

**LAWYERS RISK MANAGEMENT**
CAUTIONARY TALES

He Said—He Said: Put It in Writing

This matter was initially reported as a non-litigation claim, but later evolved into arbitration with respect to legal services provided by an insured law firm for the claimant in connection with the claimant's divorce from his wife following 25 years of marriage. The claimant initially contacted the insured and asked the firm to enter into a six-month tolling agreement for the claimant to investigate whether the insured provided him with "competent representation." The parties later agreed to arbitrate the dispute in light of an arbitration provision in the insured's engagement letter.

The claimant's former wife physically abused him during the marriage and was criminally convicted of battery. However, the conviction was subsequently expunged from her records. After the battery, the claimant and his wife separated and the claimant retained the insured in 2006 to initiate divorce proceedings. Five years later, the trial judge issued a ruling determining the value of the marital estate to determine the wife's share and confirming that the wife was entitled to support payments.

The marital estate was valued between \$2.5 and \$3 million. The court ordered that the wife was entitled to approximately \$1.25 to \$1.5 million, including the sale proceeds from the two houses they had owned together. In 2012, the claimant sold the primary home for \$747,040 and the second house for \$255,000. The wife received all of the sale proceeds totaling \$1,002,040 in partial satisfaction of what she was entitled to in the divorce. The claimant did not pay the balance of the estate assets, as he maintained that he did not have liquidity to cover those assets since they were tied to the value of his business.

The insured's liability was favorable with respect to the divorce proceeding and support award entered in favor of the claimant's wife. The insured appeared to appropriately argue that the wife was not entitled to any support payments because, pursuant to California Family Code § 4325, persons who are convicted of abusing their spouse are presumed to be disqualified from obtaining support payments from the abused spouse, and there were no factors in this instance to rebut that presumption. Under the statute, the wife would have the burden of rebutting the presumption and persuading the judge that one or more of the 13 enumerated factors in § 4325 sufficiently satisfied that burden. Despite determining that the claimant would have to pay the wife \$7,000 per month in support until he turns 65, the judge did not cite to any of the 13 factors in ruling that the wife was entitled to support payments. As such, the insured appealed this aspect of the court's ruling. However, the claimant opted to have another attorney represent him in the appeal and fired the insured.

The insured's liability, however, as to another aspect of his representation of the claimant was potentially problematic, *i.e.*, the insured's alleged failure to advise the claimant to not make contributions into his 401(k) account for the two-year period after the claimant's separation from his wife. In this regard, in California, contributions into a 401(k) plan during a marriage become part of the community property. When the insured was retained in 2006, he was aware that the claimant still was making contributions into a 401(k) plan and continued to do so for the first two years after his separation. Inasmuch as the aggregate contribution limit for the two-year period amounted to \$30,500, the claimant's 401(k) contributions could have been worth approximately \$32,000, assuming he made the maximum annual contributions and 10 percent growth, one-year compounding. Had the claimant not wanted his investments to be made part of the community property, the insured should have advised

the claimant not to make those contributions, which would have avoided the claimant's obligation of paying his wife \$16,000 from the 401(k) plan. While the insured maintained that he did so advise the claimant, he did not do so in writing and the claimant denied ever receiving the advice from the insured.

RESULTS

Ultimately, this matter proceeded through arbitration, which was narrowed down to a single allegation, being the insured's alleged failure to argue that the wife was not entitled to spousal support based on her domestic violence conviction. The claimant asserted two causes of action for legal malpractice and breach of contract. An arbitration award was issued in favor of the insured, with the arbitrator finding that the conduct of the insured exceeded the standard of care required of a family law specialist and that the claimant suffered no damages as a result of any purported negligence by the insured. The arbitrator ordered the claimant to pay the insured's costs in excess of \$50,000. This was clearly a favorable result given the initial concerns as to potential exposure.

TAKEAWAY

In this instant claim, there was little else the insured could have done with respect to the divorce proceeding. However, with respect to the 401(k) contributions, the insured should have confirmed his advice to the claimant in writing. The insured's failure to do so created a "he said / he said" situation that could have been avoided and was a distraction in the proceeding, in which the insured's favorable liability was essentially irrefutable based on the court records.