



Divorce in the Work Place -- Controlling the Release of Employment Records

By: Barbara Blee Maille

Marital discord is a growing problem which adversely affects America's workplace by taxing employee productivity and requiring employers to produce a vast array of employment information and records. In a national sample of men who had been married ten years or less, it was estimated that the work loss associated with marital problems cost employers approximately \$6.8 billion per year¹. Unfortunately divorce is on the rise. In 1994, 4.6 of every 1,000 Americans divorced, with the number of divorced persons quadrupling from 4.3 million in 1970 to 18.3 million in 1996². 43 percent of first marriages end in separation or divorce within 15 years³. In 2002 the Census Bureau projected that 50% of first marriages for men under age 45 would end in divorce, and between 44 and 52% of first marriages for women of comparable age would similarly terminate⁴. With all states reporting except California, Colorado, Indiana and Louisiana, it was reported that in 1998 approximately 1,894,768 persons finalized their divorce⁵. In 2000 that number increased to 1,914,400. It is understandable then that human resource managers are increasingly involved with lawyers and court proceedings as ever growing numbers of employees get divorced.

Marriage is factually and legally an economic partnership, the dissolution of which involves the distribution of property and the award of maintenance (alimony) and child support. Frequently, the resolution of these complex financial issues are complicated by the fact that one or both parties do not have sufficient information to evaluate his or her rights and do not trust the veracity of the information produced by the other spouse. In those situations, the formal discovery process, including the issuance of subpoenas, is available to compel the production of relevant documents and records which are not privileged. Rule 56.01 (b)(i)(2002).

¹Forthofer, Melinda; Markman, Howard; Cox, Martha; Stanley, Scott; and Kessler, Ronald, *Journal of Marriage and the Family* 58 (August 1996), page 597

²1998 Census Bureau Report: Between 1970 and 1996, the number of divorced people more than quadrupled (*Marital Status and Living Arrangements*)

³Bramlett, Matthew and William Mosher. "First marriage dissolution, divorce and remarriage: United States," Advance Data From Vital Health Statistics; No. 323. Hyattsville, MD: National Center for Health Statistics: 2 1.

⁴Rose M. Kreider and Jason M. Fields, "Number, Timing, and Duration of Marriages and Divorces: 1996", U.S. Census Bureau Current Population Reports, February 2002, p. 18.

⁵Monthly Vital Statistics Report, Vol. 50, No. 14

The employer, through its human resources department, is a reliable source of financial information relevant to the identification and valuation of certain marital assets and the determination of support. Therefore, when employees divorce human resource managers are often subpoenaed to appear and produce records at a deposition or hearing. Properly drafted and served, a subpoena has the force of law to compel the person summoned to testify and/or produce documents. An enforceable subpoena: 1) is issued by an officer, person appointed by the court, or clerk of the court in which the action is pending; 2) states the name of the court and the title of the action; 3) correctly identifies and spells the name of the person to be examined, if known; 4) absent a specific name, states a general description sufficient to identify the person or the particular class or group to which the person belongs; 5) sufficiently designates the documents or things to be produced; 6) accurately states the time, date and place of testimony/production; 7) is served at least seven (7) days before the date specified for appearance; 8) is served by a sheriff or person over age eighteen (18) who is not a party to the action; 9) is accompanied by a witness fee of \$30.00 for each day of testimony; and 10) if required to travel more than 40 miles, is accompanied with a mileage reimbursement of \$0.35 cents per mile for each mile from the witness' residence to the place of appearance. Rule 57.09 (2002), If the witness is required to travel less than 40 miles, he or she may request a mileage fee at the time of service and is not required to appear unless the demand is satisfied. Ex parte Noell, 293 S.W. 488 (Mo. App. 1927).

A subpoena is properly served by personal delivery to an officer, partner or agent of the employer, or at the office to any employee "in charge" at the time of service, including a clerical employee. Rule 54.13 (2002); Kitchens v. Missouri Pac. R. Co., 737 S.W.2d 219 (Mo. App. 1987). Once served, if a witness fails to comply with the subpoena he or she could be subject to a "body attachment" to compel his or her appearance and/or could be held in contempt of court. §491.090 (RSMo 2002); Rule 57.09 (2002). Sometimes, however, compliance with the subpoena is not possible. The subpoenaed records may be voluminous and the employer inadequately staffed to respond to the production within the allotted time. Under those circumstances, the court could, upon application of the employer, quash or modify the subpoena if found to be unreasonable or oppressive, or could require the party seeking the discovery to advance the reasonable cost of production Rule 57.09 (2002); State ex rel. Soete v. Weinstock, 916 S.W.2d 861 (Mo. App. E.D. 1996).

The subpoena may be directed 1) to a particular individual, if the name is known; 2) to a general description sufficient to identify the person or the particular class or group to which the person belongs, such as the custodian of records; or 3) to the corporation to designate a person to testify on its behalf with regard to the particular matters on which the examination is requested. Most frequently the subpoena is directed to the "custodian of records" to produce "business records". The custodian of the records is the corporation's representative delegated responsibility for maintaining control of records. "Business records" are the original or exact duplicates of the original records that are kept by the company in the regular course of business.

In proceedings for divorce, the business records subpoenaed would likely be records of the employee's: 1) salary/wages, bonuses, commissions, expenses, and benefits such as insurance, personal use of company cars, and per diem reimbursements; 2) retirement accounts, pension plans and other deferred compensation accounts; 3) stock options; and 4) severance/early retirement packages. If the conduct of a spouse is in issue, the employer may also be asked to produce an employee's personnel file, e-mails, voice messages, cellular telephone billings and expense reports.

In order to lay a proper foundation for the admission of business records into evidence under the business records exception to the hearsay rule, the custodian of records must testify that the records were maintained in the ordinary course of business; that it was the regular course of business of the company for an employee or representative with knowledge of the act or event recorded to make the record or to transmit information thereof to be included in such record; and that the record was made at or near the time of the act or event. State v. Todd, 935 S.W.2d 55 (Mo. App. E.D. 1996). This

foundation for the admission of business records as an exception to the hearsay rule may now be laid by written affidavit rather than direct testimony, provided the business record affidavit is substantially in conformity with the statutory requirements, and the affidavit and records are served on the opposing party at least seven days prior to the commencement of trial. §490.692 (RSMo 2002). Wisdom v. Director of Revenue, 988 S.W.2d 127 (Mo. App. S.D. 1999).

Most witnesses are understandably reluctant to appear at a deposition or trial to provide foundation testimony for the admissibility of business records if they are not required to testify as to the content or meaning of the records themselves. Thus, the witness is easily swayed by an attorney's request that he or she sign the business records affidavit and produce the records prior to the scheduled appearance. Beware: this is a trap for the unwary.

Records admissible under the business records exception to the hearsay rule remain subject to other substantive or procedural objections which could prevent their disclosure or admission in evidence. While some, but not all, employment information enjoys an absolute privilege, employees have a fundamental right of privacy in employment records. State ex rel. Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998). Authorization from the employee is required for the release of such information. State ex rel. Tally v. Grimm, 722 S.W. 2d 604 (Mo. banc 1987). The unauthorized production of employment records to adverse counsel prior to deposition or trial denies the employee his or her right to object to disclosure on substantive or procedural grounds and may subject the employer to liability for invasion of privacy or breach of the fiduciary duty of confidentiality. Childs v. Williams, 825 S.W.2d 4 (Mo. App. E.D. 1992); Fierstein v. DePaul Health Center, 949 S.W.2d 90 (Mo. App. 1997); Brandt v. Pelican, 856 S.W.2d 658 (Mo banc 1993); State ex rel. Crowden v. Dandurand, 970 S.W. 2d 340 (Mo. banc 1998). It is important to note that it is professional misconduct for a requesting attorney to review or otherwise use privileged records that are received by mail in lieu of an appearance required by a subpoena. id. Mo Sup. Ct. Rule 4-8.4 (2002).

Human resource managers are increasingly confronted with the onerous task of responding to subpoenas for employment records which may be confidential. Given the myriad of legal issues to consider before releasing such records, and the potential liability if wrong actions are taken, it is essential that you and your legal counsel develop detailed procedures to follow when employees file for divorce and records are subpoenaed.

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Barbara Blee Maille is a Principal in the Clayton, Missouri law firm of Danna McKitrick, P.C.

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