HERE'S LOOKING AT YOU[*1]

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Introduction

Let's explore *Marriage of Anka and Yeager* (2019) 31 Cal. App.5th 1115 (*Anka*). Prior to *Anka*, there was no clear guidance regarding the permissible and impermissible conduct of counsel under Family Code sections 3111 and 3025.5[2] about confidential child custody evaluation reports ("custody evaluation(s)") conducted under section 3111. Does *Anka* raise more questions than it answers? Let's see.

In addition to reviewing the guiding principles of a custody evaluation, this article reviews the *Anka* decision and proposes solutions for parties and counsel to avoid running afoul of the proscriptions in sections 3111 and 3025.5, which could result in the issuance of monetary sanctions. It also addresses other questions, such as: Are monetary sanctions under section 3111 the exclusive remedy for improper disclosure of a custody evaluation, or are civil damages (based on theories such as invasion of privacy, interference with parental relations, or negligent or intentional infliction of emotional distress) available as well? May a party seek *both* monetary sanctions under section 3111 *and* civil damages? Are sections 3111 and 3025.5's prohibition on publishing the contents of a custody evaluation an undue prior restraint of speech; thus rendering the statute unconstitutional (either facially or as-applied)? These questions, and other potential issues stemming from the *Anka* holding, will be discussed and analyzed. To assist counsel and courts addressing *Anka* issues, a proposed stipulation/order is provided.

What Happened in Anka?

In *Anka*, Mom is the common parent; and the two Dads (Dad-1 and Dad-2) are litigating custody with her. Mom is represented by the same attorney in both cases.

A court-ordered custody evaluation was performed in the custody dispute between Mom and Dad-1. Mom's attorney then took Dad-1's deposition *in the custody dispute between Mom and Dad-2*, and asked Dad-1 numerous questions about the custody evaluation performed in Dad-1's case. Dad-1 moved for sanctions (in Dad-1's case) against Mom and Mom's attorney for unwarranted disclosure of information from the custody evaluation. The trial court found Mom's attorney's disclosure was reckless, malicious, and not in the child's best interest, and awarded $50,000 in sanctions jointly and severally against Mom and her attorney.[3] The appellate court affirmed the sanctions against attorney, but reversed the sanctions against Mom because Mom neither directed nor encouraged her attorney to make the disclosure.

In affirming the sanctions against Mom's attorney, the appellate court found that: (1) the deposition questions to Dad-1 disclosed information protected by section 3025.5; (2) the disclosure was to persons not authorized under section 3025.5; and (3) the disclosure was unwarranted.

The opinion asserts that the deposition questions disclosed information protected by section 3025.5—even though Dad-1 evaded answering them—because the nature of the questions themselves revealed information in the custody evaluation. The questions concerned statements Dad-1 made to the evaluator, statements Dad-1's child made to the evaluator, and the evaluator's findings about whether Mom abused the children and the children's attachment to Mom.[4]

The persons not authorized under section 3025.5 to receive the protected information were: (1) the court reporter; (2) the videographer; and (3) Dad-2's attorney.

The disclosure was deemed "unwarranted" (as defined in section 3111, subdivision (f)) because it was (1) intentional (and therefore *at least* reckless); and (2) not in the child's best interest.

Finally, the panel rejected Mom's attorney's arguments that her conduct was protected by the litigation privilege (Cal. Civ. Code, § 47, subd. (b)) and that the sanctions order violated due process.[5]

Section 3111, subdivision (d) empowers the court to impose a monetary sanction, including attorney's fees, against a disclosing "party." *Anka* reveals that a disclosing "*party*" need not be a party to the action. A "party" means "anyone."

Who May Perform Child Custody Evaluations?

A custody evaluation may be conducted by a court-connected or private custody evaluator who has completed the domestic violence and child abuse training program described in section 1816 and has complied with rules 5.220 and 5.230 of the California Rules of Court.[6] (FC, § 3110.5, subd. (a).) Additional licensing, education, and training requirements are specified at length in rule 5.225.

Only custody evaluations conducted in compliance with the court rules adopted under section 3117 (i.e., rule 5.220) may be considered by the court. (FC, § 3111, subd. (a).)

Rule 5.220 is extensive, and it articulates the purpose, definitions, ethics (including protection against bias), and a multitude of other details regarding custody evaluations (e.g., the evaluation must clearly describe, in writing, its scope and distribution, and the procedures and tests used).[7] And notably—as it relates to the subject of *Anka*—rule 5.220 requires

the first page of every filed and served evaluation report to be Form FL-328, which informs the recipient of the confidential nature of the report and the potential consequences for its unwarranted disclosure. (Rule 5.220(i).) And the court's order appointing a custody evaluator must be made on Form FL-327, which must detail the purpose and scope of the evaluation, and contain a notice regarding the confidentiality of the report and the possibility of a fine for its unwarranted disclosure.

Once appointed, the evaluator must file with the court a "Declaration of Private Child Custody Evaluator Regarding Credentials" (FL-326), stating, under penalty of perjury, that he/she satisfies the applicable requirements, under the California Rules of Court, to serve as a child custody evaluator at the time of appointment.

The court supervises and determines the costs charged by the evaluator. (*Marriage of Laurenti* (2007) 154 Cal. App.4th 395 (*Laurenti*); *Marriage of Benner* (2019) 36 Cal. App.5th 177 (*Benner*); Cal. Rules of Court, rules 5.220 et seq.) Any form of custody evaluation whether limited in scope, or defined as an assessment, or investigation resulting in a written report is an evaluation for all purposes under the Family Law Act. While not specifically identified in the statutes or rules, a minor's interview resulting in a written report is subject to the confidentiality provisions of section 3111 including the notice obligation in section 3025.5 incorporated into the FL-328 mandatory form. We use the phrase "custody evaluation" to describe any form of child custody evaluation resulting in a written evaluation report presented to the court, whether under section 3111 or Evidence Code section 730.[8]

Disclosing Privileged Information to a Custody Evaluator

Statutory privileges are generally found in the Evidence Code, not the Family Code. So, while section 3025.5 makes a custody evaluation *confidential* (Rutter Group Family Law Practice Guide 7:254 et seq.), it does *not* make the custody evaluation *privileged*.

But what happens to otherwise privileged information (e.g., confidential psychotherapist-patient communications) that is revealed in a custody evaluation? Do the doctrines of waiver or consent vitiate the privilege? Probably.

Confidential custody evaluations are subject to judicial oversight and protection. While a custody evaluation is confidential, this designation does not necessarily resuscitate or protect the privilege attached to information voluntarily disclosed in a custody evaluation. If, for example, the party gives consent for the evaluator to speak to his/her therapist, such consent, and the resulting communication between the evaluator and the party's therapist could be deemed a waiver of that party's psychotherapist-patient privilege. Once disclosed, the privilege is lost, but the claim of confidentiality survives. Attached to the confidentiality privilege is the right to seek sanctions under section 3025.5.

Likewise, custody evaluators may ask parties to sign a stipulation regarding fees and other matters before they begin their work. Though generally styled as stipulations, these documents may resemble contracts of adhesion on pleading paper and may contain provisions that purport to waive the parties' statutory privileges by, say, permitting the evaluator to speak with, or obtain records from, the parties' physicians or therapists. Therefore, counsel should carefully review any such proposed stipulations and discuss any such provisions, and their implications, with the client. If a privilege will be waived for a custody evaluation, counsel should consider whether a non-disclosure agreement (NDA) with consequences as sanctions, or an independent action for a violation, should be made a condition of the waiver.

Wise counsel document their warning to the client that improper use of the custody evaluation report may subject the client to sanctions under section 3111, including possible tort actions where recovery might be sought for invasion of privacy, negligent or intentional infliction of emotional distress, and other tort theories.

Disclosure of a Custody Evaluation in Mediation

How does mediation confidentiality allow or preclude a request for 3111 sanctions? Assume that, during mediation of a child support issue, mom presents the mediator with a copy of the custody evaluation to show the needs of the child, since the best interests of the child are a consideration in imputing earning capacity.[9] Mom also tells the mediator she hates dad and does not care about the confidentiality of the custody evaluation. She knows that she is not supposed to show the custody evaluation to the mediator, but she does so anyway.

In a subsequent request for order (RFO) for sanctions under section 3111, dad reveals to the court the content of the discussions in mediation regarding the custody evaluation. This raises a few questions:

First, do dad's references to discussions in mediation violate the mediation privilege? Second, did mom's disclosure to the mediator violate sections 3111 and 3025.5? Third, is mom able or likely to be sanctioned under section 3111 for this disclosure?

As a general principle, what happens in mediation stays locked down from disclosure or use outside of mediation (Evid. Code, § 1119; *Foxgate Homeowners' Assn. v. Bramalea Cal., Inc.* (2001) 26 Cal.4th 1) because confidentiality is essential to effective mediation. The protection is so great, that waiver of mediation confidentiality requires knowing consent by *all* participants in the mediation, *including the mediator*. There are, however, exceptions to the mediation privilege.

For example, *Marriage of Lappe* (2014) 232 Cal.App.4th 774, 784 (*Lappe*) held that the mediation privilege does *not* apply to mandatory declarations of disclosure. Because the parties must prepare and exchange these declarations of disclosure regardless of whether they participate in mediation, they were not prepared "for the purpose of, in the course of, or pursuant to, a mediation," and therefore were not protected by the mediation privilege.

After *Lappe*, the Legislature amended Evidence Code section 1120 to specifically except declarations of disclosure from the mediation privilege, "*even if* prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." (Evid. Code, § 1120, subd. (b)(4).) Evidence Code section 1120, subdivision (a), had already excepted from the privilege evidence that was otherwise admissible or subject to discovery outside a mediation. In other words, a document that existed outside the context of a mediation does not become privileged by virtue of its later use in a mediation.

Generally, a custody evaluation is prepared incident to pending proceedings regarding the best interest of children to provide the court with important information about the health, safety, and welfare of the children. More often, the custody evaluation anticipates court intervention. Rarely is a custody evaluation prepared solely for the purpose of, or in the course of a mediation. But what about those rare cases? Would disclosure of the custody evaluation to the mediator result in sanctions under section 3111?

Undoubtedly, even in those cases, disclosure of a custody evaluation to a mediator (without a court order so permitting) violates sections 3111 and 3025.5. But could the violator shield himself from sanctions by virtue of mediation confidentiality? Perhaps.

Neither *Lappe* nor Evidence Code section 1120, subdivision (a), would except the evaluation report from the mediation privilege because it was prepared for the purpose of, or in the course of a mediation. Therefore, not only would the fact of the disclosure to the mediator be privileged (as it might be even where the report was not prepared solely for the purpose of the mediation), the entire report might be privileged, and therefore inadmissible.[10] The latter point might have additional implications for a party who discloses the custody evaluation *to someone outside the mediation*. Sure, the disclosure may violate section 3111, but can the trial court find that disclosure was "not in the best interest of the child" (which is a necessary prerequisite to a sanctions award) if it is prevented—by the mediation privilege—from considering the content of what was disclosed (because it was part of the custody evaluation, which is excluded from evidence by virtue of the mediation privilege)?

Who Is at Risk for Sanctions?

In *Anka*, sanctions imposed against Mom's counsel were imposed against a person who was not a party to the dissolution proceeding. Broadly construed, this means an award of sanctions could be made against anyone, such as a consulting evaluator, the client's therapist, a therapist for the child, a testifying expert, family members of the party, or a person sharing information on social media.

What About Consulting Experts and Testifying Experts?

While the examples detailed above involve conduct of the parties, what happens when the custody evaluation is shown to a consulting or testifying expert? Such disclosure is now an established trend in custody litigation where the parties have the budget to fund the litigation involving a panoply of experts.

Can dad's counsel show the custody evaluation to a non-testifying consulting expert who has been retained to assist dad in preparing to testify without running afoul of sections 3111 and 3025.5? Can mom's counsel permit her non-testifying consulting expert to review the custody evaluation and provide feedback to her attorney without running afoul of sections 3111 and 3025.5? Does the attorney-client privilege (Evid. Code, § 954) or attorney work product doctrine (Code Civ. Proc., § 2018.010 et seq.) protect the disclosure?[11]

The attorney work product doctrine shields protected information from discovery to permit attorneys to retain the privacy needed to prepare their cases thoroughly, "and to investigate not only the favorable but the unfavorable aspects of those cases." (Code Civ. Proc., § 2018.020, subd. (a).) For example, "[t]he opinions of experts who have not been designated as trial witnesses are protected by the attorney work product rule." (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297.) Even the identities of non-testifying experts are protected attorney work product. (*Id.*)

The attorney work product doctrine might shield from discovery the fact that an attorney sought the opinion of a consulting expert regarding the custody evaluation, because that fact could reveal the attorney's tactics and strategies, which are protected by the attorney work product doctrine. Does that empower the attorney to disclose the custody evaluation to a consulting expert without fear of sanctions? Perhaps, but a wise attorney would not take that risk. The much safer route would be to ask the court to authorize the disclosure for good cause under section 3025.5, subdivision (a)(4). In doing so, counsel should, to the extent possible, avoid revealing attorney work product, such as the identity of the consulting expert and the scope of his/her assignment. The sample stipulation included with this article contains a possible provision allowing for disclosing the evaluator's file (and the report) to counsel's retained experts. Absent a stipulation approved by the court, there is risk for making use of a custody evaluation.

It is now very common in complicated, complex family law child custody litigation for there to be three, or possibly more, experts: 1) the custody evaluator; 2) the expert called to criticize the custody evaluation; and 3) the expert called to validate the custody evaluation. Hearings frequently involve the evaluator testifying, since the custody evaluation is not admissible absent stipulation as specified in section 3111, subdivision (c), followed by a challenging expert criticizing the report, followed by a rebuttal expert validating the findings and methodology of the evaluator.

This paradigm has increased markedly since a court shall not consider a report that contains errors or violations of rule 5.220, or that does not comply with the standards in section 3117.

Must counsel obtain permission to permit a testifying expert to review a custody evaluation? In such circumstances, there is no question counsel intended to disclose

the contents of the report; and it is impossible to determine, without additional facts, whether this disclosure was not in the best interest of the child (however, *Anka* set the bar relatively low, holding that a finding of not-in-child's-best-interest was proper where the disclosure revealed highly personal information about a child and the child's family and the disclosure failed to explain how the disclosure was in the child's best interest). The reviewing/testifying expert has obviously reviewed the report, otherwise there would be no foundation for his/her opinions or basis for his testimony.[12]

Does recently amended section 3111 and the standards articulated in section 3117 tacitly contemplate the right of a party to demonstrate that a report suffers from only "nonsubstantive or inconsequential errors or both [section 3111(a)]," acknowledging the only way to make such a challenge is through the testimony of a qualified expert?[13]

Because this area is fraught with potential consequences, counsel must be prepared to justify and challenge the use of the custody evaluation. The absence of an order permitting use of the custody evaluation, where a disclosure is made, subjects the testifying expert's testimony to being stricken or disallowed based on a motion in limine under *Anka* and the relevant statutes.

Where a party has engaged in impermissible conduct, the litigation consequences can be profound. In *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 735 (*Slesinger*), plaintiff sued Disney claiming breach of contract by failing to pay royalties under its licensing agreement. An investigator acting on behalf of Slesinger Inc. surreptitiously obtained documents from Disney including documents marked privileged and confidential. The documents were obtained by breaking into office buildings and secure trash receptacles. According to *Slesinger,* the documents demonstrated Disney had not properly paid royalties. Acknowledging that the evidence demonstrated nonpayment, because of the conduct of Slesinger's agents, Disney moved for terminating sanctions because plaintiff's misconduct was deliberate, egregious, and no lesser sanctions were adequate to ensure a fair trial. The trial court granted terminating sanctions which were affirmed on appeal.

The stakes in an action to recover unpaid royalties differ remarkably from the stakes in a child custody case, but exploring *Slesinger* reveals its persuasive power where documents are obtained or used improperly. In *Slesinger,* the improperly obtained documents were marked "confidential," as are custody evaluations. The panel determined the trial court properly exercised its inherent power to dismiss a case as a sanction for misconduct for improperly obtaining and using confidential documents. (*Slesinger, supra,* 155 Cal.App.4th at p. 757.) According to *Slesinger*, courts have fundamental inherent equity, supervisory, and administrative powers to control litigation including evidentiary sanctions as a remedy for litigation misconduct. (*Id.* at p. 758.) *Slesinger* acknowledges that using the power to terminate litigation as a remedy for misconduct should be used sparingly. The driving consideration in *Slesinger* focuses on whether there is another remedy to "restore fairness." (*Id.* at p. 761.) A decision to preclude a parent from pursuing a change in the custody of a minor child goes to the heart of the court's highest duty of protecting and advancing the best interest of children. In a child custody proceeding where a confidential custody evaluation is improperly used by one side, as stated in *Anka*, the integrity of the custody case is infected by the misconduct. *Slesinger* informs us that actions have consequences. So does *Anka.* Here are examples of some remedies for consideration:

- An order dismissing an RFO to modify custody based on misuse of a custody evaluation;
- A mistrial and an order limiting any further use of the custody evaluation by the offending party;
- An order disallowing an expert from testifying because he/she had reviewed a custody report without court permission;
- An order prohibiting a parent from challenging a custody evaluation based on an expert's opinion that the report does not follow the protocols of rule 5.220;
- An order permitting the deposition of the attorney and the consulting expert to determine the nature and scope of the communication between them reserving jurisdiction to impose evidentiary, issue, or terminating sanctions coupled with sanctions under section 3111; or
- Such other order as the court deems just.

These examples are by no means entirely exhaustive or necessarily appropriate. The circumstances should determine the outcome, but *Slesinger* underscores the court's inherent authority to protect the integrity of the process. *Andrew V. v. Superior Court* (2015) 234 Cal.App.4th 103, unequivocally reminds us that rules and statutes are not mere suggestions. Fundamental fairness is not an afterthought.

Are Financial Sanctions the Exclusive Remedy for Improper Disclosure of a Custody Evaluation?

When the Legislature creates a right under the Family Code or the cases construing it, then subject matter jurisdiction is reserved to the family court, even if there may be another separate and independent legal right to seek relief. Does the section 3111 remedy under the Family Code occupy the field, and preclude a civil action from reframing a family law issue? Here, we explore the boundaries limiting parties from seeking relief other than in the family court.

In *Burkle v. Burkle* (2006) 144 Cal.App.4th 387[14] (*Burkle*), wife (Jan) filed a separate civil lawsuit against husband (Ron), and his financial advisors. Jan claimed fraud and intentional infliction of emotional distress. The trial court granted a demurrer and entered a judgment of dismissal for Ron and the financial advisors. Upon review, the panel concluded that Jan's civil lawsuit was properly dismissed "[u]nder well-established precedent precluding parties to a dissolution proceeding from engaging in 'family law waged by other means.'" (*Id.* at p. 391).

The *Burkle* court relied heavily on the holding in *Neal v. Superior Court* (2001) 90 Cal.App.4th 22 (*Neal*) in which a supported spouse filed a separate civil action to enforce an interim support order:

> The instant case is a perfect example. [The husband] has sued his ex-wife for breach of contract simply because she allegedly did not comply with the terms of a family law judgment. He has sued for fraud based on statements made at the family law OSC.... He has sued her for abuse of process based on false representations in family law court. He has sued her for declaratory relief based on the dispute in the family law case over whether he has paid what he owes under the family law judgment. In substance this case is a family law OSC with civil headings.

(*Burkle*, 144 Cal.App.4th at p. 394 [quoting *Neal* at p. 26].)

Besides *Burkle* and *Neal*, several other cases have prevented parties from using a civil action to redress matters in the exclusive province of the family court. (See, e.g., *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415 (*d'Elia*) [a fraud claim predicated on alleged misrepresentations about the value of stock].)

Askew v. Askew (1994) 22 Cal.App.4th 942 found that the trial court erred by failing to dismiss husband's civil action which "sought to preempt the family law court from determining issues it already had jurisdiction to determine" and which "were the province of the family law court in the first place" (*Id.* at p. 965). *Askew* was an action for fraud based on the claim wife told husband, before they married, that she felt sexual attraction for him, and in reliance on that representation, he married her and transferred his separate property into both their names. The complaint alleged the fraud "justified imposing a resulting trust on her share of certain property." (*Id.* at p. 946.)

In *Bidna v. Rosen* (1993) 19 Cal.App.4th 27 (*Bidna*), the court held that husband could not pursue a malicious prosecution action because of unsuccessful family law motions or orders to show cause; that husband could not recover from wife for negligent or intentional infliction of emotional distress; and there was no cognizable action for abuse of process. The court begins its opinion with the following statement:

> The trajectory of the case law now governing malicious prosecution claims arising out of family law proceedings arcs toward one destination: a bright line barring any such claims, no matter how egregious the defendant's conduct in the family law action. The present case (at least as pled) is egregious indeed, and forces us to ponder whether the arc should be completed.

(*Id.* at p. 29).

Bidna is another example of family law exploding into a tangled web of complex legal issues, exacerbated by strident and overheated emotions, generating a cauldron of misuse of the family court or civil actions by attempting to breathe new life into the controversy.

Bidna concluded that monetary sanctions under the Family Code are one remedy for improper conduct. And although monetary sanctions may not be the perfect remedy, curing the evil of abusive litigation at its source is a better use of court resources. These cases instruct us that when the family law court has jurisdiction over an issue, pursuing a civil action carries a high risk for dismissal (of the civil action), though there are exceptions.

Is There an Independent Right to Pursue an Action for Intentional Tort?

Section 3111 implicates issues of malintent; the disclosure must be reckless or malicious. The errant publication of the custody evaluation must be contrary to the best interest of the child. Does that mean a separate tort relating to disclosure of a custody evaluation is not permitted because family law has occupied the field? The courts have disallowed some actions between spouses occupied by the Family Law Act, but permitted spouses to pursue some intentional tort claims against each other.

In *Self v. Self* (1962) 58 Cal.2d 683 (*Self*),[15] the court overruled a line of precedent precluding actions for interspousal battery extending the right to seek recovery for intentional torts.

In *Rosefield v. Rosefield* (1963) 221 Cal.App.2d 431 (*Rosefield*), mom and the child sued dad and paternal grandfather for abduction and secretion of the child based on the allegation of willful, fraudulent, and malicious abduction and concealment under Civil Code section 49, including a count claiming a conspiracy between dad and grandfather. The panel reversed the trial court's order granting a general demurrer.

Rosefield cited *Emery v. Emery* (1955) 45 Cal.2d 421 (*Emery*), in which the California Supreme Court permitted an action brought by a minor child against a parent for willful and malicious tort, citing Civil Code section 3523, which provides: "[f]or every wrong there is a remedy." *Emery* involved an automobile accident case where there was no recoverable tort between family members for negligent acts. Such a tort action will instead lie against a parent by a child, based on the willfulness and maliciousness of the conduct.

With this intentional tort carve out, a party can pursue an action for sexual battery for being exposed to sexually transmitted diseases. An action for battery may be pursued even if a party has obtained an order of protection under the Domestic Violence Prevention Act (DVPA). In such cases, one proceeding offers protection from future abuse (DVPA), while the other redresses prior injuries whether physical or emotional harm (battery).

In *John B. v. Superior Court* (2006) 38 Cal.4th 1177 (*John B.*), the California Supreme Court balanced discovery rights against important statutory and constitutional privacy rights regarding an interspousal tort action for infecting the other spouse with HIV.

In determining whether such an action could be pursued, the court permits the action to go forward on theories of both intentional and negligent infliction of emotional distress. The majority opinion rejected the dissenting opinion of Justice Moreno regarding the criminalization of intentionally and knowingly transmitting HIV for limiting tort liability. *John B.* focuses on two important elements: (a) permissible discovery [not relevant here] and (b) the right of a

spouse to pursue an action for an intentional tort, or even an action for negligence [applicable here].

Under California Constitution Article 1, section 1, courts have recognized broad constitutional rights of privacy, including a constitutional right of privacy to protect public access to tax returns and other personal financial records. (*Valley Bank of Nevada v. Super. Ct.* (1975) 15 Cal.3d 652; *SCC Acquisitions Inc. v. Super. Ct.* (2015) 243 Cal.App.4th 741.) An action for intentional or negligent infliction of emotional distress or invasion of privacy may be permissible against a third party.

Is such a tort action permissible by a party to the custody litigation governed by section 3111? On the one hand, by enacting section 3111 and creating a means to redress inappropriate release of confidential information, the California Legislature recognizes custody evaluations (and evaluation reports) as information protected from undue intrusion by others. Unlike section 3027.1, which expressly states that "[t]he remedy provided by this section is in addition to any other remedy provided by law," section 3111 contains no such provision. It could therefore be argued, under the principle of *expressio unius est exclusio alterius*, that the Legislature intended the sanctions in 3111 to be the exclusive remedy for unwarranted disclosure of a custody evaluation.[16]

Does the Confidentiality Provision of Section 3111 Impermissibly Interfere with First Amendment Rights?

In *Evans v. Evans* (2008) 162 Cal.App.4th 1157 (*Evans*), former husband Thomas sued his former wife Linda and her mother, alleging numerous causes of action, including harassment, defamation, and breach of privacy. This civil action was filed because mom and maternal grandmother posted information and claims against dad related to the divorce case on the internet. The trial court issued a preliminary injunction prohibiting Linda and her mother from publishing statements on the internet. The appellate court reversed, finding these orders were an improper restraint on free speech. But the court also stated that defamatory speech is not protected under the constitution, and noted:

> Our reversal should not be interpreted to mean that a court lacks authority to enjoin certain speech and/or conduct. Before trial and upon a proper showing, a court may prohibit a party from having contact with certain persons or from disclosing certain specified private information under narrowly drawn circumstances. The order here, however, was not sufficiently tailored to satisfy constitutional standards. Likewise, after a trial, a court may continue these prohibitions and may additionally prohibit a party from repeating statements determined at trial to be defamatory.

(*Id.* at pp. 1161-1162.)

The question then becomes: what is defamatory? For instance, what if mom posts on the internet that Dr. Cares' custody evaluation finds that dad has an unhealthy interest in sexual activity with females under the age of 14. Since truth is a defense, must the underlying fact (i.e., dad's unhealthy interest) be true to trigger the defense? Or does only mom's literal statement (i.e., that the custody evaluation makes that finding) establish the defense? If the evaluation report actually makes this statement, then all mom has done is repeat what is in the report; does that limit dad's remedy to sanctions under section 3111?

Dr. Cares, himself, is shielded and protected by the litigation privilege, as established in *Howard v. Drapkin* (1990) 222 Cal.App.3d 843 (*Howard*), where mom sued a custody evaluator for intentional infliction of emotional distress, negligent infliction of emotional distress, and fraud. The appellate court affirmed the trial court's order dismissing the action, finding that the evaluator was protected by quasi-judicial immunity and by the statutory privilege for publications and communications made in a judicial proceeding within the ambit of Civil Code section 47(2) (now Civil Code section 47).

Does *Howard* extend protection to parents, or counsel, who publish the contents of custody evaluations? Clearly not. First, improper publication violates section 3111. Second, Civil Code section 47 provides no protection for "breaches of a court order" (§ 47, subd. (d)(2)(B)) or conduct that "violates any requirement of confidentiality imposed by law" (§ 47, subd. (d)(2)(C)) as discussed in *Anka*.

Is Section 3111 an Unconstitutional Impairment of Free Speech?

How do these cases square up against the restrictions created by section 3025.5 and the potential consequences under section 3111? Both *Evans* and *Evilsizor & Sweeney (infra)* specify defamatory speech or writings are not protected speech. Both cases refer to other civil cases designating that certain conduct such as statements evidencing employment discrimination are not protected speech. To date, no published case challenges the constitutionality of sections 3025.5 or 3111 as an impermissible prior restraint. The statutes have a facially proper purpose: protecting the best interest of children and shielding confidential information from improper disclosure. Section 3111 provides some justification for its restraint on disclosure because disclosure is sanctionable *only* if it is *both*:

- Reckless or malicious; *and*
- Not in the best interest of the child.

Regarding the first prong, *Anka* found that, by "intentionally ask[ing] numerous questions that disclose[d] the [confidential] information . . . [the attorney's] actions went beyond reckless; they were intentional."

Regarding the second prong, *Anka* concluded that the fact that "[the attorney's] questions disclosed highly personal information about the child and her family" supported the trial court's finding that the disclosure was "not in the best interest of the child."

Although *Anka* addressed both prongs of this test, its analysis offers little guidance toward a case in which the facts do not as clearly satisfy one or both prongs. And it is easy to imagine a situation where only one of the two prongs is satisfied. For example:

- Dad maliciously gives a copy of the custody evaluation report to his therapist, thinking it will show all the problems are mom's fault. After reading the custody evaluation, dad's therapist pursues a different treatment regimen for anger management resulting in a marked improvement in dad's relationship with the child and serving as a foundation for dad showing greater respect to mom. In this example the motive was bad, but the outcome was identifiably in the best interest of the child.
- Mom recklessly leaves a copy of the custody evaluation report with the child's teacher. The teacher reads the report and learns the child is diagnosed with a learning disability. The teacher changes the curriculum and lesson plan resulting in the child getting better grades. While mom was reckless, the best interest of the child is advanced.
- Mom lets the child read the custody evaluation report, hoping that it would persuade him to stop using drugs. Instead, the child is traumatized, overdoses, and ends up in the hospital. There may be a question of Mom's good faith in making the disclosure permitting her to claim she did not act recklessly or maliciously; her conduct did not advance the best interest of the child.

Would the Unauthorized Disclosure of a Custody Evaluation Support an Application Under the DVPA?

The *Evans* decision was considered in a proceeding brought under the DVPA in the case of *Marriage of Evilsizor and Sweeney* (2015) 237 Cal.App.4th 1416 (*Evilsizor & Sweeney*). In *Evilsizor & Sweeney,* the trial court issued a restraining order against former husband (Sweeney) protecting his former wife (Evilsizor) based in part on his downloading information from Evilsizor's iPhone. Sweeney republished these improperly retrieved electronically stored communications to Evilsizor's father and others. In her moving papers, Evilsizor "filed a request for a restraining order under the DVPA. She alleged Sweeney downloaded her private text communications to third parties, including her attorney, without her consent, hacked into her Facebook account, changed her password, and rerouted the email associated with her Facebook account to his own account. Evilsizor claimed that as a result she suffered 'extreme embarrassment, fear, and intimidation.'" She also alleged that Sweeney threatened to reveal publicly more text messages and e-mails for leverage in the dissolution proceedings. She sought an order prohibiting Sweeney from further disseminating her text messages and e-mails, requiring "[Sweeney] to return all electronically downloaded information he had accessed along with hard copies of the messages, and barring [Sweeney] from accessing or interfering with her Internet service provider or social media accounts." (*Id.* at p.1421.)

The trial court did not determine whether Sweeney had improperly obtained the information, but ordered that Sweeney "be prohibited from using, delivering, copying, printing or disclosing the messages or content of [Evilsizor's] text messages or email messages or notes, or anything else downloaded from her phone or from what has been called the family computer except as otherwise authorized by the court." Sweeney also was prohibited from trying to access or otherwise interfere with Evilsizor's internet-service provider accounts or social-media accounts. (*Evilsizor & Sweeney, supra,* 237 Cal.App.4th at p. 1142.)

Sweeney argued that issuing this order violated his rights under the First Amendment to the United States Constitution. The panel concluded the First Amendment provided no protection because categories such as libelous speech and words amounting to employment discrimination are not protected speech. The DVPA permits a prior restraint if the speech constitutes a form of domestic abuse as defined by the DVPA. (*Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483 (*Nadkarni*) [reversing trial court for not permitting a hearing to determine whether disclosure of mom's email and other information were surreptitiously obtained]; *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140 (*Burquet*) [affirming trial court's order granting a DVPA order based in part on uninvited text messages from a former boyfriend].)

In *Molinaro v. Molinaro* (2019) 33 Cal.App.5th 824 (*Molinaro*),[17] the Second District considered the application of husband (Michael) to dissolve a DVPA restraining order issued against him and protecting wife (Bertha) and the children of the marriage, and concluded that:

> [T]he part of the restraining order prohibiting Michael from posting anything about his divorce case on Facebook constitutes an overbroad, invalid restraint on his freedom of speech. We therefore will reverse that provision and direct the trial court to strike it from the restraining order. We affirm the restraining order in all other respects.

(*Id.* at p. 826.)

The temporary order stated, "[n]either party is to discuss any aspect of the case with the minor children until further order of the court—including Facebook postings [about the] subject case matter." (*Id.* at p. 828.)

Molinaro affirms orders of protection, including orders prohibiting a spouse from knowingly informing a child about details related to the divorce, but reverses the blanket prohibition on making any internet posting about the divorce as it is "overbroad and impermissibly infringes upon [Michael's] constitutional protected right of free speech." (*Molinaro, supra,* 33 Cal.App.5th at p. 831.)

The record showed Michael's posts "expressed his apparent despair about the divorce and his separation from the children but did not directly disparage Bertha or openly seek to alienate her from the children. Posts of this sort are 'too attenuated from conduct directly affecting the children to support a prior restraint on [Michael's] constitutional right to utter them.'" (*Molinaro* at p. 832.)

It is unclear whether *Molinaro* would shield republication of information in the custody evaluation. As seen in the hypothetical examples below, it is arguable that disclosing at least certain information in the confidential child custody evaluation report could violate the mandates of section

3111. At some point, the nature of the disclosure becomes important.

For instance, mom posts on Facebook that she is in a heated divorce case involving herself, dad, and their two daughters. In the report, the evaluator reports that the two daughters have told the evaluator they "hate their mom." If mom posts on Facebook that she is sad because the children have said they hate her, is this a violation of the prohibitions in section 3111? Does it matter if the children said they hate mom directly to her and their same statements are also contained in the evaluation report, as compared to mom learning for the first time by reading the report that the children have said that they hate her?

While not directly related to section 3111 custody evaluations, *Molinaro* is instructive on a parent's retention of rights to use social media to share their views and publish his/her feelings about the legal process or expressing emotions such as sadness, remorse, anger, or sorrow because a child has made statements indicating estrangement. By enacting section 3111 and creating a means to redress inappropriate release of confidential information, the California Legislature recognizes custody evaluations as information protected from undue intrusion by others.

Case law supports invasion of privacy as a cognizable tort under California law. It remains to be seen what conduct would be permissible under section 3111 and whether such conduct is afforded direct First Amendment protections.

Are Monetary Sanctions the Exclusive Remedy for Improper Publication of a Child Custody Evaluation?

The language of section 3111, subdivision (d), may answer the question of exclusivity of remedy. The statute creates a limitation on recovery so there shall be no sanction imposed "pursuant to this subdivision that imposes an unreasonable financial burden on the party against whom the sanction is imposed." Comparatively, there is no such unreasonable financial burden limitation for general damages in a civil action. While punitive damages are generally scalable including by remittitur in the trial court, the award of damages in a civil action has no such "unreasonable financial burden" exception.[18]

After the holding in *Anka*, disclosure of confidential information was addressed in *Herriott v. Herriott* (2019) 33 Cal. App.5th 212 (*Herriott*). In *Herriott,* Mom revealed portions of the custody evaluation report in litigation between Mom and Dad.

As part of the appellate review, the district court informed Mom that the court of appeal was considering imposing sanctions against her for violating the confidentiality provisions of section 3111. Mom argued, and the panel rejected her argument, that the offending document was a brief.

The panel concludes Mom violated the proscriptions in section 3111 by attaching portions of the custody evaluation to her brief before the court of appeal. The panel concluded:

> Unlike the wife in Marriage of Anka and Yeager, we are led to believe that Alicja knew her actions would result in the disclosure of at least a portion of the confidential custody evaluation report. It is apparent to us that the confidential report was tampered with as the cautionary words 'CONFIDENTIAL' and 'DO NOT DUPLICATE FOR DISTRIBUTION' were removed from the face of the page; this demonstrates to us that this disclosure was done intentionally and/or maliciously, per Family Code section 3111, subdivision (f). Based on the foregoing, we cannot find that Alicja acted with 'substantial justification' in disclosing various pages from the confidential child custody evaluation report. (Fam. Code, § 3111, subd. (d).) Although an unwarranted disclosure of a written confidential report has been made, we do not impose sanctions pursuant to Family Code section 3111 against Alicja as it would 'impose[ ] an unreasonable financial burden' on her. (Fam. Code, § 3111, subd. (d).)

(*Herriott,* 33 Cal.App.5th at p. 229.)

The panel explained that Mom's income and expense declaration demonstrated a sanction award would impose an undue financial burden. The *Herriott* case provides a recent example of the interplay between custody and financial issues (i.e., determination of Mom's income) in the context of improper disclosure of an evaluation report.

Whether this limitation portends an exclusivity of remedy under the Family Law Act precluding any remedy under civil law is still an open question. There is no definitive answer on this topic. Yet.

What Constitutes Unwarranted Publication of Confidential Information?

Section 3111, subdivision (d), prohibits unwarranted disclosure of a written confidential evaluation report. What happens if the information is discovered by another lawful means? For instance, dad subpoenas mom's medical records about a claimed physical disability where she is seeking custody, but she is also seeking spousal support and her earning capacity is an issue.

Under this hypothetical, the medical records are lawfully obtained through a duly noticed consumer notice, and then the records are secured through a deposition officer. A child custody report is prepared. The report discusses information about mom's physical disabilities. In the report, the evaluator concludes mom is exaggerating or faking the extent of her limitations.

After the custody report is completed, dad's attorney secures an order commanding mom to participate in a defense medical examination. Dad's attorney sends the doctor copies of the medical records and the custody evaluation report which concludes mom is malingering. Since the records are now part of the custody report, does this mean the medical records cannot be used without court permission, under section 3111? Is the doctor or vocational evaluator at risk for sanctions if he/she republishes portions of the medical reports and the conclusion of the evaluator taken from the report?

Section 4058, subdivision (b), allows the court to impute an earning capacity consistent with the best interest of the children. Does this mean any information revealed from a child custody evaluation with a logical nexus to earning capacity can be revealed without court permission?

If the custody evaluation includes comments about a new mate or a new mate's children, where this information is otherwise discoverable, is revealing this information independently from the custody evaluation protected? Does the new mate or the child have a claim against the other parent or his representatives under section 3111?

Is there an exception for information that would otherwise be discoverable? Taking the earning capacity example under section 4058, are the evaluator, parent, and his/her counsel protected from sanctions if the information in the custody report would have otherwise been accessible through other lawful means? Is there a disclosure safe harbor for information that could be obtained by other means or under the inevitable discovery theory?[19]

Once information is obtained through lawful process concerning relevant admissible information, does the information become off limits for other use once it is provided to the custody evaluator? Should the court grant sanctions or issue an order limiting use of the information because it has now migrated into the data field of the custody evaluation? If a document would not ordinarily be deemed confidential, does giving it to the evaluator shield the information from republication or use in the proceeding? If the document or information has independent legal significance on issues not solely related to child custody, even if the information is contained in the evaluator's file and/or referenced in the actual evaluation report, is that document then shielded from further use under section 3111?

Common sense suggests simply because information becomes part of the evaluator's report or part of the evaluator's file, it may be otherwise used if the information was secured by lawful means for an admissible, relevant purpose. Section 3111, subdivision (d), provides a catch-all exception that could excuse the disclosure or use of such information; it permits the court to determine that a disclosure was made by a person acting with substantial justification, or that other circumstances make the imposition of sanctions unjust.

As an additional example, if a party provides text message correspondence to the evaluator, and those text messages are referenced in the evaluation and made a part of the evaluator's file, would the act of transmitting those text messages (which would ordinarily not be privileged or confidential) to the evaluator cause them to be confidential under section 3111? The sample stipulation attached to this article contains a proposed provision that provides that just because a document is given to the evaluator by a party or counsel, as part of the evaluation process, and made a part of the evaluator's file and/or report, the act of transmitting that document to the evaluator does not make it confidential under 3111.

How Are These Issues and Cases Harmonized?

The cases analyzed here suggest:

- Some tort actions are prohibited because family law has occupied the fields of:
  - Intentional or negligent infliction of emotional distress;
  - Fraud claims against a spouse or his/her advisors; and
  - Fraud claims about misrepresenting an emotional attachment.
    - *Neal; Burkle*
- If a disclosure is in the exclusive province of the family law court, a separate civil action is not permitted.
  - *Neal; Burkle; Bidna*
- No fraud action about representations made by a party.
  - *d'Elia*
- No malicious prosecution action, infliction of emotional distress, or abuse of process action for taking a child to a psychiatrist without permission.
  - *Bidna*
- A tort action to enforce an order is disallowed.
  - *Neal*
- Other intentional torts may still be pursued if there is no direct nexus to the dissolution.
  - *Self; John B.; Rosefield & Emry*
- Revealing confidential information of a highly personal nature about a parent or publication of sensitive personal nature may serve as the basis for an order for protection under the DVPA and such conduct need not constitute disturbing the peace as defined by Penal Code section 415.[20]
  - *Nadkarni; Evilsizor & Sweeney*
- Libel and slander are not protected speech.
  - *Evans*
- Disclosing confidential information protected by statute may be restrained.
  - Section 3111
- Unwarranted republication of private electronically stored communication can constitute a form of domestic abuse, disturbing the peace of the protected party. Separately, federal and state law permit a party to seek damages for violation of the Electronic Stored Communications Act.
  - *Nadkarni*
- Abusive speech is not protected speech.
  - *Nadkarni; Burquet*
- A court can prohibit communication with a child or restrain a party from revealing information about a pending custody dispute.
  - *Evilsizor & Sweeney; Molinaro*
- Any limitation on speech must not unduly constrain a party's First Amendment rights.
  - *Molinaro*
- Evaluators enjoy quasi-judicial immunity for conduct in the discharge of their duty as an evaluator.
  - *Howard*
- Unpermitted unwarranted publication of portions of a custody evaluation is not protected by litigation privilege.
  - *Anka*

What to Do When Nonexempt Individuals Need Access to the Report

While not exhaustive, here are common examples of where disclosure to an individual not enumerated in section 3025.5, subdivision (a), might be desirable or necessary:

- A parent allowing his/her therapist access;
- A parent allowing a medical provider access;
- A medical or mental health care provider providing access to another consulting professional;
- Disclosure in a setting protected by the attorney-client privilege or work product doctrine;
- Allowing access to a consulting mental health professional or another consulting expert;
- Allowing access to a challenging expert [Evidence Code 733 expert];
- Sharing the custody evaluation report with a co-parenting therapist appointed under section 3190;
- Sharing the custody evaluation report with the children's individual therapists;
- Sharing the custody evaluation report with a new blended family's marital or family counselor;
- Sharing the custody evaluation report with a mediator or retired judicial officer jointly retained to help settle the case; and
- Sharing the custody evaluation report in the context of a collaborative divorce model.

If counsel or the parties anticipate needing to disclose information from the evaluation report or the evaluator's file in these contexts, they should consider stipulating to an order (or seeking a court order) permitting such disclosure to specified individuals. Such orders are available upon a showing of good cause pursuant to section 3025.5, subdivision (a)(4). Disclosure without such an order puts counsel, parties, and non-parties at risk of sanctions. At the end of this article, we propose a model stipulation for courts and counsel to consider when navigating the issues raised by *Anka*. Acting without court approval is ill advised.[21]

Now What?

These cases framed against the holding in *Anka* generate these questions:

- Is filing a hearing brief or declaration quoting a custody evaluation an impermissible rebroadcast? Yes.
- If the court permits reading into the record portions of a custody evaluation in open court, does this publication of the evaluation make it permissible to republish that portion of the custody evaluation? Unknown.
- Are the remedies afforded under section 3111 exclusive, precluding a separate action against the other disclosing person? Unknown.
- If a parent elects to seek sanctions under 3111, does this preclude a parent from seeking tort damages against the other parent or any other participating party? Probably.
- Will a conspiracy action lie against attorneys and other professionals who disclose confidential information in a custody evaluation? Unknown.
- Is a third party entitled to pursue an action under tort theories where confidential information is exposed outside the family court? Unknown.
- Is a third party entitled to expect the personal information they share in a custody evaluation will be protected from rebroadcasting outside the confines of the custody evaluation and incidental hearings or trial? Unknown.

Final Thoughts

It is likely that *Anka* is the most significant "game-changer" in the way family law custody cases involving custody evaluations can be handled. Here are questions for your own internal audit:

- Have you ever allowed a consulting or testifying expert to review a custody evaluation without obtaining permission from the court?
- Have you given a copy of a custody evaluation to a vocational evaluator or other expert, asking him/her to review the custody evaluation on an issue unrelated to the custody issue?
- Have you allowed your client to share a copy of the custody evaluation with his/her parents, new spouse, or significant other without court permission?
- Have you given a copy of the custody evaluation to your client's treating physician or mental health professional?
- Have you used a custody evaluation involving publication of the report in any way not described here?

Doubtless, family law is complicated enough without allowing cases to morph into an exacerbated war of attrition involving crossclaims for sanctions. When appropriate, the sanctions tools available under section 3111 should be properly applied. Any sanction request should equally consider use of Code of Civil Procedure sections 128.5 and 128.7. And whether an independent civil action is available for especially egregious conduct remains an open question. Counsel facing a sanction request or considering making such a request should ask a trusted colleague for an objective, candid assessment. Do not assume the court will grant forgiveness for even minor disclosures of a confidential child custody evaluation, particularly given the strong views expressed in *Anka*.

In addition, consider your duty to shield your client from your conduct. Documenting warnings to your client may shield you from the errant disclosure of a well-intentioned, but clearly misguided, client. No published decisions to date have found a disclosure of a custody evaluation to have been warranted under section 3111, or even to have been in a child's best interest.

Work with your local court and bar association to develop consistent, reliable, approved, and vetted stipulations for appropriately tailored and necessary disclosures of the report. Remember, there may be many good reasons to allow disclosure; just ask for permission rather than presuming you will be granted forgiveness for impermissible disclosure. Perhaps we have asked more questions than we have answered. Only time and case law will tell.

* At the request of the Honorable Thomas Trent Lewis (Ret.), this article is being published concurrently in the ACFLS Family Law Specialist, the Journal of the Association of Certified Family Law Specialists, Winter 2020 edition and in a special edition of the AFCC-CA Insights newsletter, as well as on the AFCC-CA (Association of Family and Conciliation Courts, California Chapter) website (https://www.afcc-ca.org/).

1 This article is for educational purposes only. Any consideration of legal issues is designed to inform the reader, not suggest how a court should or will rule on any contested issue. Apologies to Rick from Casablanca for partially borrowing from his famous line, ranked number five most famous quote by the American Film Institute.

2 Future unspecified statutory references are to the California Family Code.

3 Our review is confined by the reported facts contained in the opinion.

4 The court expressly declined to repeat the questions verbatim so as to avoid exacerbating the invasion of privacy.

5 Other arguments concerning the amount of the sanction were also rejected. Since these issues are not germane to this discussion, they are omitted.

6 Future unspecified rule references are to the California Rules of Court.

7 Rules regarding ex parte communications and minor's counsel may also be applicable and are found in rules 5.235 and 5.240 et seq., respectively. Other detailed procedures may be available and/or required in certain circumstances involving a serious allegation of child sexual abuse, including a multidisciplinary child interview team. (FC, § 3118.)

8 To be clear, parties, counsel, trial courts, and appellate courts frequently use the Evidence Code section 730 as a designation for a custody evaluation. The specific provisions of the Family Code occupy the field. Certainly, a custody evaluation is prepared as a form of the court's expert, but a nuanced, accurate description will reference section 3111 and the corresponding Family Code sections coupled with the applicable California Rules of Court rather than making reference to a "730 evaluation" which is a common shorthand for a custody evaluation.

9 Section 4320, subdivision (g), also considers the interests of dependent children in the custody of a parent for the purpose of calculating spousal support.

10 This is, of course, highly speculative. Because there does not seem to be any case on point, it is not at all clear that a trial court would refuse to consider a custody evaluation—whose stated statutory purpose is to assist the court in custody matter—on the ground that it was prepared for the purpose of mediation.

11 The attorney-client privilege is not limited to communications between attorneys and clients, but often extends to communications with attorneys' agents, non-testifying consulting experts, etc. And because the experts have not been designated to testify, the work product doctrine remains in play.

12 If a party attempts to call, as a witness, an expert who has not read the report, a motion in limine seeking to exclude such expert testimony is worthy of consideration.

13 It is outside the scope of this article to address the question of witness designation, expert designations, and the right to call an undesignated expert in rebuttal.

14 *Burkle* addressed the question of sanctions against Jan and her attorneys under section 271 and Code of Civil Procedure section 128.7. These ancillary issues are not addressed here. However, an appropriate use of section 128.7 might be an advisable remedy to deter, and if necessary, punish untoward behavior.

15 Our focus here is narrow. It is unnecessary to review the entire body of jurisprudence concerning negligence and intentional torts between spouses, as that is beyond the scope of this article.

16 However, the same principle (*expressio unius est exclusio alterius*) could be used to support the *opposite* position (i.e., that the Legislature did *not* intend sanctions under section 3111 to be the exclusive remedy for unwarranted disclosure), because the Legislature has used express language in other Family Code statutes to designate remedies as exclusive, and therefore the absence of such limiting language in section 3111 suggests it is *not* exclusive. (See e.g., FC, § 1100, subd. (d) ("*Remedies* for the failure by a managing spouse to give prior written notice as required by this subdivision *are only as specified in Section 1101*.") [emphasis added].)

17 *Molinaro* was originally unpublished, but upon application by ACFLS and others, the decision was certified for partial publication. A petition for certiorari to the United States Supreme Court was pending at the time this article was submitted for publication. One of this article's authors, Thomas Trent Lewis issued a preliminary order at the trial court level, but the hearing took place before a different bench officer, Judge Amy Pellman. Any comments contained here by Lewis are only with reference to the published decision, not a comment on any other aspect of the underlying case.

18 In civil actions, trial courts generally may reduce or vacate a general damage award, but cannot increase the recovery above the jury's verdict.

19 While outside the scope of this paper, there is an extensive body of law about the consequences regarding search and seizure law based on the notion that law enforcement may have improperly seized the evidence, but in the ordinary course of events, they would have inevitably discovered it.

20 Penal Code section 415 defines disturbing the peace as a crime whereas *Nadkarni* uses a dictionary (not Black's) definition.

21 We attach a stipulation or proposed order for further consideration.

Judge Lewis is a member of Signature Resolution providing mediation, arbitration, and privately compensated judge pro tem work. From 2016 to 2019, he served as the Supervising Judge for the Los Angeles County Family Law Division overseeing the operations of nearly 70 family law departments in the county. From 2014 to 2016 he served in a long cause family law trial department in Los Angeles; he was Assistant Supervising Judge of the Family Law Division from 2011 to 2014. Judge Lewis served in a regular family law department from his appointment in 2006 until 2014.

Judge Lewis is a 1975 graduate of UCLA, cum laude, a 1978 graduate of La Verne College of Law, cum laude, Dean's List and Law Review. In 2019, Judge Lewis completed advanced training at the Program on Negotiation at Harvard Law School.

Judge Lewis became a Certified Family Law Specialist in 1985 and was inducted into the American Academy of Matrimonial Lawyers (AAML) in 1987. He was inducted as a Fellow of the International Academy of Family Law in 2016. He served on the Family Law and Juvenile Advisory Commission until 2014; and he is a past faculty member for the judicial training committee for Family Law (CJER). He is a past president of the California Chapter of the Association of Family and Conciliation Courts. He is also a contributing author of The Rutter Group's ***California Practice Guide: Family Law*** *and serves as Program Director for CFLR for the update program, the advanced family law program, the basic training program, the evidence programs, and the expert series programs.*

In 2010, he was awarded the ***Outstanding Jurist Award*** *by AAML's Southern California Chapter. In 2012, the Association of Certified Family Law Specialists (ACFLS) awarded him the ACFLS Outstanding Service to Family Law Award; and in 2014, he became the first emeritus member of ACFLS. In 2015, he received the Los Angeles County Bar Association Family Law Section* ***Spencer Brandeis Award,*** *the highest honor bestowed by them. In 2016, he received the Southern California Inn of Courts,* ***Outstanding Jurist Award.*** *In 2017, he was honored by the San Fernando Valley Bar Association, Stanley Mosk* ***Legacy of Justice Award.*** *In 2018, he received the California Lawyer's Association* ***Family Law Judge of the Year Award.*** *In 2018, he was awarded the Association of Family Law Specialist (ACFLS)* ***Hall of Fame Award,*** *the highest honor bestowed by ACFLS.*

Ariel Leichter-Maroko is a partner in the law firm of Leichter Leichter-Maroko LLP, where he practices family law and appellate law in Beverly Hills, California. He is a Certified Family Law Specialist, certified by the California State Bar Board of Legal Specialization. Mr. Leichter-Maroko earned his B.S. degree from Stanford University and his J.D. from Northwestern University School of Law. He is a fellow of the International Academy of Family Lawyers, and a member of the Los Angeles County Bar Association, the Beverly Hills Bar Association, and the American Bar Association. Mr. Leichter-Maroko has had a published opinion in the California Court of Appeal entitled Manela v. Superior Court. He is admitted to practice law in the State of California, and before the U.S. Supreme Court, the Ninth Circuit Court of Appeals, and the U.S. District Courts for the Central and Northern Districts of California.

Jenna Charlotte Spatz is a partner at the family law firm Leichter Leichter-Maroko LLP in Beverly Hills, California, and has practiced family law exclusively since her admission to the California Bar in 2012. Jenna is a Certified Family Law Specialist, certified by the California State Bar Board of Legal Specialization. Jenna also serves as Minor's Counsel, is the 2018-2019 Co-Chair of the Family Law Section of the Beverly Hills Bar Association, and has been named as a "Rising Star" by Southern California Super Lawyers. She is an Executive Board member of the Family Law Section of the Beverly Hills Bar, and is a member of the Association of Family & Conciliation Courts, Association of Certified Family Law Specialists, the LA County Bar, the American Bar Association, and the Family Law Section of the California Lawyer's Association. Jenna received her J.D. from Loyola Law School in 2012, and graduated summa cum laude from the University of Southern California in 2009.

Sample Stipulation for Your Use:

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF

In re Marriage of: _____ Petitioner, and _____, Respondent.	Case No.: XXXXX [Hon. XXXXX, Dept. XX] **STIPULATION AND PROTECTIVE ORDER RE CONFIDENTIALITY OF CHILD CUSTODY EVALUATION INFORMATION PER FAMILY CODE SECTION 3025.5(a)(4)**

It is stipulated by and between the parties and their counsel that the Court make findings and orders for good cause under Family Code section 3025.5(a)(4):

1. This Court ordered a child custody evaluation to be conducted under Evidence Code section 730 and Family Code section 3111. The order for a child custody evaluation has or will result in the creation of confidential information ("Confidential Information"). As set forth in Family Code section 3025.5, the disclosure of Confidential Information is limited to specified persons. Disclosure of Confidential Information beyond any person designated in Family Code section 3025.5 is prohibited.
2. Family Code section 3025.5(a)(4) authorizes disclosure of Confidential Information to "[a]ny other person upon order of the Court for good cause." The parties stipulate that good cause exists to permit Confidential Information to be disclosed to certain persons other than those identified in Family Code section 3025.
3. The parties further stipulate there is good cause for the parties to utilize Confidential Information in discovery proceedings, to prepare for trial or settlement, and during trial or alternative dispute resolution proceedings.
4. Confidential Information, as used in this Stipulation and Protective Order, includes the evaluation report prepared by the Evaluator, as well as the Evaluator's file, including, but not limited to, notes, emails, impressions, test data, test results, interview records, intake questionnaire, and phone logs and information, as well as documents and other information presented to, or obtained by, the Evaluator in the course of the evaluation from counsel, parties, and nonparties. Notwithstanding the preceding sentence, the fact that a document or other information or material that is not otherwise deemed to be Confidential Information is given or shown to the evaluator does not in and of itself make such document, information, or material confidential in its own right, although the fact of its

presentation may be confidential. (For example, if a party provides the Evaluator with text messages between the parties, those text messages may be independently used in the proceeding, although they were transmitted to the Evaluator and are contained in the Evaluator's file. However, the fact that those text messages were provided to the evaluator may be confidential.)

5. In addition to the persons specified in Family Code section 3025.5(a), in the child custody proceeding pending before the Court, the parties stipulate there is good cause to disclose Confidential Information, as defined herein, to the following persons:

    a. Certified court reporters during depositions;

    b. Videographers present during video-taped depositions;

    c. Experts and consultants, including, but not limited to Evidence Code section 733 experts, regardless of whether said experts are designated or un-designated experts;

    d. Commercial copy services (provided such services are prohibited from retaining copies or permitting others to access the Confidential Information);

    e. Counsel's office staff;

    f. Mutually agreed upon mediators, arbitrators, private judges, and their staffs;

    g. The parties' individual therapists;

    h. The children's individual therapists;

    i. Jointly-retained co-parenting therapists; and

    j. Any other individual, mutually agreed upon by the parties and counsel, in writing.

6. Counsel for one or both parties plan to question or depose collateral and percipient witnesses who could provide evidence relevant to custody ("Collateral(s)"). In addition to the persons set forth above, good cause exists to question or depose Collaterals as follows:

    a. The file or report of the Evaluator shall not be shown to any collateral witness who has or purports to know of any facts related in the evaluation. (For example, another family member such as a grandmother, uncle, or cousin; a soccer coach; music instructor; teacher; neighbor; or friend might be a Collateral.)

    b. A Collateral may be asked questions to verify, correct, or deny any statements or other information attributed or related to the Collateral in the file and evaluation report.

    c. Counsel and the parties should narrowly construe the ability to interview or examine a Collateral about the file or the contents of the evaluation report.

    d. Nothing contained herein shall restrict the ability of counsel to interview a Collateral about any topic not specifically contained in the evaluation report or file.

7. Portions of deposition transcripts (including digital and paper copies) containing Confidential Information shall be designated as "Confidential," separately bound and provided only to the

persons authorized by law or this Stipulation and Protective Order.

8. All persons to whom Confidential Material is disclosed shall be provided with a copy of this Order along with FL-328, Notice Regarding Confidentiality of Child Custody Evaluation Report, and are ordered to take all reasonably necessary steps not to disclose Confidential Information to any person not authorized by law or this Stipulation and Protective Order.

BASED ON THE STIPULATION OF THE PARTIES AND FOR GOOD CAUSE SHOWN, THE COURT ORDERS:

1. In addition to the persons specified in Family Code section 3025.5(a), in the child custody proceeding pending before the Court, Confidential Information may be disclosed to:
    a. Certified court reporters during depositions;
    b. Videographers present during video-taped depositions;
    c. Experts and consultants, including, but not limited to Evidence Code section 733 experts, regardless of whether said experts are designated or un-designated experts;
    d. Commercial copy services (provided such services are prohibited from retaining copies or permitting others to access the Confidential Information);
    e. Counsel's office staff;
    f. Mutually agreed upon mediators, arbitrators, private judges, and their staffs;
    g. The parties' individual therapists;
    h. The children's individual therapists;
    i. Jointly-retained co-parenting therapists;
    j. Collaterals, as defined in Paragraph 6 herein; and
    k. Any other individual, mutually agreed upon by the parties and counsel, in writing.
2. Portions of deposition transcripts (including digital and paper copies) containing Confidential Information shall be designated as "Confidential," separately bound and provided only to the persons authorized by law or this Stipulation and Protective Order.
3. All persons to whom Confidential Material is disclosed shall be provided with a copy of this Order along with FL-328, Notice Regarding Confidentiality of Child Custody Evaluation Report, and are ordered to take all reasonably necessary steps not to disclose Confidential Information to any person not authorized by law or this Stipulation and Protective Order.
4. This Stipulation and Protective Order binds the parties, their counsel, and their agents, or any other person acting on behalf of or at the direction of any counsel, party, or other person or entity.
5. For good cause shown, the Court may expand, refine, constrict, or clarify this Stipulation and Protective Order to the maximum extent of the law and as provided by Family Code section 290.

6. The Court reserves jurisdiction to resolve any disputes regarding this Stipulation and Protective Order.

7. All proceedings in this matter where Confidential Information may be discussed will be closed to the public under California Family Code section 214.

The foregoing is agreed to by:

DATED: _____ _____
XXXXXXX, Petitioner

DATED: _____ _____
XXXXXXX, Respondent

Approved as conforming to the Stipulation of the parties:

DATED: BY: _____
XXXXXXX
Attorneys for Petitioner

DATED: _____ BY: _____
XXXXXXX
Attorneys for Respondent

IT IS SO ORDERED.

DATED: _____ _____
Judge of the Superior Court