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Detecting Hidden Assets During Divorce

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New York state law dictates that in any marital action "in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states." The law is expansive, mandating extremely broad disclosure regardless of whether or not there are any "special circumstances" warranting court intervention.¹

A complete sworn statement of net worth is usually the initial vehicle by which the parties disclose to one another the assets, incomes and liabilities at stake in a marriage that is going to be dissolved. There are 12 asset categories, ranging from bank accounts to tax shelters, patents to jewelry and artwork.² Attorneys must certify the accuracy of the contents of the net worth statement. Hiding assets to prevent the trial court from making an equitable distribution of property supports a finding of economic fault.³ Once that finding is made, the court must consider the missing assets when making its distributive award.⁴ Even if assets turn up after trial, courts have the discretion to re-order valuations in light of new evidence.⁵

Zealous matrimonial lawyers will therefore want to do everything they can to make sure no assets are hidden. What they may not realize is that not being zealous enough may expose them to litigation: The failure to discover large assets is among "the most fertile legal malpractice inquiries" against matrimonial attorneys.⁶ Therefore, attorneys cannot just assume that the other side has fully provided all of the necessary information to ensure a fair distribution of marital property. Instead, they must doggedly investigate whether the opposing party has been honest or not.

If there is suspicion that assets remain uncovered, attorneys may need to retain the help of professional investigators trained in computer forensics and asset searching. Investigators are able to thoroughly search the public record for any ties between the opposing spouse and property, companies or other assets that may have remained undisclosed. The depth and breadth of an investigator's efforts may mean the difference between a client who feels his or her attorney did not do enough and one who is satisfied with the thoroughness of efforts to uncover assets on his or her behalf.

Watch for Red Flags

Some of the signs that assets or income are being omitted from the net worth statement are fairly obvious. For example, is the spouse living beyond his declared means? The opposing side will furnish credit card statements, which are then reviewed to see whether the spending patterns match the supposed income. A modest income coinciding with extravagant spending is the pattern to watch for.

Other times the smell of misconduct is stronger. In one case reported in 2008, a husband concealed substantial assets, failed to provide an accounting ordered by the court, twice submitted an incomplete accounting during the trial, submitted inaccurate net worth statements, and used an attorney's escrow account to secret assets. A significant portion of the hidden money was spent on relatives and their businesses. There were also undisclosed interests in a variety of limited liability companies (LLCs) and partnerships.⁷

The most dangerous asset evaders are the ones who present no red flags at all. Assets such as shares in an LLC that holds commercial property will be difficult or impossible to find using internet searches. LLCs are supposed to appear on a tax return but we may not get to see this if the person we are investigating is a tax evader or if the investigation is preliminary and the spouses have filed separate returns. In such cases, investigators may resort to public record and database searches that associate names of individual debtors with their secret companies.

How could such a process work? Here is an example. Mr. Smith takes \$800,000 of bonus money accumulated over several years and forms a company, and with two partners buys a rent-producing building with it. It could be discovered that Mr. Smith owns the company and then a search could be conducted for the property that company owns. If Mr. Smith were clever, he would have a lawyer receive all the correspondence for the company in order to keep his name off of it, though his name may still be associated with the property's address. The authors have experienced cases in which careful owners like Mr. Smith nonetheless sign mortgage documents--one reason among many not to rely on abstracts and databases but to go after the documents themselves. This takes time and patience at the courthouse, but can often be worth it.

Generally, though, there are signs that a spouse is hiding assets. Matrimonial attorneys need to make sure their clients know what those signs might be so that they can provide the necessary information for an efficient and effective investigation.

Among the red flags to consider are:

- Secretiveness about financial affairs. This may include not providing any information about property or investments, as well as hiding income sources or denying access to receipts for expenses.
- Secretiveness about travel. Does one spouse have only vague or no knowledge of where the other one goes on business or no-spouse trips with his friends? Leaving only a cell phone contact number without the name of the hotel he will be staying at is particularly worrisome since he could then be anywhere.
- Traveling to countries that are known as safe havens for people interested in hiding assets. Frequent trips to Switzerland should raise suspicion, but travel to countries known for their relaxed banking laws or their status as tax havens, like Nevis, the Cayman Islands or the British Virgin Islands may also be a sign that assets are being hidden overseas.
- Denying a spouse access to a computer used for financial transactions or storing financial records. This could include keeping the computer password protected, or locking it or the hard drive in a location to which the spouse has no access.
- Complete control by one spouse of all bank and investment accounts as well as insurance policies. Does the spouse refuse to share account numbers or passwords?
- Renting a P.O. Box so that account statements, bills and property records are not intercepted in the mail.
- Renting a safety deposit box to store property or company records, including deeds to homes or cars, as well as undeclared jewelry or artwork.
- The sudden decision to hire a new attorney or financial planner for business or personal matters.
- Owning multiple cell phones. While this is generally assumed to be a sign that the spouse is being unfaithful, it may also be a sign that he is hiding assets. A phone that the other spouse does not have access to ensures privacy for business calls or calls from attorneys or financial consultants.
- Claiming that business or investments are suddenly suffering severe losses and yet his expenses remain the same.
- Depleting cash resources by investing in jewelry, cars or artwork. These purchases could be hidden and sold for profit after a divorce.
- Reluctance by one spouse to introduce the other spouse to any colleagues from work.

All of these point to the need for a full examination of the spouse's assets.

The Role of Technology

The computer and Internet have both facilitated the hiding and detection of assets, but not as much as many people think. Money can be transferred at the touch of a button from anywhere with an Internet connection, but there is still going to be a record of the transaction available by court order. Where technology helps the asset concealer is that there is less paper to be left lying around. Obtaining a forensic examination of a computer (whether used at home as a "family" computer, used by one spouse as "his" or "her" computer, or as an employer's machine utilized by the employee spouse for personal, albeit unauthorized transactions) is beyond the scope of this article.

Looking for assets electronically is enormously helpful, but many attorneys mistakenly think that trips to courthouses and records offices are now a thing of the past. Not only is this not true, but even when we do use computers, Google is only one of our many ways to find assets. Usually, Google searching is not even close to the most helpful technique.

Back to Mr. Smith and his concealed \$800,000 interest in his partnership: The LLC Mr. Smith formed will probably not be findable on Google because if it has a common name, there will be a multitude of extraneous results to look through before reaching the desired result. The link between Smith and the LLC will also not be found on Google because Google does not have access to the credit reports, utility bills and mortgage documents that proprietary databases do.

Arguably one of the most critical things to understand about Google is that it is not a neutral index of the Web, but rather a profit-making business. A "good" or "useful" result for someone looking for "Smith property" may not be our Mr. Smith's little building in New Jersey. Instead, Google would want actual or potential advertisers named Smith Properties, per this example, to occupy the top results upon the site's search.

When lawyers appear surprised by this, the advice is: Google yourself and see how much about your own life you can find. Can you find all of your own assets? Or people with whom you have lived and worked? Perhaps all of your relevant litigation? Google will be no more forthcoming with Mr. Smith's information than it is with yours. If there is precious little information about you on Google, why should information about Mr. Smith be any easier to come by?

Ethics and Best Practices

Lawyers on both sides of an asset search often confront a particular set of ethical considerations.

If a matrimonial lawyer learns that a financial statement submitted to a court contains a material omission, and that client perpetrated a fraud on the tribunal, that lawyer must call upon the client to rectify the material omission. If the client refuses, the lawyer may need to withdraw the financial statement.⁸ While the lawyer may not go so far as to declare the statement to be fraudulent (because doing so could violate privilege), such a withdrawal is among the biggest red flags out there.

For the asset-searching lawyer, it is critically important to instruct an investigator on the ethical boundaries that differentiate a law-abiding attorney's agent from hacker Lisbeth Salander in *The Girl With the Dragon Tattoo*.

To begin, obtaining bank and cell phone records without judicial authority (whether court order or subpoena) is simply not permitted, even though there are plenty of investigators who will claim to be able and willing to do so. Medical records provide their own thorny issues courtesy of HIPAA. (Health Insurance Portability and Accountability Act.)

Another area in which investigators can get their principals in trouble is when they "pretext" and pretend to be people that they are not when approaching interview subjects. While "dissemblance" is allowed,⁹ lawyers may not knowingly make a false statement,¹⁰ or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."¹¹

This extends to the use of social media. Gone are the days when lawyers and their agents could invent Facebook characters out of thin air in order to "friend" anyone on Facebook to gain access to restricted identities of friends and information posted on the "wall." Now, throughout the country and according to the New York City Bar, "a lawyer may not use deception to access information from a social networking webpage."¹²

The trend toward specializations in the practice of law is mirrored by the trend towards specialization in the businesses that support the practice. Asset tracing is no longer a stepchild of discovery, but a full-blown specialty.

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Endnotes:

1. Domestic Relations Law (DRL) §236(B)(4)(a).
2. Statement of Net Worth, DRL §236. The assets include not only marital property, but separate property and property that may be protected by a prenuptial agreement as well.
3. *Blickstein v. Blickstein*, 99 A.D.2d 287 (2d Dept. 1984); DRL §236[B][1][c], [5][d][1]. Cf., *Griffin v. Griffin*, 115 A.D.2d 587 (2d Dept. 1985).
4. *Harrell v. Harrell*, 120 AD2d 565 (2d Dept. 1986); *Contino v. Contino*, 140 A.D.2d 662 (2d Dept. 1988).
5. *Lukacs v. Lukacs*, 238 A.D.2d 483 (2d Dept. 1997).
6. Andrew Lavooott Bluestone, "Matrimonial Litigation and Legal Malpractice," NYLJ, May 21, 2012.
7. *Doscher v. Doscher*, 54 A.D.3d 890 (Sup. Ct. Nassau County 2008).
8. New York Rules of Professional Conduct, Rule 3.3(a)(3).
9. NYCLA Committee on Professional Ethics Formal Opinion No. 737, issued May 23, 2007.
10. New York Rules of Professional Conduct Rule 4.1.
11. Id. at Rule 8.4(c).
12. *New York City Bar Formal Opinion 2010-2*.

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