

**20/20 Foresight: Strategies for Protecting  
a Business and its Employees During a Divorce**

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**I. Discovery: How a Business Should Respond to Discovery Requests When an Employee Divorces**

A. Authorizations

Business receives form signed by employee authorizing it to provide information to employee's spouse's divorce attorney upon request

1. Company is under no legal duty to comply
2. Consider need for confidentiality order to protect against sensitive company information making its way into the public record before releasing information
3. Consider whether to insist upon payment of costs to assemble and copy requested records

B. Subpoenas

Business or one of its employees is served with a subpoena to attend and give testimony at a deposition noted by divorcing employee's spouse's attorney

Subpoena also may command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein

1. Failure to obey a subpoena without adequate excuse is a contempt of court. Minn.R.Civ.P. 45.07
2. Determine if subpoena was properly served
  - a. Personal service required by a person who is not a party. Minn.R.Civ.P. 45.03

- b. Fees for 1 day's attendance and the mileage allowed by law must be tendered with subpoena.  
Minn.R.Civ.P. 45.03
  - c. Non-party who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information or facts objection as a result of activities in such profession, business or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.  
Minn.R.Civ.P. 45.06. Rule does not necessarily require the reimbursement of nominal expenses.
  - d. Party serving the subpoena is supposed to make arrangements for such reasonable compensation prior to the time of the taking of such testimony.  
Minn.R.Civ.P. 45.06
3. A resident of this state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person, or at such other convenient place as is fixed by order of the court.  
Minn.R.Civ.P. 45.04(c).
4. Steps to take if business objects
- a. If objection is to the giving of testimony, then before the time specified in the subpoena, file a motion for a protective order pursuant to Minn.R.Civ.P. 26.03.
    - 1. Business bears the burden of proof
    - 2. If motion is denied in whole or in part, court can require business and/or its attorney to

pay the reasonable expenses incurred in opposing the motion. Minn.R.Civ.P. 26.03 and 37.01(d)

b. If objection is to the production of documentary evidence, then within 10 days after service or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve on the attorney designated in the subpoena written objection to the production, inspection or copying of any or all of the designated materials. Minn.R.Civ.P. 45.04(b).

1. Burden then shifts to attorney serving the subpoena to seek an order compelling the production of the documents.  
Minn.R.Civ.P. 45.04(b) and 37.01.
  
2. However, if motion is granted, or if the requested discovery is provided after the motion was filed, the court SHALL require the deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, unless
  - (a) the motion was filed without the movant first making a good faith effort to obtain the discovery without court action;
  - (b) the opposing party's objection was substantially justified; or
  - (c) other circumstances make an award of expenses unjust.

Minn.R.Civ.P. 37.01(d)(1)

C. Applicable Rules of Civil Procedure

**Rule 26.02. Discovery, Scope and Limits**

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

The court may act upon its own initiative after reasonable notice or pursuant to a Rule 26.03 motion.

### **Rule 26.03. Protective Orders**

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (a) that the discovery not be had;
- (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (e) that discovery be conducted with no one present except persons designated by the court;
- (f) that a deposition, after being sealed, be opened only by order of the court;
- (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or
- (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37.01(d) applies to the award of expenses incurred in connection with the motion.

## **RULE 30. DEPOSITIONS UPON ORAL EXAMINATION**

### **Rule 30.01. When Depositions May Be Taken**

After service of the summons, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made pursuant to Rule 4.04, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Rule 30.02(b). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

### **Rule 30.02. Notice of Examination: General Requirements; Special Notice; Non-Stenographic Method of Recording; Production of Documents and Things; Deposition of Organization; Depositions by Telephone**

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the name and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

\* \* \*

(e) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

f) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate

one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This provision does not preclude taking a deposition by any other procedure authorized in these rules.

**Rule 30.04. Schedule and Duration; Motion to Terminate or Limit Examination**

(a) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (c).

(b) By order the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26.02(a) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(c) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26.03. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion.

## **RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES**

### **Rule 34.01. Scope**

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data, compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served, of (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

### **Rule 34.02. Procedure**

The request may, without leave of court, be served upon any party with or after service of the summons and complaint. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order pursuant to Rule 37 with respect to any objection to or

other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business at the time of the request or, at the option of the producing party, shall organize them to correspond with the categories in the request.

**Rule 34.03. Persons Not Parties**

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

**RULE 37. FAILURE TO MAKE DISCOVERY OR COOPERATE IN DISCOVERY: SANCTIONS**

**Rule 37.01. Motion for Order Compelling Discovery.**

(a) **Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

(b) **Motion.** If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30.02 (f) or 31.01(c), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) **Evasive or Incomplete Answer, or Response.** For purposes of this subdivision an evasive or incomplete answer, or

response is to be treated as a failure to disclose, answer, or respond.

(d) **Expenses and Sanctions.**

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**Rule 37.02. Failure to Comply with Order**

(a) **Sanctions by Court in County Where Deposition Is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) **Sanctions by Court in Which Action Is Pending.**

If a party or an officer, director, employee, or managing agent of a party or a person designated in Rules 30.02(f) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made pursuant to Rules 35 or 37.01, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(3) An order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(5) Where a party has failed to comply with an order pursuant to Rule 35.01 requiring that party to produce another for examination, such orders as are listed herein in paragraphs (1), (2), and (3), unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

## **RULE 45. SUBPOENA**

### **Rule 45.01. For Attendance of Witnesses; Form; Issuance**

(a) Every subpoena shall be issued by the court administrator under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The court administrator shall issue a subpoena, or a subpoena for the production of documentary evidence or tangible things, signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) Subpoenas shall be issued only in connection with a duly noted deposition as set forth in Rule 45.04 or in connection with a hearing or trial as set forth in Rule 45.05. Violation of this provision constitutes an abuse of process, and shall subject the attorney or party to appropriate sanctions or damages.

(c) Every subpoena shall contain a notice to the person to whom it is directed advising that person of the right to reimbursement for certain expenses pursuant to Rule 45.06, and the right to have the amount of those expenses determined prior to compliance with the subpoena.

### **Rule 45.02. For Production of Documentary Evidence**

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

### **Rule 45.03. Service**

A subpoena may be served by the sheriff, a deputy sheriff, or any other person who is not a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's usual place of abode with some person of suitable age and discretion then

residing therein and by tendering to the person the fees for 1 day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state of Minnesota or an officer or agency thereof, fees and mileage need not be tendered.

**Rule 45.04. Subpoena for Taking Depositions; Place of Examination**

(a) Proof of service of notice to take a deposition, as provided in Rules 30.02 and 31.01 or in the rules of a state where the action is pending, constitutes a sufficient authorization for the issuance of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26.02, but in that event the subpoena will be subject to the provisions of Rules 26.03 and 45.04(b).

(b) The person to whom the subpoena is directed may, within 10 days after service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to the production, inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to the production of, nor the right to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(c) A resident of this state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person, or at such other convenient place as is fixed by order of the court. A nonresident of the state may be required to attend in any county of the state.

**Rule 45.05. Subpoena for a Hearing or Trial**

At the request of any party, the court administrator of the district court shall issue subpoenas for witnesses in all civil cases pending before the court, or before any magistrate, arbitrator, board, committee, or other person authorized to examine

witnesses. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

**Rule 45.06. Expenses of Non-Parties**

Subject to the provisions of Rules 26.02 and 26.03, a witness who is not a party to the action or an employee of a party [except a person appointed pursuant to Rule 30.02(f)] and who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.

The party serving the subpoena shall make arrangements for such reasonable compensation prior to the time of the taking of such testimony. If such reasonable arrangements are not made, the person subpoenaed may proceed under Rule 45.02 or 45.04(b). The party serving the subpoena may, if objection has been made, move upon notice to the deponent and all parties for an order directing the amount of such compensation at any time before the taking of the deposition. Any amounts paid shall be subject to the provisions of Rule 54.04.

**Rule 45.07. Contempt**

Failure to obey a subpoena without adequate excuse is a contempt of court.

## II. Assets: The Division of Business Assets and Employee Benefits Upon Divorce

### A. Non-Compete Agreements

#### 1. Basic Legal Premise

- a. These are considered an *asset* and are divided in a marriage dissolution proceeding.

#### 2. Given the court's equitable role, the issue is how to value and divide these types of interests.

- a. Generally, the value of a non-compete agreement is divided into two components – a marital component, which is divisible – and a non-marital component, which is (generally) not.

- b. Sweer v. Gilbert-Sweer, 534 N.W.2d (Minn. Ct. App. 1995).

1. Non-marital portion: the non-compete payment that compensates the spouse for restricting his post-marital services.

2. Marital portion: the non-compete payment that secures the transfer of goodwill or other intangible property of the corporation.

- a. The important point to remember: the party trying to prove an asset is non-marital bears the burden of proof.

1. When drafting a non-compete agreement, it is a good idea to spell out specifically what portion of the payment secures the transfer of goodwill and what portion compensates for a restriction on future employment.

2. If the agreement fails to do so, and the spouse is otherwise unable to establish what specific portion of the payment compensates him for the restriction on his future employment, the entire payment will likely be considered marital and thus, divisible as a marital asset.

## B. Severance Agreements

1. Like non-compete agreements, a severance agreement is an asset to be divided in a divorce.
  - a. Also, like non-compete agreements, the division of a severance agreement depends upon the purpose of each component of the agreement.
  - b. The question becomes, was the particular component of the agreement based upon marital employment or post-marital efforts?
    1. If a component is based on marital employment, then that portion of the agreement's value is considered marital and is divisible.
    2. If a component is based on post-marital efforts, then that portion of the agreement is considered non-marital and is (generally) not divisible.
2. Potential income tax issues: If the severance agreement is determined to be marital property, the non-employee's share of the agreement should be tax-affected before a distribution.
  - a. Because, from the IRS' standpoint, the employee will be responsible for all the taxes associated with the funds received under the agreement.

- b. This is an concern with both non-compete agreements and severance agreements.
- 3. Recent case of Grigsby v. Grigsby, Minn. Ct. App., No. C0-01-2264, July 30, 2002.
  - a. The husband negotiated an employment separation agreement during divorce proceeding and trial, but did not disclose this fact to his wife.
  - b. The agreement contained a variety of terms, including a non-compete clause and a waiver of all employer-related claims.
  - c. The agreement as a whole was valued at about \$1.8 million.
  - d. When the Court learned of the agreement after the trial, it reopened the record and included the entire \$1.8 million in the parties' divisible marital estate (which was more than double the remainder of the marital estate).
    - 1. While the Court indicated that a portion of the agreement may have related to post-marital efforts, the husband failed to present evidence regarding the marital or non-marital character of the various components of the agreement, and thus, the entire agreement was held to be marital.

C. Qualified Pension Plans, 401(k) Plans, and ESOPs

- 1. Subject to federal law called ERISA (Employee Retirement Income Security Act).
- 2. Divided by drafting a Qualified Domestic Relations Order (QDRO)
  - a. Defined benefit pension plans present valuation issues regarding how to calculate the marital portion of the plan.

1. Actuaries are used to determine the present value of the future stream of payments from a defined benefit pension plan.

D. Bonuses

1. What is the purpose of the bonus? Courts look at the employer's documentation (if it exists) to determine if the bonus is based on past, present, or future service.
  - a. Profit-based bonus. Was it earned during the marriage? May be divided as property in a divorce.
  - b. Incentive programs. Are they linked to the employee's performance and/or the company's performance? May be treated as additional income or an asset subject to division in a divorce.
  - c. Signing bonus. Was it earned in contemplation of future employment or as an incentive for accepting employment? May be considered income or property.

E. Life, Disability, and Health Insurance

1. Generally, employer provided life insurance is term insurance and has no cash value. Some employers offer split-dollar policies with a cash value. These may or may not be divisible depending upon whether the employee or the employer owns the policy.
2. Disability insurance has no cash value, but an employee may be obligated to use a portion of the disability payments to pay a child support or spousal maintenance obligation.
3. Health insurance – a non-employee spouse is entitled to COBRA coverage. The employee spouse may continue coverage for the children. A qualified medical child support order may be needed; this order requires the employer's medical and dental plans to honor and process claims for the dependent children.

F. Goodwill of a Business

1. Hard to define. Described as the intangible advantage or benefit of a business beyond the value of its assets. Derived from public patronage and is based on the business's local position, reputation, and skill.
2. Some states make a distinction between "commercial" or "entity" goodwill and "personal" goodwill.
3. Minnesota considers goodwill of a professional practice to be a divisible marital asset. However, case law distinguishes between "goodwill" attributable to the practice and goodwill attributable to owner. See, Rolfe v. Rolfe, C2-00-19 (Minn. Ct. App. August 15, 2000)(goodwill considered in the value of dental practice, but the value must exclude any goodwill attributable to Dr. Rolfe personally).
4. Difficult to value. Issues include appropriate capitalization rates, the use of different valuation methods, and issues regarding the exclusion of owner/officer salaries.

G. Stock Options

1. Qualified vs. Non-Qualified. These are designations used by the Internal Revenue Service to determine the point in time at which the option will be taxed as income.
2. Valuations issues: The options may be classified as property or compensation.
  - a. Court looks at whether the options are compensation for past or future services, or a combination of both.
  - b. The best evidence is the actual documentation establishing the plan, the letter notifying the employee of inclusion in the plan, and testimony from a company representative.
  - c. Vesting issues. Dependent upon when the options become exercisable, Do they vest during or after the marriage? Involves calculations regarding what

percentage of the options vested during the marriage and are considered marital property.

2. Options are almost always nontransferable and non-assignable. They generally require continued employment with the firm in order to take advantage of the option at the designated exercise date.
  - a. Usually divided in kind in a divorce. This spreads the risk equally between the spouses.
  - b. In-kind division often requires the employee spouse to hold the options in trust for the non-employee spouse.
  - c. Potential Tax Traps. Recent IRS Revenue Ruling 2002-22. If nonstatutory stock options are transferred to the non-employee spouse in a divorce, the former spouse (not the employee spouse) is taxed when he/she exercises the stock options.
3. Examples of Different Types of Stock Options
  - a. Incentive Stock Options (ISO) – employer grants an employee an option to purchase stock at some time in the future at a specified price. There are often restrictions on how the options are structured and when they can be exercised.
  - b. Phantom Stock Options – un-funded and unsecured promise by an employer to pay money or property to an employee in the future. They present potential valuation issues during a divorce. Court must determine if the phantom options are based upon past or future employment?
  - c. Stock Appreciation Rights – Contractual right granted to an employee by an employer to receive, either in cash or employer stock, the appreciation in the value of a share of employer stock over time.
  - d. Restricted Stock – The employee acquires title to the stock as soon as the grant is made, subject to a series of restrictions. The most common restriction

is that the employee must continue to work for the employer for a set number of years.

#### H. Deferred Compensation

1. Provides an employee with pretax cash compensation in the future. This benefit may be based upon the employee's past, present, or future services.
2. Benefits usually cannot be assigned per plan regulations.
3. Valuation issues – are the future payments definable? If yes, the stream of future payments may be discounted to a present value. Valuation arguments must consider the tax implications to the employee spouse.
4. New Tax Regulations – Revenue Ruling 2002-22. Taxpayer who transfers his/her interest in nonqualified deferred compensation to a former spouse in a divorce settlement is not taxed on the transfer. The former spouse is taxed on the deferred compensation when it is made available to the former spouse.

#### I. Non-qualified Supplemental Executive Retirement Plans

1. Not subject to ERISA and are not divisible through the use of a QDRO.
2. May contain restrictions based upon the employee's future employment or contain non-compete agreements.
3. Usually divided by agreement between the spouses. An employer may agree to provide a separate check to each party and treat the payments as taxable to the employee and the non-employee spouse.

#### J. Miscellaneous Perks

1. Company Vehicle – Is it income to the employee or just a benefit of employment? If it is income to the employee, the non-employee spouse may claim it is additional income available for the payment of child support and/or spousal maintenance.

2. Country Club and Golf Club Memberships – Income to the employee or fully funded by the employer? Is it part of the employee’s expense account? If this is a taxable perk to the employee it may be considered additional income available for the payment of child support and/or spousal maintenance even though it is not cash.
3. Frequent Flier Miles – Retained by the employee or surrendered to the employer? If the employee owns them they may be subject to division in the divorce.
4. Sports Tickets (baseball, football, etc.) – Funded by the employer or considered income to the employee? If they are income to the employee they may be added to the employee’s gross income when calculating child support and/or spousal maintenance.
5. Expense/Promo Accounts – Employer must be careful if it allows employee to charge personal expenses to their promo accounts. In a divorce the non-employee may claim it is additional compensation even if the employer does not tax the employee for the personal expenses.

K. Patents, Copyrights, and Trademarks

1. Governed by federal law.
2. Is it owned by the employee, employer, or both?
3. Difficult to value, requires the assistance of an expert from the appropriate field. Can be considered a stream of income or property in a divorce.