

DEFENDING YOUR CLIENT'S FINANCIAL STATEMENT FROM ATTACK

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I. GENERAL COMMENTS

1. Your client's credibility is essential in domestic litigation. The reason to avoid attack of your client's financial statement is to avoid an attack of, and the questioning of your client's credibility.

2. The best way to defend an attack is to prevent an attack by presenting an accurately prepared financial statement. This means taking the time to prepare and revise the financial statement until it is accurate.

3. The financial statement should not be prepared in the hallway of the courthouse, or by your client without assistance and/or review from the attorney.

II. GENERAL COMMENTS ON THE PREPARATION OF THE FINANCIAL STATEMENT

1. If able, your client should complete a detailed financial statement worksheet with each of the entries to reflect the client's monthly income, expenses, and total assets and liabilities.

A. MAKE SURE YOUR CLIENT KNOWS THE FOLLOWING BEFORE COMPLETING THE WORKSHEET:

i. 4.33 is the number of weeks in a month. A weekly figure is converted to a monthly figure by multiplying the weekly figure by 4.33. Do not use 4.0 as the multiple.

2. The attorney should prepare the client's financial statement from the client's financial worksheet. That does not mean the attorney just types what the client provides to the attorney. Thoroughly question and review your client's financial statement entries.

3. Check your client's figures against your client's documentation, and/or

using your common sense. If a figure appears too high, have your client confirm and verify that the figure provided is a monthly figure, and not a quarterly or annual figure. Question figures that appear to low, such as automobile expenses, did your client forget to include his/her parking expense at work?

4. For any figure that does not appear correct, request confirmation or verification from the client and question the client's accuracy.

5. Preferably, correspond with your client in writing regarding the questions, confirmation, and verification of the client's financial statement worksheet. This way, you and your client both have written documentation to review and refresh your recollections prior to courtroom testimony on the financial statement (and you have written correspondence if your client questions your services in regard to the financial issues).

III. PREPARATION AND COMMENTS REGARDING THE INCOME SECTION OF THE FINANCIAL STATEMENT

A. Income:

1. Has your client accurately reflected all of his/her income? Your worksheet should set forth all types of income that fall within FL 12-201.

2. Has your client accurately calculated his/her gross wages? There is a difference between being paid bi-weekly (every two weeks -26 pay periods per year) and twice a month (two times a month, on the 1st and 15th (or some other dates) - 24 pay periods per year).

A. Confirm how frequently your client is paid

i. Ask your client; and

ii. Ask your client to provide at least three (3) months of pay

stubs so that you can confirm your client's income

B. To compute gross monthly income, if your client is paid:

Weekly: multiply the weekly gross wages by 52 pay periods and divide by 12 months.

Biweekly: multiply the biweekly gross wages by 26 pay periods and divide by 12 months.

Semimonthly: multiply the semimonthly gross wages by 24 pay periods and divide by 12 months.

Monthly: the monthly gross wages is placed on the financial statement.

C. If your client's pay varies from pay check to pay check, then you need to determine your client's average monthly pay. To do that, you need to obtain all of the client's pay checks from the beginning of the year, or the most recent pay check if the check reflects year to date earnings.

3. Interest/Dividend Income: Remember that 12-201 includes interest/dividend income. This becomes most relevant in a merits hearing with support issues, where there are significant investment accounts, and thus additional income from these accounts. If you do not include this income on the financial statement, prepare your client as to how to handle cross examination on this issue.

4. Tax Refunds: Remember that income will include tax refunds. Because the parties' tax filings and status may change with the divorce process, this may not be relevant. However, if the parties' typically filed separate returns, and if a party historically received tax refunds then the party may face attack if the refund is not included on the financial statement.

5. In Kind Payments/Expense Reimbursements: If your client receives in kind payments or expense reimbursements such as a company car, discount rent, reimbursements of social security taxes, etc. those in kind payments and/or reimbursements need to be included as income. A dollar value for these items can usually be found on the parties' W-2 form or the parties' tax return.

It is more likely than not that the opposing party will tell his or her attorney numerous times about all the benefits your client gets through his/her employment. Such benefits are unlikely to go unnoticed, so do not forget to list them.

6. Rental Income: Be consistent in listing both the gross income of the property and the expenses of the property, or list just the net income but explain the computation of the net income in an footnote/endnote or elsewhere.

7. Support: Do not forget to list the support payments your client may be receiving, both child support and alimony/spousal support

8. Overtime: Include consistent overtime pay and explain in an endnote how the overtime was computed and/or if the amount of overtime hours or pay is expected to be different in the future.

9. Do not forget to address bonuses, commissions, trust fund income, retirement income, disability income and other types of income.

10. If your client's gross wages are reduced because of the number of exemptions claimed on his/her pay stub, there may be an "attack" of the client's financial practices. Prepare your client to explain this on direct and/or cross examination.

11. Review your client's W-2 form to make sure the figures are comparable to the income figures calculated by reviewing the client's pay stubs.

12. Review your client's tax returns carefully to make sure your client did

not forget to include additional income. Your client does not want to fail to disclose or understate income.

B. Deductions:

1. Has your client accurately reflected all of his/her deductions from gross wages?

2. Has your client accurately calculated his/her deductions?

A. How frequently is the deduction taken? Is the deduction taken from every pay check, or only some (ie Union dues) ? Is the deduction taken year round, or only during certain months (ie school teachers)?

B. Federal Social Security tax: There is a cap on the amount of social security tax that a wage earner pays. A wage earner pays 6.2% of their earnings until they earn \$76,200, then there are no further social security taxes for the remainder of the year. If your client earns in excess of \$76,200.00 annually, you cannot just take the social security pay check deduction and multiply that figure by the annual number of pay periods. If you do that, the deduction will be too high.

i. Social Security tax is 6.2% of earnings, with a cap on earnings exceeding \$76,200.00 for the year 2000.

ii. Medicare tax is 1.45% of wage earners total income, there is no cap.

iii. FICA is medicare and social security tax combined or 7.65% of income. However, watch out for the social security cap!

3. Has your client listed an item as both a deduction and expense? For example: insurance offered through the employer, cafeteria plans, direct payments to creditors. If the amount is deducted from the client's pay check and is listed in the income section as a deduction from income, do not also include this amount as an expense on the expense section of the financial statement. That would be double counting. Be careful not to double count as double counting will be a reason to attack the financial statement.

4. Obtain at least 3 months of pay stubs from your client so that you can confirm the deductions taken, and the frequency of the deductions taken from your client's paystubs.

5. Accurate computation of deductions is important in alimony cases and child support guideline deviation cases where the court is going to be looking at the parties' net income.

IV. PREPARATION AND COMMENTS REGARDING THE EXPENSE SECTION OF THE FINANCIAL STATEMENT

1. Your client may be asked in cross examination, how he/she figured out his/her expenses. Make sure your client uses a reasonable method to determine expenses and that your client can articulate the method.

2. Expenses such as utilities should be determined by taking the average of 12 months worth of statements - a full year which includes summer and winter, if possible.

3. For expenses such as food, recreation, incidentals, etc. where your client is unlikely to have retained every single receipt and is guesstimating based on past usage, the expense should not be an odd number such as \$423.21. An odd number for such an item will raise a flag to opposing counsel to inquire as to how your client computed such an exact (and odd) expense.

4. If the family recently separated, your client cannot rely on the past bills for all expenses unless they are fixed regardless of the number of persons in the household. For example, the electric bill may be the same regardless of the persons in the household, but the food expenses should decrease if one adult leaves the home.

5. Be careful not to double count expenses within the expense section. For instance, suppose your client spends \$100 on clothing, \$400 on food and has a \$500 credit card bill. If you list all three of these expenses, then the expense section will indicate a \$1,000 expense (clothing \$100, food \$400, and \$500 credit card) instead of the actual expense which is only \$500.

6. Expenses not currently Incurred: Do not list expenses that are currently not incurred, as that will be raised on attack. Consider listing the expense as an item on the financial statement, the amount of the expense as zero, and using a footnote or endnote to indicate what the anticipated expense will be and when it will be incurred.

7. Expenses paid by opposing party: Expenses paid by the opposing party should either: i) not be listed on your client's financial statement; ii) be listed in a column labeled expenses paid by spouse, or iii) listed as an expense with a zero monthly cost, and an endnote indicating the actual expense, and by whom the expense is paid.

8. Inflated Expenses: Expenses should not appear or be inflated. If the expenses appear inflated on their face, a red flag will go up to opposing counsel. If your client insists that an expense, which appears inflated to you, is accurate, prepare your client to handle cross examination on that expense. For example, your single client claims he/she spends \$750.00 per month on food. At a glance, it does not seem appropriate or accurate for one person to spend \$750.00 per month on food.

9. Consider the facts of the case to assess whether an expense appears inflated. If your client has a new or relatively new car, a high expense for

automobile maintenance/repair will be an area for attack.

10. Vacations: If the parties did not historically go on vacations, or did not go on expensive vacations, high expenses for vacations will now appear suspect and an area for attack. Wish lists are okay if there is a historical basis or a reasonable basis, but explain with an endnote.

11. Food: Is food expense high because the bills include receipt of cash back? If so, reduce food expense by the cash back amount. Remember to look at the back of cancelled checks for cash back from grocery stores.

12. House repairs/Maintenance: Unless the house has old appliances, or is aged, a high expense for household repairs/maintenance may appear suspect and be an area for attack.

13. Medical/Dental expenses: Confirm that the client's medical/dental expense is the uninsured out of pocket expense. If your client is reimbursed the expense or the expense is covered by the insurance, then the expense should not be listed on the financial statement. If the client incurred the out of pocket medical expense because client failed to submit reimbursement forms consider listing the expense with the explanation that the client is awaiting insurance reimbursement or do not have the client list the expense and have client submit those reimbursements to the insurance company before the court date.

14. Transportation: Your client may be attacked for allocating savings for a replacement car if the client currently has a working vehicle. Indicate clearly if that is what is being done and have your client explain why new car is anticipated. Remember high maintenance/repair expenses for a relatively new car will appear suspect and will likely be questioned.

15. Are expenses of paramour being included, such as the purchase of expensive gifts, meals out, payment of living expenses. If so, this will be an area of attack. Prepare to explain such expenses.

16. Credit Card Payments: If more than the monthly payment is paid and

listed as an expense, prepare your client to testify as to why this is being done/necessary. If the payment is decreased to the minimum payment, the client will have less expenses and more income available for other purposes.

17. Is the expense really an expense? For example, a party who pays a \$5,000.00 retainer to the attorney lump sum cannot prorate this lump sum payment monthly and list it as an expense. However, a client who is on a monthly payment plan of \$500.00 per month, can list the attorney fees as a monthly expense.

18. How does one allocate expenses between party and child(ren)? Make sure the allocation between client and children is reasonable. You need to consider the allocation as part of the strategy of your case. Whether your client is seeking alimony, and/or a deviation from guideline child support, should impact how the allocation is done, but in all situations the allocation needs to appear reasonable, otherwise it will be subject to attack.

19. Monthly expenses exceeds monthly income. If your client's monthly expenses exceeds his/her monthly income, make sure your client is going into debt each month and paying the difference on credit cards, loans etc. If your client is not going into debt each month, then the listed expenses are not being incurred each month and the financial statement needs to be revised.

20. If your client is going into debt each month, unless all of your client's expenses are for necessities, your client may be attacked and the court may question the judgment of your client.

V. PREPARATION AND COMMENTS REGARDING THE ASSET SECTION OF THE FINANCIAL STATEMENT

1. The financial statement should include a list of all assets in which your client has an ownership interest.

2. Review your client's tax returns to see if there are any assets that your client forgot to list.

3. If your client is not sure of the value of an asset, consider leaving the value blank. For instance, if your client has not had the house appraised, and does not know the value, it may not be in your client's best interest to put a value. If you put a value, your client may be prejudiced later by that value. If you put unknown then your client may be questioned later as to how he/she has a basis to testify now, when previously he/she said they did not know the value.

4. Do not understate assets/values as this can raise an attack on credibility.

VI. PREPARATION AND COMMENTS REGARDING THE LIABILITIES SECTION OF THE FINANCIAL STATEMENT

1. Is family money given to a party to be considered a loan or a gift? It depends on the facts. Discuss the facts with your client before listing as a liability. This could be an area of attack.

2. Does your client have loans outstanding, yet have money in bank/investment accounts? Discuss this with your client. Having a liability, especially a liability with interest payments, when there are assets to pay of the liability raises a red flag and is an area for attack.

VII. THE USE OF FOOTNOTES/ENDNOTES ON A FINANCIAL STATEMENT

1. Footnotes/Endnotes are a great way to have "testimony" regarding financial statement entries. It is also a great way to remind the attorney and client as to issues that are important to explain in Court.

2. Opposing counsel may object to the use of the footnotes/endnotes, and the Court may not allow the admission of those notes. For this reason, it is recommend that endnotes be used, as the endnote page can be easily removed from the financial statement. It is difficult to remove footnotes that appear on every page, when you are in the courtroom in the midst of a trial.

3. If you are required to remove the endnotes, you have an outline of areas which you want to bring out in testimony. Also, your client has seen the endnotes on numerous occasions and will be familiar with the testimony needed.

VIII. DIRECT EXAMINATION REGARDING THE FINANCIAL STATEMENT

1. If it turns out that despite all the preparation you and your client did to accurately prepare the financial statement, an error is discovered, have your client testify as to the correction. Do not wait for your client to be attacked on cross examination.

2. Have your client testify to any changes that have occurred since the financial statement was filed, if an updated financial statement is not being used.

3. Have your client explain any unusual or complicated financial statement entries, or any entries that are essential to a specific issue before the Court. An explanation may preempt an attack by the opposing side.

IX. CROSS EXAMINATION OF THE FINANCIAL STATEMENT

1. Prepare your client for cross examination by reviewing those areas where you think the client is most likely open to attack.

2. Instruct your client to practice how he/she will explain specific financial statement entries.

3. Remind your client to review the completed worksheet, financial statement, and any correspondence between you and the client regarding the financial statement prior to testimony. These items should help your client refresh his/her recollection as to what types of expenses he or she included when calculating his or her recreation, incidental, and any other such broad categories of expenses, and how his/her expenses were calculated.

