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Session 2

**Where Paths Collide:
Identifying Pitfalls of
Overlapping Practice Areas**

Presented by:

Anthony J. Procaccio, Randall S. Miller & Associates LLC, Milwaukee

Michael Holsen, Milwaukee

Chelsea Lee Williamson Cordell & Cordell, Milwaukee

About the Presenters...

Anthony J. Procaccio is an associate attorney in the Wisconsin office of Randall S. Miller & Associates, LLC, a multistate creditor rights firm. His practice has primarily focused on foreclosure, replevin, and small claims matters, and the related intersections with bankruptcy, probate, and family law. He obtained a bachelor's degree from the University of Tampa, before returning to the Midwest to attend Marquette University Law School. He is the current President of the State Bar's Young Lawyers Division, and currently serves on the board for the Solo, Small Firm, and General Practice Section, and also the Bankruptcy, Insolvency, and Creditor Rights Section.

Michael E. Holsen is a creditor's attorney that has been practicing since acquiring his law degree from Marquette University Law School cum laude in 2009. He has practiced consumer bankruptcy (chapters 7 and 13) as well as representing creditors in bankruptcy and other debt-related actions (primarily foreclosure). He is admitted to practice in the State of Wisconsin, and the Bankruptcy Courts for the Eastern and Western Districts of Wisconsin and Northern and Southern Districts of Indiana.

Chelsea Lee Williamson is a Litigation Manager at Cordell & Cordell, the world's largest domestic relations law firm. She received her undergraduate degree from the University of Virginia and her law degree from Marquette University Law School. After law school, she worked at a general practice firm in Waukesha, WI. She then joined Cordell & Cordell in 2016 practicing family law exclusively. During her time there she also was a Client Development Attorney performing over 2000 initial consultations and training attorneys around the country. Ms. Williamson also volunteers with the Waukesha Teen Court program and the South Eastern Adaptive Ski Program.

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Presented by:

- Chelsea Williamson, *Cordell & Cordell, Madison*
- Anthony Procaccio, *Randall S. Miller & Associates, Milwaukee*
- Michael Holsen,

Purpose

- Identifying overlapping areas
- Issue spotting outside your practice area
- Questions to ask and when to probe further

The Blind Men and the Elephant

1. An ancient Buddhist text tells the story of a group of blind men encountering a strange animal, called an elephant, for the first time. They approached the animal and said, "We must inspect and know it by touch, of which we are capable". Each person laid their hands upon it and gave their assessment. The first person felt the trunk said, "This being is like a thick snake". For the one who reached its ear, it seemed like a kind of fan. The person whose hand was upon its leg thought the elephant was a pillar like a tree-trunk. The blind man who placed his hand upon its side said the elephant, "is a wall". Another who felt its tail described it as a rope. The last felt its tusk, stating the elephant is hard, smooth and like a spear.

Divorce and Debt Collection

2. Marital Property as the starting point (Chapter 766 of the Wisconsin Statutes)
 - a. Property of spouses is presumed to be marital property, and each spouse has an undivided one-half interest in that property. This includes obligations (i.e. debts) incurred during the marriage.
 - b. **766.31 Classification of property of spouses.**
 - i. **(1) General.** All property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. [\(8\)](#).
 - ii. **(2) Presumption.** All property of spouses is presumed to be marital property.

- iii. (3) Spouse's interest in marital property. Each spouse has a present undivided one-half interest in each item of marital property,

c. **766.55 Obligations of spouses.**

- i. (1) An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family.
- ii. (2) (b) An obligation incurred by a spouse in the interest of the marriage or the family may be satisfied only from all marital property and all other property of the incurring spouse.
- iii. (3) This chapter does not alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date.
- iv. (4m) Except as provided under s. 766.56 (2) (c), no provision of a marital property agreement or of a decree under s. 766.70 adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred...

d. **Actions Affecting The Family, Chapter 767**

- i. 767.61(5)(b)2: In a judgment described under sub. (1), the court shall do all of the following: (b) Include all of the following in the judgment:
 - 1. 1. Notification that it may be necessary for the parties to take additional actions in order to transfer interests in their property in accordance with the division of property set forth in the judgment, including such interests as interests in real property, interests in retirement benefits, and contractual interests.
 - 2. 2. Notification that the judgment does not necessarily affect the ability of a creditor to proceed against a party or against that party's property even though the party is not responsible for the debt under the terms of the judgment.

ii. **Subchapter VIII: Enforcement**

- 1. 767.78 Enforcement, contempt proceedings
 - a. (2) Noncompliance; order to show cause. If a person has incurred a financial obligation and has failed within a reasonable time or as ordered by the court to satisfy the obligation, and the wage assignment proceeding under s. 767.75 and the account transfer under s. 767.76 are inapplicable, impractical, or unfeasible, the court may on its own initiative, and shall on the application of the receiving party, issue an order requiring the payer to show cause at a reasonable time specified in the order why he or

she should not be subject to contempt of court under ch. 785.

3. Debt allocation and future collections

- a. Scenario: Spouse A and Spouse B divorce, encumbered assets of house and car are allocated, as are liabilities of credit card debt and the loans for the house and car. Post-divorce, the parties responsible for the payment of the various liabilities default and the creditors file suit.
- b. Unsecured debt
 - i. For the family: Obligations incurred by a spouse during marriage are presumed to be incurred in the interest of the marriage or the family.
 - ii. Joint Liability: Obligations can be satisfied from all marital property.
 - 1. 766.55(2m): no income of a nonincurring spouse is available for satisfaction of an obligation under sub. (2) (b) after entry of the decree. But, if a dissolution decree provides that the nonincurring spouse is responsible for satisfaction of the obligation, the obligation may be satisfied as if both spouses had incurred the obligation.
 - a. Essentially converts the nonincurring spouse into the incurring spouse, but it does not flip the roles, just creates a second incurring spouse. Both become garnishable.
- c. Auto loans
 - i. Title issues: Actions to repossess will be initiated against the titled owner of the vehicle as well as the account holder.
- d. Real property
 - i. Note vs. mortgage vs. deed
 - 1. Note: Borrowing money and promising to pay it back
 - 2. Mortgage: The posting of real property as collateral to secure repayment of the loan
 - 3. Legal owner of record
 - ii. Lender/Service will initiate an action against all borrowers, mortgagors, and titled owners to ensure that a default in repayment is proven and that a clear title free of encumbrances is the end result of the process.
 - iii. Quitclaim deeds only speak to legal ownership, but not to the obligation to repay the debt.
 - iv. Refinancing is what converts the loan to only obligating one person
 - 1. Struggles: Dual applicants versus single applicants; interest rates.
 - 2. Releases: Uncommon, and language used is critical in assessing what the borrower is actually being released from.
 - a. e.g. Released from making the monthly payments or released from the entire repayment?

- v. Foreclosure effect on housing: eviction after foreclosure
 - 1. Most common procedure after foreclosure for the removal of the occupants is a “writ of assistance”. Rather than proceeding with an eviction action under Chapter 799, the new owner of the property can request a writ through the foreclosure case that operates the same way as a writ of restitution (846.16(2m)(as)).
 - 2. However, in some instances, a formal eviction case must be initiated, and it may result in all borrowers/owners being named in the eviction case.
- vi. Veteran’s Affairs Home Loan Eligibility
 - 1. A foreclosure on a VA loan that does not result in full repayment may result in a party having reduced entitlement, having to wait up to 2 years before reapplying, or no longer being eligible for a VA Loan.
 - a. Example: Home obtained with VA loan; divorce initiated. Respondent is a veteran. Per temporary order, Petitioner is granted use/possession of the home and responsible for making payments on the mortgage. Respondent fails to make payments, and the lender initiates a foreclosure.
- e. Judgments (Chapter 806) and Garnishment (Chapter 812)
 - i. Judgment and Lien Docket: judgment is docketed against “each judgment debtor and of the spouse or former spouse of the judgment debtor if the spouse is named in a judgment described under s. 806.15 (4).” (806.10(1)(a))
 - ii. (4) A lien under this section does not attach to property that is held, as defined in s. 766.01 (9) [titled owner], by a person who is the spouse or former spouse of a judgment debtor and that is not held by the judgment debtor, unless the spouse of the judgment debtor is a named defendant in the action for which judgment is rendered, the spouse of the judgment debtor is named in the judgment itself, the obligation is determined an obligation described in s. 766.55 (2) and any of the following applies:
 - 1. (a) With respect to property held by the spouse of the judgment debtor when the judgment is entered in the judgment and lien docket, the property is expressly determined available under s. 766.55 to satisfy the obligation.
 - 2. (b) The property is acquired after the judgment is entered in the judgment and lien docket.
 - iii. Effectively, a docketed judgment lien can attach to the spouse of the judgment debtor; and once docketed, a creditor may then proceed against the spouse (or former spouse) in a garnishment action. Whether rightly or

wrongly, it would then create an instance where the spouse must assert the property or income is exempt or otherwise not available under Wis. Stat. 766.55 to satisfy the obligation.

4. Effect (or lack thereof) of Divorce Decrees
 - a. Except as provided under s. 766.56 (2) (c), no provision of a marital property agreement or of a decree under s. 766.70 adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred or, in the case of an open-end plan, as defined under s. 766.555 (1) (a), when the plan was entered into.
 - b. Put simply: Contracts vs court orders: The spouses are a party to the divorce proceedings, but the creditor is not.
 - c. Credit reporting
 - i. The creditor can only report based on the account holder, regardless of who is obligated by the court to make payments.

Bankruptcy and Divorce

5. Bankruptcy Estate: The filing of a bankruptcy petition creates an estate, which includes all assets owned by the debtor.
6. The Automatic Stay: 11 U.S. Code § 362
 - a. A bankruptcy petition operates as a stay of the enforcement, against the debtor or against property of the bankruptcy estate.
 - b. The estate includes all community property under the debtor's sole, equal or joint management and control, and can also include marital property not held by the debtor, but rather titled in the name of the nondebtor spouse. 11 U.S.C. § 541(a)(2), *In re Morgan*, 286 B.R. 678 (Bankr. E.D. Wis. 2002)
7. Filing debtor / Discharged debtor
 - a. Co-debtor Stay: The chapter 13 codebtor stay protects nonfiling codebtors who are liable on a debt or who have secured a debt of the debtors p26, p59
 - b. Community discharge (*aka* the Phantom Discharge)
 - i. When only one spouse in a community property state receives a discharge, it extends to protect the non-filing spouse against claims on community property.
 - ii. Most collection efforts against the non-filing party will be suspended entirely rather than attempt to discern what is and is not available to satisfy the remaining obligation of the non-filing spouse.
 - iii. The practical effect of the discharge ends with divorce. The non-filing party's obligations were not discharged, and now there is no concern that collecting from that party will affect the marital property interest of the discharged party.

8. What is dischargeable after divorce
 - a. Domestic Support Obligations are generally not dischargeable, and the bankruptcy code uses the language of “in the nature of” common support payments regardless of how it’s designated in the divorce order (e.g. paying the mortgage on the homestead)
 - i. Factors: obligation in lieu of maintenance; support awarded inadequate without the obligation; intent of the parties/court; if the obligation terminates upon death/remarriage; financial resources of each spouse
 - b. Property division debts are dischargeable.
 - c. Attorney fees
 - i. Similar considerations of property division vs support obligation, and if the obligation to pay attorney fees of the spouse are intended to serve as support for the spouse who incurred the fees
 - d. Postpetition Debt: A mortgage debt in existence at time of petition was not discharged as to the debtor’s former wife because debtor’s obligation under the decree *was to make payments to former wife*, which was an entirely separate indebtedness that arose postpetition. The obligation to the mortgage creditor would be discharged. *In re Degner*, 227 B.R. 822 (Bankr. S.D. Ind. 1997).
 - e. Court orders establishing dischargeability are not entitled to deference prior to the filing of the bankruptcy
 - i. A provision in a settlement agreement that the debtor’s obligation was nondischargeable was unenforceable because it did not constitute a valid waiver of discharge under 11 U.S.C. § 727(a)(10), and no court has jurisdiction to make such a finding before a bankruptcy is filed. *In re Freeman*, 165 B.R. 307 (Bankr. S.D. Fla. 1994)
9. Violation of the stay is a void(able) order
 - a. Acts taken in the family court case that violate the stay are void or voidable.
 - b. Includes marital settlement agreements and transfers of property post filing of the bankruptcy, as well as a post-nuptial agreement after filing.
10. Proceedings to compel child support can violate the stay
 - a. Support may be exempt from discharge, but the stay is not contingent on the dischargeability of the debt.
 - b. Duration of the stay:
 - i. Stay continues until property is no longer property of the estate, until case is closed or dismissed, or debtor is discharged. 11 U.S.C. § 362(c). In chapter 7, the stay is in effect for about three months. In chapter 13, it is in effect until the plan is completed, which can be between 36 and 60 months in duration.

- c. Proceedings to compel support: If incarceration is used to compel debtor to pay support from property of the estate, especially if support arrearage will be paid through a plan, the action violates the stay.
 - i. Both the former spouse and their attorney may be subject to sanctions for violating the stay in bringing the action in state court,
 - d. Actions to establish or modify the amount owed are excepted from the stay, but modification of property division would not be allowed. *In re Zick*, 123 B.R. 825 (Bankr. E.D. Wis. 1990)
11. Issue/claim preclusion
- a. Adjudications, stipulations, and Rooker-Feldman
 - b. If divorce has been completed, the bankruptcy court cannot change the adjudicated rights of the parties. *Adams v. Adams*, 738 F.3d 861 (7th Cir. 2013)
 - i. Amount of arrearages determined by family court; legality of the marriage; validity of the divorce; annulment; etc. If the issue has been addressed or if the claim/defense could have been raised in the family court case, the BK court will not re-litigate.
 - c. Stipulations to facts in the divorce proceedings will be binding in the bankruptcy case.
 - d. Rooker-Feldman Doctrine: a federal court is without jurisdiction to act as an appeals court to a state court of competent jurisdiction.
 - e. The bankruptcy court won't allow it to become a venue for "do overs" to get around or undo things properly before the state court.

Bankruptcy and Immigration

12. Public Charge

- a. 212(a)(4)(A) of the Immigration and Nationality Act (INA), [8 U.S.C. 1182\(a\)\(4\)](#),
 - i. Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

13. Affidavit of Support

- a. 212(a)(4)(C): Family Sponsored Immigrants
 - i. By executing an Affidavit of Support, a sponsor creates a contract between the sponsor and the U.S. government. Under this contract, the sponsor agrees to provide support to maintain the sponsored immigrant during the period the support obligation is in effect; and to be liable for any reimbursement obligation incurred from the sponsored immigrant receiving means-tested public benefits during the period the obligation is in effect

- b. Sponsor's debts
 - c. A person is inadmissible under family sponsorship unless (ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.
 - d. Form I-864
 - i. Completed under oath, so it is important to verify and compare based on what Information was provided to the BK court in those filings regarding income, household size, etc.
14. Obligations of sponsor end at death, but not at divorce
- a. The obligation of support ends if the sponsor or the sponsored immigrant dies or if the sponsored immigrant ceases to be a lawful permanent resident.
 - b. However, the obligation does not end due to Divorce. (Form I-864 Instructions, Pg. 16, <https://www.uscis.gov/sites/default/files/document/forms/i-864instr.pdf>)

Identifying and preparing

1. Cross practice awareness
2. Intake and fact gathering
 - a. Questions to ask
 - i. Recent transfers of money or assets?
 - ii. Ever married?
 - iii. Currently or soon to be filing divorce
 - iv. Joint Debts?
 1. Any significant debts?
 2. Agreement with the lender?
 3. Refinanced, modification, or release?
 - v. Transfers
 1. Any recent transfers to spouse?
 2. Anyone else?
 - vi. Ever filed for bankruptcy?
 1. Who filed? Both or just the spouse?
 2. Discharge?
 - vii. Was there ever a collections case against you?
 1. Just you or both?
 2. Account holder?
 3. Married at the time?
 - viii. Any pending immigration applications?
 1. Any impact on the ability to live/work/remain in the US?

3. Collaboration and referrals
 - a. Build your network
4. Advising beyond your expertise
 - a. Don't!
 - i. SCR 20:1.1 Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
 - b. Hedge!
 - i. There is no requirement to give authoritative, concrete legal advice when identifying a possible issue outside one's expertise, and the rules contemplate this. Limited scope practice, co-counsel, referrals, and other aspects suggest a preference for directing a client to an attorney best suited to handle their claims, but in the role of advisor and counselor, there is still a duty to identify and communicate possible legal ramifications that may arise from the current matter.
 - ii. SCR 20:2.1 Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.
 - iii. ABA Comment to 20:2.1: [4] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.
 - iv. ABA Comment to 20:1.1: [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.
 - c. Identify issues, point them in the right direction
 - i. ABA Comment to 20:1.1: [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

Q&A and conclusion