals Co., Inc.*, 119 N.C. App. 431 (1995).
- g. Preliminary injunctions require a likelihood of success on the merits, facts proving the movant will likely suffer irreparable loss, and sworn statements with specific facts to support the required findings. *N.C. Baptist Hosp. v. Novant Health Inc.*, 195 N.C. App. 721 (2009).
- h. The source of funds rule determines marital and separate interests. *Wade v. Wade*, 72 N.C. App. 372 (1985).

- i. Marital property includes all real and personal property acquired by either or both spouses during marriage and before separation. N.C. Gen. Stat. §50-20(b)(2); *McLean v. McLean*, 323 N.C. 543 (1988).
- j. Property acquired following separation may be marital property if the right to receive the property vests by date of separation. *Hall v. Hall*, 88 N.C App. 297 (1987) (stock options).
- k. Assets obtained during the marriage are presumed marital property. Conversely, debts obtained during the marriage are presumed separate debt, and the party asserting the debt is marital has the burden of proof. *Lowe v. Lowe*, 170 N.C. App. 436 (2005). Marital debt is defined as debt incurred during the marriage and before the date of separation for the joint benefit of husband and wife. *Geer v. Geer*, 84 N.C App. 471 (1987).
- l. Separate property includes property owned before marriage, gifts intended for one spouse, the noneconomic portion of personal injury awards, and inheritance. *Hunt v. Hunt*, 85 N.C. App. 484 (1987) (donor's intent admissible to show a gift); *Johnson v. Johnson*, 317 N.C. 437 (1986) (defining separate property using an analytic approach in personal injury proceeds).
- m. Mixed property includes both marital and separate property. Increases in value of separate property during the marriage require an active-passive appreciation analysis. *Smith v. Smith*, 121 N.C. App. 334 (1996). Passive appreciation is an increase in value due to market forces or inflation. Active appreciation results from contributions (e.g., money, effort, expertise, or otherwise) of one or both spouses and creates a marital interest. *Wade v. Wade*, 72 N.C. App. 372 (1987).
- n. One spouse's conveyance of real property to both spouses during the marriage creates a tenancy by the entirety and a marital gift presumption. *McLean v. McLean*, 88 N.C. App. 285 (1987).
- o. Divisible property includes: (1) all passive increases and decreases in value to marital property occurring after date of separation and before date of distribution; (2) commissions, bonuses, contract payments, property, or property rights earned before separation but received after separation and prior to date of distribution; (3) passive income from marital property received or accrued after date of separation, including interest and dividends; and (4) increases in marital debt, including financing charges and interest, occurring after separation and before date of distribution. *Warren v. Warren*, 175 N.C. App. 509 (2006) (post-separation payments on a line of credit is divisible property).

- p. At trial, the court classifies, values, and distributes marital property, using date of marriage, date of separation, and date of trial values.
- q. If the parties have an equitable interest in property titled in the name of a third party, the third party should be joined in the ED action. The title holder is not bound by the court's order unless made a party and given the opportunity to defend. *Locklear v. Locklear*, 92 N.C. App. 299 (1988); *Gragg v. Gragg*, 94 N.C. App. 134 (1985). Think of a consulting or resulting trust, which is the creation of an implied trust by operation of law when property is transferred to one who paid nothing for it. The third party impliedly holds the property for the benefit of the transferor, causing the property to result back to the transferor.
- r. A single factor may support an unequal distribution award. *Rosario v. Rosario*, 139 N.C. App. 258 (2000). The proponent bears the burden of producing evidence of a factor. *White v. White*, 312 N.C. 770 (1985).
- s. Marital fault unrelated to economic factors is not relevant to division of property. *Smith v. Smith*, 314 N.C. 80 (1985).
- t. File motions for an interim distribution. The law is favorable. "Unless good cause is shown that there should not be an interim distribution, the court may, at any time...enter orders dividing part of the marital property, divisible property or debt, or marital debt..." N.C. Gen. Stat. §50-20(i1). A party requesting interim allocation is only required to make a *prima facie* showing he is likely to recover the value of the allocation requested. *Id.*
- u. Use a business valuation expert when appropriate. Consider how long the business has been in operation, size of the customer base, and goodwill (or the value of the name). The court may appoint an expert. N.C. Rule Evid. 706.
- v. Require the party who receives the residence to refinance. Remember, refinancing restarts the overall term of the loan.
- w. Get full disclosure so you can make a good assessment of the case. Insert a clause in the final order or document stating all parties have provided full disclosure of assets and debts.
- x. A good mediator is imperative. The mediator will rely upon the affidavits. Update them. The mediator can insure all documents are provided, explain the process to clients, manage the attorneys, and help analyze the issues in a competent, neutral and balanced manner.

- y. Do your homework. Get the supporting documents. Crunch the numbers. Come up with a realistic range of high and low trial values. Then be prepared to make a reasonable settlement offer.
- z. Do not be afraid to ask for an unequal distribution. Courts are not required to make findings which explain the reasoning for an unequal distribution. *Troutman v. Troutman*, 193 N.C. App. 395 (2008) (trial court's unequal division will not be disturbed unless an obvious miscarriage of justice). Judges want to be fair.
- aa. Malpractice tip: Address gains and losses which occur post separation.
- bb. Trial strategy: Prove everything. Have the best expert. Concede, or compromise, the minor points. Focus on a few key values. Be smart, prepared, and reasonable.

**XII. Attorney Fees:**

- a. Charge a true retainer. Avoid the issue.
- b. Seek sparingly. Courts are reluctant to award attorney fees except in clearly justified circumstances.
- c. Authority exists in child custody, child support, spousal support, 50B, contract (with an attorney fee clause), discovery, and contempt claims.
- d. Contingent fee contracts are void and prohibited in divorce, alimony, or child support cases. *Thompson v. Thompson*, 70 N.C. App 147 (1985) *rev'd on other grounds*, 313 N.C. 313 (1985).

**XIII. Possession of Residence:**

- a. A difficult issue.
- b. Authority exists in 50B, custody, motions for interim distribution, and divorce from bed and board cases.
- c. A motion for possession of the residence should accompany the claim itself and plead sufficient facts for both. *Harper v. Harper*, 50 N.C. App. 394 (1981).

**XIV. Discovery:**

- a. N.C. R. Civ. Pro. 26 through 37.

- b. Use as needed. If you have an opposing counsel who will share documents, reciprocate fully. If not, be formal.
- c. The best tools are subpoenas, requests to produce documents, and depositions.
- d. Depositions are information gathering tools. It is an art unto itself. Read the rules. N.C. R. Civ. Pro. 30, *et al.* The scope is broad (i.e., reasonably calculated to lead to the discovery of admissible evidence). Objections are limited, typically to form. In short, explain the process, get basic information, probe with open-ended questions, and, in the end, impeach. When your client is deposed, he can only lose his case. My deposition instructions are attached as Exhibit 4.
- e. If the opposing files a motion for sanctions, remember Rule 37(a)(2) requires a certification the movant “has in good faith conferred or attempted to confer...in an effort to secure the information...without court action.” A common mistake.
- f. The self-employed, closely-held corporations, and family businesses are fertile opportunities for record reviews and discovery depositions.
- g. Certain disclosures are required by the local rules. Make sure disclosures are attached and supplemented.

**XV. Drafting Orders:**

- a. Offer to draft the order. Keep the language clean, neutral, and precise as dictated by the judge.
- b. If there is disagreement as to language, calendar the case for entry of order.
- c. Give opposing counsel adequate time to respond. We give seven days. Grant additional time upon request unless your client is prejudiced. Always notify opposing counsel of your proposed action and the court of any opposition.
- d. Do not add language to a memorandum of judgment which modifies the meaning therein.
- e. Evidence must support findings. Findings must support conclusions. Conclusions must support the judgment. *Coble v. Coble*, 300 N.C. 708 (1980).
- f. Findings are conclusive on appeal if there is any competent evidence to support them. *Pritchard v. Pritchard*, 45 N.C. App. 189 (1980).

- g. Be careful with the difference between orders and judgments. An order generally decides the matter litigated and provides direction by the court. A judgment generally disposes of a controversy and results in the denial or granting of an award. Remedies are completely different (e.g., contempt vs. execution, etc.). Black's Law Dictionary 755, 988 (6<sup>th</sup> ed. 1990).

**XVI. Enforcement of Orders:**

- a. File a motion to compel. It is faster but excludes attorney fees.
- b. File a motion to show cause with a judge's signature.
- c. File a motion for contempt.
- d. Other effective enforcement tools include wage withholding, garnishment, forfeiture of licensing privileges, transfer of title to real or personal property, IRAs, and *lis pendens*. N.C. Gen. Stat. §50-13.4(f); N.C. Gen. Stat. §50-13.12; N.C. Gen. Stat. §50-20(h), 1-116 and 120.

**XVII. Contempt:**

- a. N.C. Gen. Stat. Chapter 5A.
- b. Criminal contempt is to punish, civil contempt to force compliance.
- c. Insure a judge signs the show cause order.
- d. Be mindful of court tardiness or absence, cell phones, client gestures or reactions, or disobedience to any court instruction or local rule.
- e. Criminal contempt may be direct or indirect. Direct contempt occurs within sight or hearing of the court and may be punished summarily. Indirect contempt requires a plenary proceeding, including notice and hearing, and results in a criminal trial. Generally, criminal contempt is punishable by censure, thirty days in jail, and a fine not to exceed \$500.00, or any combination, and is subject to appeal. N.C. Gen. Stat. §§5A-11 through 17. Increased penalties exist for refusal to testify with immunity (may be imprisoned up to six months) and failure to pay child support (may be imprisoned up to 120 days for each act), among other exceptions. N.C. Gen. Stat. §5A-12.
- f. Civil contempt applies when an order remains in force, noncompliance is willful, the person has the ability to comply, and the purpose of the order may still be served by compliance therewith. Civil contempt no longer applies after compliance, even after the filing of a motion for contempt. Civil contempt proceedings are outlined in N.C. Gen. Stat. §5A-23.

Punishment includes imprisonment for ninety days for the same act with periods of recommitment allowed up to a total of twelve months. Judges often order confinement with a purge condition and a review date, and any finding may be appealed. N.C. Gen. Stat. §5A-21-24.

- g. No person may be held in civil and criminal contempt for the same conduct. N.C. Gen. Stat. §5A-12(d) and 21.
- h. Tricks of the trade: you lose criminal contempt if you call the contemnor as a witness; if you issue a show cause order, the burden of proof shifts to the contemnor requiring him to testify first; and, if a judge signs the show cause order and the contemnor fails to appear, ask for an immediate order for arrest.
- i. Tip: A motion to compel visitation, rather than a motion for contempt, is the proper method for the noncustodial parent to use where the custodial parent does not prevent visitation but takes no action to force it. *Hancock v. Hancock*, 122 N.C. App. 518 (1996).

#### XVIII. Contract Issues:

- a. Remedies for breach:
  - 1. Direct money damages (limited by foreseeability). *Hadley v. Baxendale*, 9 Exch. 341 (1854).
  - 2. Interest (from the date of breach). *Riddle v. Riddle*, 32 N.C. App. 83 (1977); N.C. Gen. Stat. §24-5.
  - 3. Mental anguish (in breach of contract to marry or *Ruark* claims). *Allen v. Baker*, 86 N.C. 91 (1882); *Johnson v. Ruark Obstetrics and Gynecology Assoc.*, 327 N.C. 283 (1990) (landmark case in negligent infliction of emotional distress claims).
  - 4. Specific performance (when no adequate remedy at law and the obligor has present ability to comply). *Moore v. Moore*, 297 N.C. 14 (1979); *Cavanaugh v. Cabenaugh*, 317 N.C. 652 (1986).
  - 5. Punitive damages (when breach constitutes, or is accompanied by, tortious and aggravated conduct). *Stanback v. Stanback*, 297 N.C. 181 (1979).
- b. Procedural defenses (making the contract void or subject to rescission):
  - 1. Incapacity. *Harris v. Harris*, 50 N.C. App. 305 (1981).

2. Fraud or misrepresentation. *Eubanks v. Eubanks*, 273 N.C. 189 (1968).
  3. Mistake. *Link v. Link*, 278 N.C. 181 (1971).
  4. Undue influence or duress. *Coppley v. Coppley*, 128 N.C. App. 658 (1998).
  5. Lack of disclosure. *Sidden v. Mailman*, 137 N.C. App. 669 (2000).
- c. Substantive defenses:
1. Material breach. *Stegall v. Stegall*, 100 N.C. App. 398 (1990).
  2. Lack of fairness or unconscionability. *King v. King*, 114 N.C. App. 454 (1994).
  3. Duty to mitigate damages. *Durham Construction Co., v. Wright*, 189 N.C. 456 (1925).
  4. Anticipatory breach. *Kintz v. Spoor*, 2010 N.C. App. LEXIS 1669 (2010).
- d. Tip: Argue rules of construction. Useful rules include:
1. Ambiguities will be resolved against the draftsman. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484 (1975).
  2. Specific terms govern when in conflict with general terms. *Wood-Hopkin Contracting v. NC State Port Authority*, 284 N.C. 732 (1984).
  3. Any acts of performance by the parties are strong evidence of the intent of the agreement. *Duke Power Co., v. Blue Ridge Electric Membership Corp.*, 253 N.C. 596 (1961).
  4. Where a contract is susceptible to legal and illegal interpretation, it will be construed to effectuate a lawful purpose and so enforced. *State v. Cooke*, 248 N.C. 485 (1958).

## XIX. Taxes:

- a. I.R.C. §1041 covers transfer of property between spouses incident to divorce, generally making them a nontaxable event. Written instruments are required for transfers two to six years after divorce to be presumed incident

to divorce. However, §1041 does not apply to any transfer occurring more than six years after divorce.

- b. Recapture rules apply to alimony. I.R.C. §71(f).
- c. Gains are taxed when realized.
- d. Individual taxpayers may exclude up to \$250,000.00 (joint filers \$500,000.00) of gain on the sale or exchange of the principal residence when the ownership and use test is met, without other election. I.R.C. §121.
- e. QDROs must be prepared correctly so as not to trigger a taxable event. *Rodoni v. Commissioner*, 105 T.C. 29 (1995).
- f. Joint and several liability applies to individuals filing joint returns. I.R.C. §6013(d)(3).
- g. The innocent spouse rule is an exception to the general joint and several liability rule. I.R.C. §6013(e).
- h. Either party may be responsible for the entire tax due. *Murphy v. Commissioner*, 103 T.C. 111 (1994).
- i. The IRS usually collects unpaid tax due on a joint return from the spouse having the most accessible assets. Federal Taxation 1671 at 696.
- j. It is not safe to assume the most advantageous filing status is married, filing jointly. Consult with an accountant.

**XX. Malpractice Tips:**

- a. Maintain a comprehensive calendaring, docket control system. Deadlines count.
- b. Do not wait until the last minute to file a complaint. Problems occur with summons, misspellings, and parties. Liability carriers suggest filing six months in advance. Do the best you can.
- c. Know the correct statute of limitations. Be careful with out-of-state occurrences, involving foreign limitation periods.
- d. Preserve equitable distribution or alimony claims prior to entry of a divorce judgment.
- e. Investigate and protect retirement, or other, benefits. Be careful with errors related to the division of retirement benefits. A QDRO must be drafted,

follow specific requirements, and be approved by the pension or plan administrator. Have the QDRO prepared and entered at the time of divorce. A plan participant may die and the client may lose his benefit because the QDRO does not exist. Provide for pre-retirement survivor benefits in the QDRO. Neglecting to address survivor benefits, when the plan participant predeceases the alternate payee spouse, is a claim waiting to happen. Put the burden of calculating the marital share on the plan participant. Be aware of loans which may adversely affect the spouse's share. Do not rely on a 401K distribution to pay off debt when the plan does not make an immediate, lump sum distribution.

- f. Client complaints center on a failure to explain the legal process or billing system, return phone calls, attend to cases in a timely manner, and keep the client informed. Do not create unrealistic expectations, return phone calls if possible within twenty-four hours, and choose your clients wisely.
- g. Have a conflicts checklist.
- h. Do not practice outside your area of expertise. RPC Rule 1.1.
- i. Do adequate research. Substantive errors account for forty-six percent of all malpractice claims.
- j. Use engagement contracts. Reasons are plentiful. Kudos if you send disengagement letters.
- k. Document all advice given to the client.
- l. Forego fee disputes but for the exceptional case. Otherwise, comply with the State Bar's fee dispute resolution program. RPC Rule 1.5.
- m. Eight percent of malpractice claims to Lawyers Mutual originate as a family law claim. *Avoiding Malpractice Traps*, LAWYERS MUTUAL, DECEMBER 2009.

#### **XXI. Technology:**

- a. Learning never ends.
- b. Current innovations include iCloud, tablets, apps, smartphones, remote computing, video conferencing, VoIP, and more.

#### **XXII. Cutting Edge Topics:**

- a. Smart phones, computers, cloning hard drives (not an "interception" under the eavesdropping statutes), spyware protection, GPS/vehicle tracking

(permissible unless state action), surveillance, locating witnesses, and social media are both new and hot topics. *See U.S. vs. Antione Jones*, 132 S. Ct. 945 (2012) (government's attachment and use of GPS device to a vehicle constitutes a search under the Fourth Amendment).

### XXIII. **Conclusion:**

Life needs purpose: an immense purpose. I close with a quote from Joe Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. I have deleted one word. Hear the message. Then go make a difference.

“A...lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end.”