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Bits and Bytes™

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Welcome to *Bits and Bytes*™, our bimonthly electronic newsletter published for attorneys registered with New York Divorce and Family Law. This electronic newsletter will be sent to you by email each a month to keep you up to date on important developments in New York Divorce and Family Law. If you do not wish to receive it or are receiving it in error, please send an email to unsubscribe@nysdivorce.com, with the words "unsubscribe" in the subject line.

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Did you know that you can find past issues of *Bits and Bytes*™ in our Archives on our website at www.brandeslaw.com?

We are pleased to report that "Custody Cases and Forensic Experts", written by Bari Brandes Corbin, appears in the September 2005 issue of the New York Family Law Monthly® at http://www.ljnonline.com/issues/ljn_nyfamily/. Ms. Corbin maintains her office for the practice of law in Laurel Hollow, New York and is Vice-President of Joel R. Brandes Consulting Services, Inc.

NYSBA Ethics Opinion 781 Requires Lawyers to Withdraw Fraudulent Net Worth Statement or Withdraw From Case

In New York State Bar Association, Opinion 781 – 12/8/04, in order to submit a financial statement on behalf of a client, a matrimonial lawyer certified the accuracy of the statement to family court. After filing the statement, the lawyer learned that it contained a material error relating to the omission of substantial client assets. The lawyer asked the Committee if he is required to withdraw the financial statement?

The Committee on Professional Ethics rendered an opinion which concluded that a matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court contains a material omission, and that the client perpetrated a fraud on the tribunal, must call upon the client to rectify the material omission. If the client refuses, the lawyer must withdraw the financial statement. If the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule (which we be the case where it is not withdrawn), the lawyer must withdraw from the representation, with the court's permission if required by court rules.

The lawyer must first determine if he or she received information "clearly establishing" that the client has committed a fraud. "Fraud" under the Code of Ethics "does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another." If the lawyer is uncertain of the client's state of mind in making this determination, EC 7-6 states that the lawyer should "resolve reasonable doubts in favor of the client."

DRL 236[b]9[b] Applied in Family Court Proceeding For Modification of Spousal Support

In *Sannuto v Sannuto*, --- N.Y.S.2d ---, 2005 WL 2152701 (N.Y.A.D. 2 Dept.) The Appellate Division pointed out that Family Court Act 439(e) provides that an aggrieved party's specific written objections to the final order of support of the Support Magistrate must be submitted within 35 days after the mailing of the order to such party. Since the wife did not submit written objections to the Support Magistrate's order until more than 35 days after the mailing of the order, the Family Court should have denied the objections on this ground. However, the order of the Support Magistrate dated March 2, 2004, was subject to the review process set forth in Family Court Act 439(e), based upon the husband's timely objection, coupled with the wife's rebuttal to his objections. Upon review of the husband's objections, it held that the Support Magistrate erred in determining that the husband demonstrated a substantial change in circumstances to justify a downward modification of his spousal support obligation. Pursuant to Domestic Relations Law 236(B)(9)(b), the court may modify any prior order or judgment with respect to maintenance. The party seeking the modification has the burden of establishing the existence of a "substantial change in circumstances" warranting the modification. Importantly, in determining if there is a "substantial change in circumstances" to justify a downward modification, the change is measured by comparing the payor's financial circumstances at the time of the motion for downward modification and at the time of the divorce or the time when the order sought to be

modified was made. Under the circumstances in the present case, the court properly determined that the husband failed to meet his burden.

Child Support Agreement That Does Not Specify Amount of Basic Child Support Obligation And Reasons For Deviation is Void

In *Jefferson v Jefferson*, --- N.Y.S.2d ---, 2005 WL 2154697 (N.Y.A.D. 2 Dept.) the Appellate Division reversed an order which denied the Wife's motion to vacate the child support provisions of the parties' separation agreement on the ground that they did not comply with Domestic Relations Law 240(1-b)(h), and granted the motion. The matter was remitted to the Supreme Court for a determination of the parties' respective financial circumstances, including income, expenses, and standard of living, as of December 6, 2000, and for a determination of the appropriate amount of child support to be paid based thereon. The child support provisions of the parties' December 6, 2000, separation agreement (hereinafter the agreement) deviated from the Child Support Standards Act (Domestic Relations Law 240[1-b]) (CSSA) in that the agreement failed to take into account the combined parental income in excess of \$80,000. Domestic Relations Law 240(1-b)(h) provides that a validly-executed support agreement which deviates from the basic child support obligation set forth in the CSSA must specify, inter alia, the amount that the basic child support obligation would have been under the CSSA and the reason or reasons that the agreement does not provide for payment of that amount. Here, the agreement failed to set forth the presumptively correct amount of support that would have been fixed pursuant to the CSSA, and failed to articulate the reason the parties chose to deviate from the CSSA guidelines. Consequently, the child support provisions of the agreement are invalid and unenforceable and the Supreme Court should have granted that branch of the plaintiff's motion which sought their vacatur.

Wife Entitled To Opportunity To Purge Contempt Before Going to Jail

In *Cooper v Cooper* --- N.Y.S.2d ---, 2005 WL 2155186 (N.Y.A.D. 2 Dept.) pursuant to a pendente lite order of the Supreme Court the wife was directed to return \$274,000 she unilaterally withdrew from the parties' joint account and to account for any sums spent. She not only refused to abide by the court's directive, but, after issuance of the directive, secretly removed the funds and hid them in her father's safe and continued to deplete the funds. The Supreme Court held her in contempt and directed that she be incarcerated for four days with no opportunity to purge herself of the contempt. She was released by the sheriff after serving a day in jail, who mistakenly calculated her release date. Learning of her release, the Supreme Court directed that she be re-incarcerated. The Appellate Division stayed enforcement of those portions of the Supreme Court's orders directing incarceration, including the directive requiring re-incarceration and reversed the order directing incarceration on the law. It held that even if the wife had been properly adjudicated in contempt, the Supreme Court erred in failing to give her an opportunity to purge herself of her civil contempt, since she still had the ability to return the funds and to render an accounting (see Judiciary Law 774). It also erred in granting the husband's motion for contempt. Before holding a party in contempt, Domestic Relations Law 245 requires a showing that resort to other enforcement devices has been exhausted or would be ineffectual. The Wife's attorney's efforts to defend against the contempt motion by demonstrating the efficiency of other enforcement remedies were prematurely terminated by the hearing court. Thus, the court improperly adjudicated the plaintiff in contempt.

Preclusion not Available where Movant Spouse Failed to Disclose Too

In *Biggio v Biggio*, --- N.Y.S.2d ---, 2005 WL 2211685 (N.Y.A.D. 2 Dept.) the Appellate Division held that husband having failed to make full disclosure, was in no position to argue that wife should have been sanctioned with penalty of preclusion for failure to make disclosure. It noted that the preclusion order overlooked the plaintiff's failure to make full disclosure, including disclosure of financial information regarding assets and expenses clearly within his sole control. Under the circumstances, the plaintiff was in no position to argue that the court should sanction the defendant with the penalty of preclusion.

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