Primer On Fiduciary Duty During Divorce
And Remedies For Breach

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# TABLE OF CONTENTS

1. **Introduction**....................................................................................................................... 1  

2. **Summary**............................................................................................................................ 1  

3. **Two Legal Relationships Established By Marriage – Confidential and Fiduciary** ......................................................................................................................... 2  
   a. Overview.......................................................................................................................... 2  
   b. General Characteristics Of Both Relationships .......................................................... 2  

4. **New Portrait Of Fiduciary Respect In Divorce** .............................................................. 5  
   a. Overview......................................................................................................................... 5  
   b. General duty of respect in managing the interests of another .................................... 5  
   c. New “party” statutes in divorce ..................................................................................... 5  
   d. New public policies of divorce ...................................................................................... 6  
   e. New duty of disclosure .................................................................................................. 7  
   f. New duty to preserve and protect assets from dissipation ........................................ 7  
   g. Fiduciary duties simplified ........................................................................................... 9  
   h. Summary table ............................................................................................................ 10  
   i. Summary illustration – The Triangle of Respect ......................................................... 10  

5. **Anatomy Of The Divergent (Or Adverse) Interests In Divorce That Fiduciary Duty Seeks To Mediate** .................................................................................................................. 11  
   a. Overview......................................................................................................................... 11  
   b. One spouse has broad authority to manage community property alone during marriage - akin to a general power of attorney ......................................................... 11  
   c. Managing the property of another activates the fiduciary duty .................................... 11  
   d. The fiduciary duty requires the managing spouse to champion the interests of the other spouse .................................................................................................................. 11  
   e. Following separation, the parties’ interests diverge and become adverse .................... 12  
   f. The fiduciary duty, accordingly, expands in divorce ................................................... 12
Specifically, the party enjoying a superior position is charged with superior responsibilities .......................................................... 13

Summaries .................................................................................................................................................. 13

6. Fiduciary Duty Of Disclosure ...................................................................................................................... 15
a. Overview ................................................................................................................................................ 15
b. The non-managing party’s interests are the same as the managing party’s .......................................................... 16
c. The disclosure duties within 2100-2113 (violations of which may be subject to monetary sanctions under 2107 (c)) ............................................................................................................. 16
d. Disclosure duties outside of 2100-2113 and which are not sanctionable under 2107 (but which may require the same disclosures as 2100-2113) ........................................................................................................... 20
e. Other characteristics of duty of disclosure ..................................................................................................... 21

7. Remedies For Breach Of The Duty Of Disclosure ............................................................................................ 23
a. Overview ................................................................................................................................................ 23
b. Advance due date of FDD .......................................................................................................................... 23
c. Issue sanctions - 2107 (a) and (b) ............................................................................................................. 24
d. Monetary sanctions - 2107 (c) .................................................................................................................. 24
e. Suggested approach to monetary sanctions under 2107 (c) ........................................................................ 25
f. Defenses .................................................................................................................................................. 26

8. What Actively Can Be Done To Promote Disclosures In Order To Minimize Disputes ....................................................... 27

9. Fiduciary Duty To Preserve And Protect Property From Dissipation .................................................................................. 28
a. Overview ................................................................................................................................................ 28
b. The duty to preserve and protect assets by transferring management decision making to both parties or the court (because the former authority during marriage to act alone has been restrained by order and revoked by reason) ............................................................................................................. 29
c. The duty to preserve and protect assets by acting reasonably when the authority to act alone is present ........................................................................................................................................... 31
d. The legislature invites either party to petition the court for instructions ................................................................. 35

10. Remedies For Mismanagement – Short Of Breach And Amounting To Breach Of The Fiduciary Duty To Preserve And Protect ........................................................................................................... 36

a. Overview ............................................................................................................. 36

b. The court’s broad discretion (“may”) under 2252 for mismanagement generally (that is, for conduct not amounting to breach of fiduciary duty) ........................................................................... 37

c. The general characteristics or nature of a breach of fiduciary duty ...................... 37

d. The court’s mandate (“shall”) is to measure damages resulting from breach of fiduciary duty under section 1101 (g) or Civil Code section 3333, whichever is greater (but only to the extent section 3333 is accepted as part of the “including but not limited” remedy in 1101 (g)) .................................................................................................................. 38

e. The court’s mandate (“shall”) under section 1101 (h) is to double damages measured under section 1101 (g), when the breach is accompanied by fraud or malice .......................................................................................... 42

f. Other remedies for breach of fiduciary duty ................................................................ 42

11. Vital Questions That Need To Be Answered Regarding The Non-Managing Party ................................................................................................................................. 43

a. Overview ............................................................................................................... 43

b. What are the duties of the non-managing party during divorce? ......................... 43

c. How should the non-managing party be counseled regarding allegations of breach of duty by the managing party? ................................................................. 44

12. Concluding Remarks ........................................................................................................... 45

a. To attorneys .......................................................................................................... 45

b. To managing party ................................................................................................. 45

c. To non-managing party .......................................................................................... 45

d. To judges ............................................................................................................... 46

e. Final words of hope ............................................................................................... 46
1. Introduction

The fiduciary duty of disclosure was codified in 1993 (presently Family Code sections 2100-2113). But years often pass before the courts clarify legislative enactments. For example, In re Marriage of Feldman (2007) 153 Cal.App.4th 1470, the leading case on monetary sanctions under section 2107 (c) for disclosure violations, was decided fourteen years after these sanctions became law.

In 2002, the legislature passed AB 583 (scope of fiduciary duty expanded and consequences for violating it increased). In 2003, the lawmakers passed SB 1936 (section 721 (b) amended to incorporate Corporation’s Code section 16404, in order to establish a standard of care during marriage that was found lacking by the court in In re Marriage of Duffy (2001) 91 Cal.App.4th 923). Thus, if the past is any indication, it will take years before these new laws will be reliable and predictable guides to spouses to a marriage who become parties to a divorce.

For the past thirty years, I have enjoyed being a legal archaeologist of sorts – examining not only what the law is but also the driving influences behind it. This Primer is the harvest of the seeds of curiosity and reflection I have sown over the years in the soil of fiduciary duty during divorce. It is my view of where the law is on settled issues and where it is likely to go on unsettled issues. Hence, time will tell which views will be affirmed, which ones require fine tuning, and which ones need to be jettisoned.

In the meantime, family law judges and attorneys need guidance. Steve Wagner has already made a huge contribution to this end. This Primer is my contribution. If clarifying the law requires someone to be wrong, my love of the law compels me to risk being that person.

2. Summary

This Primer dwells on the fiduciary relationship during divorce. It is different from the other legal relationships triggered by marriage: Fiduciary relationship during marriage and confidential relationship. A brief mention of these other relationships provides the context helpful to focus on the text of the fiduciary relationship during divorce.

Next, the new portrait of fiduciary duty during divorce is displayed, painted by new “party” statutes, new public polices, and new duties. The rules dramatically change in divorce, a fact that cannot be appreciated enough.

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1 All statutory references are to the Family Code unless otherwise noted.

2 The legislative timeline of the expanding scope of the fiduciary duty, and the increasing penalties for violating it, is attached as Exhibit 1.

3 Similar efforts resulted in my Amicus Brief in In re Marriage of Haines (1995) 33 Cal.App.4th 277, which dealt with the confidential relationship of marriage.
Then, the discussion turns to the adverse or divergent interests of divorce litigation that the fiduciary duty seeks to mediate. Understanding the “why” behind the law encourages conduct pleasing to it.

Finally, the Primer zooms in on the scope and character of the fiduciary duties during divorce and the remedies for breach. The discussion of duties will attempt to answer the key questions, including but not limited to the following:

What is the meaning of the disclosure duty in 2102? That is, to what extent does it require disclosures above and beyond 2104 (PDD) and 2105 (FDD)?

What are the characteristics of the duty of disclosure?

How is the duty to preserve and protect satisfied (or breached)?

The presentation on the remedies for breach of duty will likewise focus on answering the vital issues, including but not limited to:

What is the relevance or irrelevance of state of mind (intent) in breach?

What are the elements to a 2107 (c) motion for monetary sanctions?

How should the court handle a motion seeking a court order under 2040(a)(2), 2108, or instructions generally?

How should damages be measured for a breach during divorce causing impairment to property?

Woven into the foregoing presentation will be a discussion of two important topics: What can be actively done to minimize disclosure disputes? What are the duties of the non-managing party and how should that party be counseled regarding possible breaches by the managing party (in ways beyond a form letter that defaults to allegations of breach)?

3. Two Legal Relationships Established By Marriage – Confidential and Fiduciary

a. Overview: Before you can zoom in on a problem, you need to know where you are. Does the problem involve the confidential or fiduciary relationship? If fiduciary, when did the alleged breach occur, during marriage or divorce? And if divorce, does the issue involve non-disclosure of material facts or impairment of property as a result of the unilateral actions of the managing party? (See the flow chart attached hereto as Exhibit 2.)

b. General Characteristics Of Both Relationships

1) Distinctions generally per Vai: “The prerequisite of a confidential relationship is the reposing of trust and confidence by one person in another who is cognizant of this fact. The key factor in the existence of a fiduciary relationship lies in
control by a person over the property of another. . .” (Vai v. Bank of America (1961) 56 Cal.2d 329, 338 [emphasis added].) These relationships are summarized as follows:

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Res To Manage</th>
<th>Problem</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidential</td>
<td>Other spouse’s trust and confidence</td>
<td>Gain to one spouse and loss to the other, as a result of an interspousal transaction</td>
<td>Should this transaction be cancelled?</td>
</tr>
<tr>
<td>Fiduciary</td>
<td>Other spouse’s property</td>
<td>Loss to both spouses, as a result of a management decision by one spouse</td>
<td>Should this loss be charged to the managing spouse?</td>
</tr>
</tbody>
</table>

2) Confidential relationship– interspousal transaction
   a) Practical issue: Did an interspousal transaction “advantage” one spouse, and if so, should the transaction be cancelled?
   b) Key authorities:
      - 721 (a) and (b)⁵

3) Fiduciary relationship– management of property “during marriage”
   a) Practical issue: Should the value of the estate at time of separation be greater in the eyes of the law (for example, $12 instead of $10), and if so, should the difference ($2) be charged to one spouse?⁶

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⁴ “The word “fiduciary” derives from the Latin fiducia, a term of Roman law referring to the transfer of a right to a person who received it subject to an obligation to transfer it again at a future time or upon the fulfillment of a condition. Its first English use is in the 17th Century.

In contemporary jurisprudence it refers to the duty owed by one who is trusted toward the one (or ones) who trusts in him. A fiduciary duty is a cluster of obligations owed by one person called the ‘trustee’ or ‘fiduciary’ toward another, called the ‘cestu’” or ‘beneficiary’, with respect to an identified subject matter called the ‘res’ or ‘subject of the trust’. It is thus a three-place predicate: in any given case, we may ask whether A owes a fiduciary duty towards B with respect to C, but we must not ask simply, “Does A owe B a fiduciary duty?” because such a question will inevitably mislead us.” (Chodos, The Law of Fiduciary Duty (2000), p. 1 [emphasis in original].)

⁵ Just as minors are disabled from contracting or voting, section 721 expressly disables adult spouses from transacting with each other unless the circumstances are pleasing to the fiduciary standard – that is, the disadvantaged spouse participated in the transaction voluntarily and intelligently, based on knowing the same facts as the advantaged spouse.
b) Key authorities:

- 721 (b), 1100 (e), and 1101;

- Corp. Code section 16404 (c)\(^7\) for an alleged breach during marriage. (SB 1936 made Corporations Code section 16404 a part of section 721 (b), effective January 1, 2003.); and

- Remedies recognized by statutory and case law before Corp. Code section 16404 (c).

4) Fiduciary relationship – disclosures and management of property “during divorce”

Fiduciary duty during divorce gives guidance to the parties on two questions:

a) What to disclose?

Practical issue - concealment: Were material facts not disclosed? If so, should the breaching party be sanctioned, even if the non-disclosure is harmless?

b) How to manage the other party’s interest in property?

Practical issue –impairment: Is the value of the estate at time of distribution less than what was tendered at the time of separation? If so, what explains this loss? Market forces? Decisions of both owners or the court? Or the unilateral actions of the managing party? And if the latter, should the loss be charged to that party?

c) Key authorities: See the balance of this Primer.

Preview insight: The questions - What is the fiduciary duty during divorce? What does respect look like? And how would a reasonable fiduciary act in divorce? - are all answered the same: (1) Disclose all material facts - aka duty of disclosure; and (2) transfer management decision making to both parties or the court when the authority to act alone is absent and act reasonably when such authority is present - aka duty of preservation and protection.

\(^6\) If yes, the resulting unequal division of property is explained by mismanagement of property, an entirely different matter than mismanagement of the marriage (or marital fault).

\(^7\) No family law case has yet to interpret this statute.
4. New Portrait Of Fiduciary Respect In Divorce

a. Overview: Each party has a general duty to respect the other party while managing his/her interest in property. What this “respect” looks like in divorce is materially changed by new “party” statutes, new policies, and new duties.

b. General duty of respect in managing the interests of another:

Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. (Family Code section 1100 (e) [emphasis added]; see also section 720 [spouses “contract toward each other obligations of mutual respect, fidelity, and support”] [emphasis added].)

“Respect” means to treat a person with “honor or esteem.” (The American Heritage College Dictionary (4th ed. 2002).) Accordingly, a fiduciary is legally required to “act with the utmost good faith for the benefit of [the non-managing spouse” [In re Marriage of Reuling (1994) 23 Cal.App.4th 1428, 1438] and to “act or advise with [the non-managing spouse’s] interest in mind” or “welfare in mind.” (Vai v. Bank of America supra, 56 Cal.2d at 337-338.)

Preview insight: During marriage, the managing spouse generally gets to decide what the other spouse’s interests look like. (Section 1100 (a).) But in divorce, this unilateral authority is largely arrested or restrained, for reasons discussed infra. Consequently, the managing party’s focus of respect changes to equipping and allowing the non-managing party to decide what his/her own best interests look like, either by agreement or advocacy at trial.

c. New “party” statutes in divorce: The fiduciary duty of a “spouse” during marriage is not the same as the fiduciary duty of a “party” during divorce - the latter is greater for the reasons discussed infra. Therefore, to put everyone on notice that divorce is different than marriage, the Legislature introduces “party” statutes to divorce. For example, compare Family Code sections 721 and 1100 (a) [“spouse”] with Family Code sections 2040 and 2100 et seq. [“party”]. “Spouse” statutes generally continue in divorce. This would be the case in 1101. In some cases, a “spouse” statute [721] is not only adopted in, but also expanded by a “party” statute. (2102 (a) [the “transactions in 721 are expanded to include “activities” in 2102].)

8 “Fidelity” means “faithfulness to obligations, duties, or observances.” (The American Heritage College Dictionary (4th ed. 2002).)
And when a “party” statute conflicts with a “spouse” statute, as may be the case with 2105 and 1100 (e) as discussed infra, the “party” statute more specific to divorce arguably prevails over the “spouse” statute. Examples of possible conflicts include the following:

<table>
<thead>
<tr>
<th>FACIALLY CONFLICTING STATUTES</th>
<th>SUBJECT MATTER</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Spouse”</td>
<td>“Party”</td>
</tr>
<tr>
<td>1100 (e)</td>
<td>2105</td>
</tr>
<tr>
<td>1101 (e)</td>
<td>2040(a)(2), 2108</td>
</tr>
</tbody>
</table>

d. **New public policies of divorce:** Section 2100 (a) and (b) provide:

The Legislature finds and declares the following:

(a) It is the policy of the State of California (1) to marshal, *preserve, and protect* community and quasi-community assets and liabilities that exist at the date of separation so as to *avoid dissipation* of the community estate *before distribution* …

(b) Sound public policy further favors the *reduction of the adversarial nature of marital dissolution* and the attendant costs by fostering full disclosure and cooperative discovery. (emphasis added.)

Section 2100 (c) further provides that the duty of disclosure is continuous and purposeful “so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.”

*Hence, the public policy goals of divorce are (1) full disclosure of what exists at separation* and (2) *safe transport of it to the time of distribution, in a proceeding marked by little to no adversity.* These goals are realized by two new duties working as teammates – the

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9 The third declaration of public policy is in section 2120 (a), which similarly provides: “The State of California has a strong policy of ensuring the division of community … property … and of providing for fair and sufficient child and spousal support awards. These policy goals can only be implemented with *full disclosure* … *and decisions freely and knowingly made.*” (emphasis added.) Thus, “full disclosure” is purposeful, so that “decisions [are] freely and knowingly made” - heads and tails of the same coin.

10 The fiduciary duty during marriage addresses the issue of what should exist at separation, beyond what actually exists.

11 Every family that goes on a trip has two important wishes: Cooperation and safety. The legislature mandates the same during the journey of divorce.
duty of full disclosure and the duty to preserve and protect property from dissipation, waste, or impairment. The duty of disclosure is the primary workhorse.

e. New duty of disclosure: The term “disclosure” is mentioned forty-nine (49) times in sections 2100 – 2113. The duty of full disclosure, unique to divorce litigation, is “sua sponte.” (In re Marriage of Feldman supra, 153 Cal.App.4th at 1493.) This means: “Of his or its own will or motion voluntarily, without prompting or suggestion.” (Black’s Law Dictionary.) What triggers the affirmative duty of disclosure is the “superior position” to obtain information, not a demand from the other party. (In re Marriage of Feldman supra, 153 Cal.App.4th at 1487, 1492, 1492 n. 18; In re Marriage of Brewer & Federici (2001) 93 Cal.App.4th 1334, 1348.) The scope of the duties of disclosure in 2102, 2104, and 2105, and the remedies for breaches, are discussed infra.

Practice pointer: The disclosing party needs to decide whether a protective order is appropriate, and, if so, what it looks like.

f. New duty to preserve and protect assets from dissipation:

1) The scope of this duty and remedies for breach (discussed infra)

2) The case for this duty: The duty to preserve and protect property from dissipation or impairment is supported by the following arguments:

a) The public policy to preserve and protect against dissipation involves a corresponding duty to enforce it: Section 2100 (a) provides: “It is the policy of the State of California (1) to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation of the community estate before distribution.” (emphasis added.)

Point: Public policy is meaningless without a corresponding duty to enforce it.

b) The duty of disclosure is helpful, but not sufficient, to protect against dissipation: A party may fully disclose his/her intentions, and then proceed to act upon those intentions, resulting in dissipation of or impairment to property.

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12 See also Vai v. Bank of America supra, 56 Cal.2d at 339 [“In the course of negotiations for dissolution, each partner must deal fairly with his copartners and not conceal from them important matters within his own knowledge touching the business and property of the partnership”]; In re Marriage of McLaughlin (2000) 82 Cal.App.4th 327, 331 [duty of disclosure following separation is “affirmative”]; Pollack v. Lytle (1981) 120 Cal.App.3d 931, 940 [“an agent must make the fullest disclosure of all material facts which might affect his principal’s decision-making”]; Ball v. Posey (1986) 176 Cal.App.3d 1209, 1214 [“fiduciary’s [disclosure] obligation is affirmative”].
Point: Something more than the duty of disclosure is required to protect and preserve property from dissipation during divorce, namely, a duty that (1) restrains action when there is no authority to act unilaterally and (2) instructs on how to act, when such authority is present.

c) The remedy for impairment admits of a duty not to impair, the flip-side of which is the duty to preserve and protect: “A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment . . .” (Section 1101 (a).) The remedy for impairment involves a corresponding duty not to impair.

Point: The duty not to impair, and the duty to preserve and protect, are the heads and tail of the same coin.

d) Section 1101 (a) admits of more than one duty: Section 1101 (a) provides a remedy for “any breach of the fiduciary duty that results in impairment . . .” (emphasis added.)

Point: The fiduciary duty is not limited to the duty of disclosure, but features an additional dimension, namely, the duty to preserve and protect.

e) The managing fiduciary does not enjoy unlimited authority: The Family Law Act “contemplates an equal division of community assets tendered to the court for adjudication. In Civil Code sections 4351 and 4359 [predecessor to ATRO in section 2040], the Legislature has provided a statutory remedy that allows the courts to preserve assets until an equal division can be accomplished.” (In re Marriage of Van Hook (1983) 147 Cal.App.3d 970, 986 [emphasis added].) But there are exceptions to this restraining order, one of which is the “usual course of business.” (2040 (a) (2).) In such situations, the managing fiduciary does not have a grant of immunity, as though a tyrant.

Point: Management authority is encumbered by the ancient standard of reasonableness – that is, a reasonable fiduciary would not act alone when there is no authority to act alone and would act reasonably when such authority is present.

f) Family law cases have diligently protected property from harm during divorce as a result of the unilateral actions of the managing party: The courts have long protected property from dissipation, impairment, or waste during divorce on grounds separate from the duty of disclosure: In re Marriage of Hokanson (1998) 68 Cal.App.4th 987, 992 [wife charged with the loss that would not have occurred had she not been “dilatory”]; In re Marriage of Quay (1993) 18 Cal.App.4th 961, 964, 971-973 [husband’s “making a loan, based on friendship, to a company whose financial situation was uncertain are not the hallmarks of a
prudent fiduciary”]; \textit{In re Marriage of Czarpar} (1991) 232 Cal.App.3d 1308, 1317-1318 [“William was guilty of \textit{wasting} community assets by his actions in managing ACE and of violating the \textit{standard of care} owed to Phyllis”]. (emphases added.)

**Point:** The law has long recognized the need to preserve and protect property while it is being readied for distribution in divorce.

g) \textit{Civil cases likewise involve a duty to preserve and protect property during litigation}: A fiduciary managing property that is the subject of pending litigation must behave as a reasonable fiduciary would behave under the same or similar circumstances. For example, an “executor could be held liable for negligence if it failed to exercise the skill and knowledge ordinarily possessed by such professional fiduciaries.” (\textit{Estate of Gerber} (1977) 73 Cal.App.3d 96, 110.) “It is the duty of the personal representative to collect estate assets and preserve them until distribution … He is accountable for all of the decedent’s estate that comes into his possession and is chargeable with the losses resulting from his default or neglect.” (\textit{id.} at 109; see also \textit{Timmsen v. Forest E. Olson, Inc., supra}, supra, 6 Cal.App.3d at 871 [“An agent who violates his duty to use reasonable care, skill, and diligence is liable for any losses which his principal may sustain as the result of his negligence or breach of duty”].)

**Point:** The duty of a fiduciary to preserve and protect property that is the subject of litigation is rooted in reason, common sense, tradition, and law.

h) \textit{In sum, the fiduciary duty in divorce is two-dimensional – duty of disclosure and duty to preserve and protect}: These two duties protect against any acts of disloyalty – that is, there is no separate need for a duty of loyalty or any other dimension to the fiduciary duty.

**Point:** No reason exists for a dimension or aspect to the fiduciary duty during divorce beyond the duties of disclosure and preservation.

g. \textbf{Fiduciary duties simplified}

1) \textbf{Two commands}: All breaches involve either concealment or unilateral management decisions involving action or inaction. Therefore, two simple (positive and negative) commands worth remembering are: Disclose what you know and don’t act alone.\textsuperscript{13}

\textsuperscript{13} These commands are limited by materiality. So, in full, they should read: Disclose what you know of a material nature and don’t act alone if your actions (or inactions) will materially affect assets or liabilities.
2) **One rule:** All of the foregoing can be boiled down into one rule: Treat the other party the same way you would want to be treated if the management roles were reversed.

h. **Summary table:** The greater standards in divorce are contrasted with marriage in the table attached hereto as Exhibit 3.

i. **Summary illustration – The Triangle of Respect:**

![The Triangle of Fiduciary Respect During Divorce](image)

The triangle, expanded to include compliance and breach, is attached as Exhibit 4.
5. Anatomy Of The Divergent (Or Adverse) Interests In Divorce That Fiduciary Duty Seeks To Mediate

a. Overview: Understanding the “why” of the heightened fiduciary duty in divorce is essential. Following separation, the parties’ interests diverge and become adverse. These interests must be mediated in order for property to be fully disclosed and safely transported to distribution in a proceeding characterized by minimal adversity. To this end, the law tasks the managing party, who enjoys superior knowledge, with superior responsibilities.

b. One spouse has broad authority to manage community property alone during marriage - akin to a general power of attorney: During marriage, “either spouse has the management and control of the community personal property … with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.” (Family Code § 1100 (a).) The same unilateral authority exists as to real estate except for a leasehold longer than a year, conveyance, or encumbrance. (Family Code § 1102 (a).)

Preview insight: This unilateral authority during marriage carries considerable momentum and habits into divorce. Therefore, the essence of fiduciary duty in divorce is how to (1) restrain this authority and transform these habits, by instructing the managing party to put one foot on the break pedal of unilateral decision making and the other foot on the gas pedal of disclosures; and (2) tutor the non-managing party on his/her new fiduciary duties as well.

c. Managing the property of another activates the fiduciary duty: “The key factor in the existence of a fiduciary relationship lies in the control by a person over the property of another.” (Vai v. Bank of America supra, 56 Cal.2d at 338.) “A fiduciary is a person who undertakes to act in the interest of another person.” (Scott, The Fiduciary Principle (1949) 37 Cal. L. Rev. 539, 540.)

d. The fiduciary duty requires the managing spouse to champion the interests of the other spouse: “The one who is entrusted with the rights of another is charged with the duty of guarding those rights with the utmost good faith.” (Nelson v. Abraham (1947) 29 Cal.2d 745, 751; accord In re Marriage of Reuling supra, 23 Cal.App.4th at 1438 [“act with the utmost good faith for the benefit of [the non-managing spouse”]; Vai v. Bank of America supra, 56 Cal.2d at 337-338 [“act or advise with [the non-managing spouse’s] interest in mind” or “welfare in mind”].)

14 “It is the public policy of this state ‘to foster and promote the institution of marriage.’” (In re Marriage of supra, 33 Cal.App.4th at 287, quoting Marvin v. Marvin (1976) 18 Cal.3d 660, 683.) On the other hand, “[t]he concern of society as to the property rights of the parties is secondary and incidental to its concern as to their status.” (In re Marriage of Haines supra, 33 Cal.App.4th at 287 [emphasis added], quoting Borelli v. Brusseau (1993) 12 Cal.App.4th 647.) Thus, for reasons of policy, the Legislature chose not to encumber the primacy of marriage with the requirement of joint management and control of secondary property rights. Practicality may have also played a role in this allocation of duties during marriage. (See Vai v. Bank of America supra, 56 Cal.2d at 337 [management of assets during marriage by one spouse allows them to “be more efficiently handled”].)
e. Following separation, the parties’ interests diverge and become adverse: Unlike during marriage, when the parties’ interests converge, following separation, their interests “diverge.” (In re Marriage of Duffy (2001) 91 Cal.App.4th 923, 935, 940.) Their positions are “adverse” to one another. (In re Marriage of Quay supra, 18 Cal.App.4th at 972; accord Family Code § 2100 (b) [“the adversarial nature of marital dissolution” is declared as a matter of public policy].) These divergent or adverse interests include but are not limited to the following:

1) New characterization rules: “The earnings and accumulations of a spouse … while living separate and apart from the other spouse, are the separate property of the spouse.” (Family Code section 771 (a).)

2) Differences in tolerance for risk: “[T]he managing spouse [may be] willing to risk dissipation in a speculative investment in hope of greater returns in the future, [whereas] the other spouse [might desire] … to conserve the existing estate until its division and distribution.” (In re Marriage of Duffy supra, 91 Cal.App.4th at 935.)

3) The powerful lobby of self-interest: The differences that led to the breakdown of the marriage are magnified in divorce, where there is the added tension of the certainty of “the end” (a close of escrow, if you will15) and the uncertainty of its terms. During this process, the parties legitimately lobby their own interests, which often lead to conflicting outcomes.

In short, how former spouses, now adverse party litigants, relate to each other as fiduciaries vis-à-vis property they continue to co-own during divorce is perhaps the most challenging of all the fiduciary relationships. By contrast, a fiduciary attorney, real estate broker, or executor typically does not co-own property with the person or persons to whom he/she owes a fiduciary duty. There is no property interest that survives the termination of their relationship. But when spouses take off their hats as husband and wife at separation, they continue their relationship not only as fiduciaries but also as co-owners of property. This situation unique to divorce accordingly results in new and expanded duties.

f. The fiduciary duty, accordingly, expands in divorce: The fiduciary duty more than survives separation and continues until property is distributed. (Family Code §§ 1100 (e) and 2102.) “[E]xpanded fiduciary obligations with regard to management of the community estate are triggered when spouses separate …” (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2007) 8.607, p. 8-156.7 [emphasis added].)

Stated differently, out of basic respect, co-owners of property typically allow each other to know about and participate in activities materially affecting their property. When these two owners are spouses, this common courtesy is elevated to a fiduciary duty. When the spouses become adverse parties to a divorce proceeding, this fiduciary standard goes on the highest alert.

15 Escrow is the process of transferring real estate from the seller to the party. Divorce is the process of transferring the rights and duties of a husband and wife to a marriage to a petitioner and respondent in divorce. But there is this vital difference: When real estate is escrowed, the parties know the terms in advance, but in divorce, those terms are not known, often until the end.
g. **Specifically, the party enjoying a superior position is charged with superior responsibilities:** The spouse who manages property has control over and information about the assets he/she is managing. As a result, the managing spouse enjoys a “superior position” [*In re Marriage of Feldman* *supra*, 153 Cal.App.4th at 1487, 1492, 1492 n. 18; *In re Marriage of Brewer & Federici* *supra*, 93 Cal.App.4th at 1348] over the non-managing party. Therefore, continuing the marital status quo into divorce means that the playing field “tilts”\(^{16}\) in favor of the managing fiduciary.

The story of fiduciary duty in divorce is how to “tilt” the playing field the other way to protect the non-managing party (and in the process, both parties). The law accomplishes this by charging the managing party, who enjoys a superior position, with superior responsibilities: Full disclosure without demand and preservation and protection of property until the final asset is distributed.

The conceptual underpinnings to these expanded duties are:

- Marriage gives rise to the authority to act unilaterally; therefore, the death of the marriage means the death of this authority - the general power of attorney to act alone during marriage is revoked by reason and law
- The disabling of unilateral authority (more limited as to a business) means that the new decision makers are both parties or the court
- The new decision makers need to make decisions but only after the unequal playing field of knowledge is leveled by full disclosures
- The managing party, who enjoys a superior position, has a superior duty to make voluntary and self-initiated full disclosures
- The end has been declared - the community estate is being readied for distribution; accordingly, property must be preserved and protected from dissipation or impairment as a result of the unilateral actions of the managing party, until all of the estate is distributed

h. **Summaries**

1) **Word summary #1:** To meaningfully level property at the end, information and unilateral management risks relating to that property must be leveled, beginning at separation.

\[/ / /\]

\[/ / /\]

\[/ / /\]

\[^{16}\text{Credit for the term “tilts” belongs to Rafael Chodos, in his book The Law of Fiduciary Duty, *supra*, p. 405.}\]
2) **Graphic summary:**

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3) **Word summary #2:** The monarchy during marriage (the authority to act alone) is replaced by a democracy in divorce, with the checks and balances of full disclosure, joint decision making (because unilateral authority is restrained), and protection and preservation of property at all times. Full disclosure promotes joint decision making and protection, joint decision making promotes full disclosure and protection, and protection promotes full disclosure and joint decision making.

Conversely, the enemy of fiduciary duty is concealment (less than full disclosure) or unilateral management decisions in either of two situations – acting alone when the authority to act alone is lacking or acting unreasonably when such authority is present.
6. **Fiduciary Duty Of Disclosure**

a. **Overview**

1) Disclosures, unlike discovery, are voluntary and without demand: Leveling the playing field of information, which reduces the adversarial nature of divorce, occurs in two ways: “full disclosure and cooperative discovery.” (2100 (b).) The Feldman court distinguishes the two:

<table>
<thead>
<tr>
<th>Disclosures</th>
<th>versus</th>
<th>Discovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>“full disclosure and cooperative discovery” (FC 2100 (b))</td>
<td>and</td>
<td></td>
</tr>
<tr>
<td>“In sum, Aaron had a fiduciary duty to disclose the existence of the 401(k) account on the Schedule in the first place without prodding from Elena”</td>
<td>and</td>
<td>to produce relevant documents upon Elena's request” (Feldman, 153 Cal.App.4th at 1488)</td>
</tr>
<tr>
<td>Family Code §§ 2100+</td>
<td></td>
<td>Code of Civil Proc. §§ 2016.010+</td>
</tr>
</tbody>
</table>

2) Disclosures target two categories of information:

   a) *Present tense*: Material facts (favorable and unfavorable) that are presently known regarding the existence, character, and valuation of assets and liabilities; and

   b) *Future tense*: Contemplated changes that will materially affect those assets and liabilities BEFORE those changes are consummated, such as changing the form of an asset from stock to cash, cash to stock, a contingent asset to an asset, and so forth.

3) Disclosures are continuous: Disclosure must be updated or augmented to the extent of any material changes since the last disclosure.

4) Disclosures involve assets and debts – actual as well as contingent: Disclosure must include actual as well as contingent asset and liabilities. (2101.)

5) Disclosures involve community and separate property: Disclosures are not limited to what the disclosing party believes are community assets. Instead, they include “all assets and liabilities in which one or both parties have or may have an interest.”

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17 The following discussion focuses primarily on disclosure of assets and liabilities, and activities that affect them, but the same duty applies to the disclosure of income and expenses on issues relating to support.
b. The non-managing party’s interests are the same as the managing party’s: A good starting point is that the non-managing party’s interests are not hypothetical or speculative. Rather, they are “present, existing, and equal” to those of the managing party’s. (Section 751.) Accordingly, they are deserving of the highest respect, beginning with full disclosure.

The duty of disclosure is commonly understood to mean the Preliminary and Final Declarations of Disclosure (“PDD” and “FDD”) in sections 2104 and 2105. But it is respectfully submitted that section 2102 merits a fresh and thorough look.

c. The disclosure duties within 2100-2113 (violations of which may be subject to monetary sanctions under 2107 (c))

1) Section 2102

a) Key statutory language: Section 2102 begins:

(a) From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including, but not limited to, the following activities:

A redline version showing all of the changes to 2102 by AB 583 is attached as Exhibit 6.

b) Question: Does this statute stand on its own? That is, what disclosures, if any, does it mandate beyond those required in 2104 (PDD) and 2105 (FDD)?

Feldman quotes 2102 as a free standing statute (153 Cal.App.4th at 1483, 1490, 1491)

Section 2102 is quoted in 2105 (d) (3) with its own identity

The Judicial Council’s form for disclosures is not limited to 2104 and 2105, but includes 2102 as well.

c) Expansion of 721 duty in divorce: Section 2102, a party statute, extends 721, a spouse statute, to divorce, and expands it. Thus, Rutter concludes: “expanded fiduciary obligations with regard to management of the community estate are triggered when spouses separate …” (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2007) 8.607, p. 8-156.7 [emphasis added].)
d) **When duty triggered:** “From the date of separation …”

e) **Augment:** The duty in section 2102 is not static but continuous – that is, it includes the duty to augment “to the extent there have been any material changes.” (Section 2102 (a) (1); see also section 2100 (c).)

f) **Scope:**

- **“all activities”:** Section 721 (b) refers to “a” or “any” “transaction” whereas section 2102 refers to “all activities that affect”. The terms “all activities” in section 2102 are broader than “a or any transaction” in section 721 (b). A transaction is preceded by activities, but not all activities result in a transaction.

- **materially “affect”:** Three observations are noteworthy:

  1. The word “affect” broadly means: “‘to influence’; ‘to produce an effect upon’; ‘to act upon.’” (*Sacramento Terminal Co. v. McDougall* (1912) 19 Cal.App. 562, 565.)

  2. The word is not in the past tense, “affected”. Hence, an activity, which if allowed (or not allowed) to mature into a transaction, would materially affect assets or liabilities, must be disclosed in advance.

  3. It is further believed that the affects which the law is concerned with are “material” ones. The word “material” also appears in 2100 (c), 2102 (a)(1), and throughout 2105; accord 1100 (e).

- **“including but not limited to”:** The only place in “this chapter” where the language “including but not limited to” appears is in 2102 (a). This language confers on the court broad discretion, subject to the limitations imposed by statutory construction and constitutional due process.

- **“upon request” language absent:** The duty of disclosure in 2102 is clearly “without demand”, “voluntary”, “without prompting or prodding” – that is, sua sponte.

g) **Summary exhibits:** The full text of 721 (“spouse” and “transaction”) and 2102 (“party” and “activity”) appear in Exhibit 7. In this same spirit, a table comparing the greater (2102) to the lesser (721) is attached as Exhibit 8.
h) **Suggested interpretation:** Section 2102 is a disclosure statute that stands on its own. Whereas section 721 (b) refers to “transactions” that have already occurred, section 2102 is broadened to include disclosure of “all activities that affect assets and liabilities” BEFORE they mature into transactions.

Thus, section 2102 is more than past tense – disclosure, for example, of a stock account. It is also future tense - disclosure of activities surrounding a contemplated transaction (whether to sell stock) before it progresses to a transaction (actual sale). Stated differently, the managing party is disrespectful if he/she denies the other party “notice and opportunity” to participate in a decision, which if implemented (or not implemented), would materially affect an asset or liability in which the other party may be or is an owner.

Section 2102 (c) further supports this interpretation. It requires disclosure of an opportunity for gain to the community during divorce when that opportunity has “sufficient contacts” with the marital period. But before this opportunity can be changed from a contingent asset to an actual asset, both parties are entitled to notice and opportunity to participate in it.

2) **2104 - Preliminary Declaration of Disclosure ("PDD")**

a) **Key statutory language**

(a) *After or concurrently with service of the petition* for dissolution or nullity of marriage or legal separation of the parties, each party shall serve on the other party a preliminary declaration of disclosure . . .

. . .

(c) The preliminary declaration of disclosure shall set forth with sufficient particularity, that a person of reasonable and ordinary intelligence can ascertain, all of the following:

(1) The *identity* of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate.

(2) The declarant's *percentage of ownership* in each asset and percentage of obligation for each liability where property is not solely owned by one or both of the parties. The preliminary declaration may also set forth the declarant's characterization of each asset or liability. (emphasis added.)

b) **Practical suggestion:** A more specific due date of the PDD should be established by statute or local rule – for example, 45 days after service of the
Petition, for the Petitioner, and 45 days after filing the Response, for the Respondent (or both due on the same, readily identifiable date).

c) **Duty to augment**: Section 2104 itself contains no language requiring augmentation to the extent of any material changes since the previous disclosure, but such a duty is arguably inferred from the broad augmentation language in 2100 (c) together with the specific language in section 2102 (a) (1) and 2105 (d) (3).

3) **2105 - Final Declaration of Disclosure (“FDD”)**

   a) **Key statutory language**

      (a) *[If the case goes to trial, no later than 45 days before the first assigned trial date,]* each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure and a current income and expense declaration . . .

      (b) The final declaration of disclosure shall include all of the following information:

      (1) All *material facts* and information regarding the *characterization* of all assets and liabilities.

      (2) All *material facts* and information regarding the *valuation* of all assets that are contended to be community property or in which it is contended the community has an interest.

      (3) All *material facts* and information regarding the amounts of all *obligations* that are contended to be community obligations or for which it is contended the community has liability.

      (4) All *material facts* and information regarding the *earnings*, accumulations, and expenses of each party that have been set forth in the income and expense declaration. (emphasis added.)

   b) **Duty to augment**: The duty to augment the FDD to the extent of material changes to it is clear from section 2100 (c), 2102 (a) (1), (c), and (d).

      **Warning**: The waiver of the FDD in section 2105 (d) (3) requires disclosures greater than the PDD.
4) **2100, 2102, 2104, and 2105 summarized:**

<table>
<thead>
<tr>
<th>Statute</th>
<th>Due Date</th>
<th>Scope</th>
<th>Augment?</th>
</tr>
</thead>
<tbody>
<tr>
<td>2100 (c)(^{18})</td>
<td>“in the early stages of a proceeding”</td>
<td>“all assets and liabilities in which one or both parties have or may have an interest”</td>
<td>Yes, as to 2100</td>
</tr>
<tr>
<td>2102</td>
<td>“From the date of separation”</td>
<td>“all activities that [materially] affect the assets and liabilities of the other party, including, but not limited to, the following activities”</td>
<td>Yes, as to 2102</td>
</tr>
<tr>
<td>2104</td>
<td>“After or concurrently with service of the petition for dissolution”(^{19})</td>
<td>The identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable</td>
<td>Yes, as to 2104</td>
</tr>
<tr>
<td>2105</td>
<td>“no later than 45 days before the first assigned trial date”(^{20})</td>
<td>material facts re: characterization of all assets and re: valuation of assets that may be community</td>
<td>Yes, as to 2105</td>
</tr>
</tbody>
</table>

d. **Disclosure duties outside of 2100-2113 and which are not sanctionable under 2107 (but which may require the same disclosures as 2100-2113)**

1) **ATRO:** In addition to the negative injunction, section 2040 (a) (2) contains the positive injunction “requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party.”

2) **1100 (e)**

   a) **Key statutory language:** Section 1100 (e) provides that the duty [to “act with respect to the other spouse in the management and control of the community assets and liabilities”] “includes the obligation to make full disclosure

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\(^{18}\) A fair question is whether 2100 is a statement of policy regarding disclosure as compared to a stand alone statute mandating disclosures beyond those required in 2102, 2104, and 2105.

\(^{19}\) Section 2104 was amended in 1998 to provide the current, and admittedly ambiguous, due date for a PDD. Before this amendment, the PDD was due “[w]ithin 60 days of service of the petition …” This measurable date may have been inappropriate (and perhaps the petitioner’s PDD should be due before the respondent’s), but replacing it with a measureless date was not helpful to anyone. Thus, a legitimate question is what should the court do, if anything, to promote the exchange of the PDD’s “in the early stages of a proceeding”, in accordance with the spirit of 2100 (c). And what does “early stages” mean? What is “early” in one case might be “late” in another.

\(^{20}\) This due date can be advanced or delayed upon a showing of “good cause.” (Section 2105 (a).)
to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, *upon request*." (emphasis added.)

b) “Upon request” language deleted for breaches during divorce: The managing “spouse”s duty of disclosure during marriage is activated “upon request” from the other spouse. (Family Code section 1100 (e).) But when the managing “party” breaches the duty of disclosure during divorce, the courts omit the words “upon request” when they quote section 1100 (e). (*In re Marriage of Feldman supra, 153 Cal.App.4th at 1485, 1486, n. 13, 1489, 1490, 1492; In re Marriage of Brewer & Federici, supra, 93 Cal.App.4th at 1342*)

c) Section 1100 (e) compared to 2105 (b) (FDD): See the table attached hereto as Exhibit 9.

d) Question: Are there statutory construction and due process problems of applying 1100 (e) to divorce, even “upon request”? Sections 1100 (e) and 2105 require the disclosure of the same information as set forth above, but the due date of 1100 (e) is ambiguous whereas the due date of 2105 is specific. Therefore, wouldn’t 1100 (e), if applied in divorce, advance the due date of the FDD to an earlier date? In short, should the “party” statute (2105) more specific to the current circumstances of divorce control over the “spouse” statute (1100 (e))? If not, is 1100 (e), when applied in divorce, rewritten by sections 2100+ to read as set forth in Exhibit 10?

e. Other characteristics of duty of disclosure

1) Disclosure is always, not reasonably, possible: AB 583 modified the last sentence of section 2100 (c) to read:

Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have as full and complete knowledge of the relevant underlying facts as is reasonably possible under the circumstances of the case.

The legislature’s intent is that “[d]isclosure should always be possible.”

2) Assets and debts are broadly defined: The scope of disclosure broadly includes contingent assets and debts. (Section 2101 (a) and (f).)
3) **Fiduciary duties are personal to the parties:** In *In re Marriage of Hokanson supra*, Mary failed to disclose information to her husband (Jon) about selling their home. But the court was unmoved by her attempt to explain away the breach by arguing that there is no evidence she instructed the real estate agent not to talk to Jon. “Family Code sections 721 and 1100 impose a fiduciary duty to Jon directly on Mary, and there is ample evidence in the record that she delayed the sale and failed to communicate information to Jon.” (*In re Marriage of Hokanson supra*, 68 Cal.App.4th at 992 n. 3 [emphasis in original]; see also the statutory quotes in Exhibit 11.)

4) **Fiduciary duties cannot be delegated to a non-party:** “The law has long recognized one party may owe a duty to another which, for public policy reasons, cannot be delegated.” (*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455.) For example, “[t]he ‘fiduciary duty is nondelegable. The principle is well established a fiduciary cannot delegate fiduciary duties to any in an effort to avoid their strictures or to avoid responsibility for the manner in which they are undertaken.” (*Ibid.*). This is particularly true in Family Law, where fiduciary duties themselves are creations of public policy. (Family Code sections 2100 (b) and (c).)

5) **Disclosures must be in writing:** As to the fiduciary duty of disclosure itself, the Legislature mandates a strict protocol:

- “executed under penalty of perjury on a form prescribed by the Judicial Council”²¹ (Family Code section 2104 (a).)
- “in the early stages of a proceeding for dissolution of marriage” (Family Code section 2100 (c).)
- “full and accurate” (*Ibid.*)
- updated “immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes” (*Ibid.*)

Thus, a conversation between the parties is not sufficient. (See the unpublished case of *In re Marriage of Taylor* (2nd dist. July 21, 2009) B195226, p. 31 [“But a ‘conversation’ in no way satisfied Lawrence’s duty under section 2100, subdivision (c) ‘to immediately, fully, and accurately update and augment’ his Final Declaration in the event of material changes”].)

6) **Fiduciary duties are strictly construed:** No court has excused the “written consent” required by the ATRO’s in 2040 (a)(2). And all courts have rejected attempts by managing fiduciaries to read exceptions into fiduciary duty of disclosure statutes. (See the cases summarized in Exhibit 12.) Thus, the courts have heeded Justice

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²¹ This form, a Schedule of Assets and Liabilities (Schedule), is quoted twenty-two (22) times by the Court of Appeal in *In re Marriage of Feldman supra*, 153 Cal.App.4th 1470.
Cardozo’s urging last century to resist efforts “to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions.”

7) Fiduciary duties are multiple and sequential to each other: Each fiduciary red light facing a managing party in divorce must turn green before he/she can proceed. For instance, full disclosure and written consent are different requirements. Satisfying the former does not satisfy the latter. Rather, making full disclosure means only that the managing fiduciary can then proceed to obtain the “written consent” of the other party or the court.

Concluding that a breach has occurred is the beginning, not the end, of the analysis. What the appropriate remedy is, and whether it should be pursued, require thoughtful consideration.

7. Remedies For Breach Of The Duty Of Disclosure

a. Overview: A breach that causes harm to property is remedial under sections 2107 and 1101. A breach that is harmless is not remedial under 1101 [which requires “impairment”], but is subject to monetary sanctions under section 2107 (c). (In re Marriage of Feldman supra, 153 Cal.App.4th at 1479.) While the remedy of monetary sanction under section 2107 (c) is “in addition to any other remedy provided by law”, it is the primary focus of the discussion below.

b. Advance due date of FDD: The FDD is a powerful vehicle for leveling the playing field of information. Therefore, advancing the due date of the FDD is a strategy deserving of consideration when there are concerns of disclosure not necessarily constituting breach.

In this regard, section 2105 (a) provides: “Except by court order for good cause, before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure …” (emphasis added.)

22 “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.” (Meinhard v. Salmon (1928) 249 N.Y. 458, 464; 164 N.E. 545, 546 [emphasis added].)

23 One is tempted to limit Feldman to its egregious facts. The courts have not yet, however. For example, in the unpublished case of In re Marriage of Taylor (2nd dist. July 21, 2009) B195226, the court of appeal, citing Feldman, reversed trial court’s refusal to sanction husband for his breach of the duty of disclosure.
Thus, upon a showing of good cause, the court has broad discretion to order one or both parties to exchange FDD’s on a date earlier than what is the custom. “Good cause” does not require facts amounting to breach (just like the “good cause” in section 2552 (b) gives the court discretion to order an alternate valuation date on facts less than breach of fiduciary duty, as discussed infra).

c.  **Issue sanctions - 2107 (a) and (b)**

(a) If one party fails to serve on the other party a preliminary declaration of disclosure under Section 2104 or a final declaration of disclosure under Section 2105, or fails to provide the information required in the respective declarations with sufficient particularity, and if the other party has served the respective declaration of disclosure on the noncomplying party, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.

(b) If the noncomplying party fails to comply with a request under subdivision (a), the complying party may do either or both of the following:

1. File a motion to compel a further response.

2. File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

d.  **Monetary sanctions - 2107 (c)**

1) **AB 583 changes:** 2107 (c) was changed by AB (effective January 1, 2002) according to the following redlines:

(c) If a party fails to comply with any provision of this chapter, the court shall, in addition to any other remedy provided by law, order impose money sanctions against the noncomplying party. Sanctions shall be in an amount sufficient to pay to the complying party any deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Section 2107, as fully changed by AB 583, is redlined in Exhibit 13.

2) **Issue:** Section 2107 (c) does not say “deter repetition of the breach.” Rather, it says “deter repetition of the conduct or comparable conduct.” Therefore, what type of conduct does the legislature seek to deter in 2107 (c)? Every breach, however isolated or inadvertent?
3) Legislative intent: Increase penalties for breach of fiduciary duty.

4) General comments

a) “any provision of this chapter” refers to sections 2100-2113;

b) “in addition to any other remedy” includes but is not limited to issue and monetary sanctions pursuant to 2107, fees under 271, contempt, alternate valuation per 2552, damages under 1101 when the breach causes impairment, and advancing the due date of the FDD upon a showing of “good cause” under section 2105 (a); and

    Practice pointer: The language “in addition to any other remedy” confers broad discretion on the court. Hence, avoid testing the court’s imagination here.

c) “deter repetition of the conduct” language is borrowed from CCP section 128.7 (d).

e. Suggested approach to monetary sanctions under 2107 (c): The “deter repetition” language in section 2107 (c) was adopted from Code of Civil Procedure section 128.7 (d), according to the legislature history of AB 583. In this regard, the California Judge’s Benchbook has a thoughtful approach to a motion for monetary sanctions under CCP 128.7 (d). (See Exhibit 14.)

Therefore, it is suggested that this same general approach should be followed for 2107 (c) monetary sanctions. Specifically, the moving party has the burden under Evidence Code sections 115 and 500 of proving all of the following:

1) Person seeking sanction: Was any duty of disclosure in sections 2100 - 2113 breached, regardless of whether it was harmful or not;

2) Person being sanctioned: Was the breach intentional (as compared to being negligent or a mere oversight), or by a person who has legal training - this requirement is arguably relaxed for a breach that is harmful or prejudicial;

    Note: In Feldman, “the trial court found that Aaron intentionally had sought to circumvent the disclosure process” (p. 1475); and “the nondisclosure of the Israeli bond was part of a “clear pattern that [Aaron] has no intentions of complying with the policy . . . that this information is to be shared from the very

24 But see Timmsen v. Forest E. Olson, Inc. supra, 6 Cal.App.3d at 871 [“When the acts of an agent have been questioned by his principal and the fiduciary relationship has been established, the burden is cast upon the agent to prove that he acted with the utmost good faith toward his principal and that he made a full disclosure prior to the transaction of all the facts relating to the transactions under attack”]; accord Batson v. Streblow (1968) 68 Cal.2d 662, 675.
The trial court also found that Aaron's conduct was intentional, that he was "trying to circumvent the process, hide the ball," and it stated that "[g]o fish, you figure it out, is not acceptable." (p. 1483 (emphasis added).)

3) Conduct being sanctioned: Was the nondisclosure part of a pattern as opposed to an isolated incident - this requirement is arguably relaxed for a breach that is harmful or prejudicial;

Note: In Feldman, the word “pattern” appears eight (8) times.

Comment: A “pattern” arguably accomplishes two things: First, it demonstrates the forgiving nature of the court, at least for the first breach that involves no harm. Second, a pattern provides context helpful to the court in discerning intent.

4) Amount of sanction: What is the amount of the sanction needed to deter the person from repeating the conduct, given the person’s financial resources; and

5) Question: Will the court require some form of a “meet and confer” where a breach has allegedly already occurred?

f. Defenses

1) Statute of limitations: Section 2107, as revised, contains no statute of limitations. Therefore, do equitable principles apply to determine the timing of a motion under section 2107? (See In re Robert J and Catherine D (2009) 171 Cal.App.4th 1500, 1522 [“We conclude a party seeking sanctions under section 3027.1 should file his or her motion within the time provided in rule 3.1702”].)

2) Moving party not in compliance with 2107 (a): 2107 (c) present a different remedy than 2107 (a) and (b). Hence, it arguably stands on its own. But does the party seeking sanctions under 2107 (c) have to also prove that he/she has satisfied the disclosure requirements of 2107 (a)? Current authorities suggest a yes answer to this

Such a “pattern” is also required for a court order enjoining harassment. That is, a single incident of harassment not involving physical harm does not entitle plaintiff to injunctive relief. (Leydon v. Alexander (1989) 212 Cal.App.3d 1, 4.)

In Feldman, the court of appeal affirmed the trial court’s sanctions, which were supported by a dual finding of a pattern of breaches that were intentional. A question that needs to be decided, however, is whether a trial court’s refusal to award sanctions for an isolated breach or for multiple breaches that were inadvertent (and which caused no harm as in Feldman) would be reversed.

The legislative history to AB 583 contains this language: “An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply.” (emphasis added.) The final version did not include an express statute of limitations, however. The statute of limitations in section 1101 (d) should not apply to a motion under section 2107 (c).
question.  

3) **Substantial justification:** These same words appear in CCP section 2023.030 (a). There, a party is “substantially justified” in refusing discovery and opposing a motion to compel while that party’s motion for a protective order in pending.  

(Foothill Properties v. Lyon/Copley Corona Assocs., L.P. (1996) 46 Cal.App.4th 1542, 1557-1558.) A restraint on disclosure from a source outside of the proceeding, such as a contract or federal law, may also be a “substantial justification” for not disclosing.  

(See In re Marriage of Reuling (1994) 23 Cal.App.4th 1428.)

4) **Unjust:** This term, which also appears in CCP section 2023.030 (a), seems to suggest a financial inability to pay sanctions.

5) **Estoppel:** A fact situation could arguably lend itself to the equitable defense of estoppel.

6) **Unclean hands:** This equitable defense should also be considered even though it was rejected in the egregious facts facing the court in In re Marriage of Rossi (2001) 90 Cal.App.4th 34, 42. “We find nothing in the language of the statute to justify an exception to the penalty provision of section 1101, subdivision (h) because of the supposed unclean hands of the spouse from whom the asset was concealed. Nor are we cited to legislative history which would suggest such an exception.” (emphasis added.)

7) **Waiver:** “Waiver is the intentional relinquishment of a known right after full knowledge of the facts …”  

(DRG/Beverly Hills, Ltd. v. Chopstick Dim Sum Café & Takeout III, Ltd. (1994) 30 Cal.App.4th 54, 59.) “Waiver of rights is rarely permitted. A party claiming waiver of favored statutory rights must prove it by clear and convincing evidence, and doubtful cases will be decided against waiver.”  


The best defense to a duty of disclosure dispute is an offense that reduces the risk of such a dispute from ever arising.

8. **What Actively Can Be Done To Promote Disclosures In Order To Minimize Disputes**

Some thoughtful questions to ponder are:

- Should the managing spouse and his/her advisors be encouraged to formulate a plan of disclosure, including augmentations, as early as when separation is contemplated but no later than the time of separation (see the sample letter to the managing party attached hereto as Exhibit 15)?

- Are there high risk cases, such as those involving a business or tracing?
- How can information be transferred electronically?
- How can information be accessed electronically?
- How can disclosures be efficiently facilitated when there are multiple recipients?
- What role can joint experts or a special master play?

Warning: Remember that the duty of disclosure cannot be delegated. Therefore, compliance with a “plan of disclosure” does not mean the duty has been satisfied. That is, compliance with the plan is not a defense to a non-disclosure of something otherwise within the scope of the duty of disclosure.

The goal of fully disclosing what exists at separation and safely transporting it to the time of distribution is accomplished mostly by the duty of disclosure – the lead mule of fiduciary duty during divorce. But there is one more teammate necessary to get to the finish line - the duty to preserve and protect property from dissipation.

9. Fiduciary Duty To Preserve And Protect Property From Dissipation

a. Overview: Property is not impaired or dissipated in a legal sense by the consensual actions of both parties\(^{28}\). Rather, property can be harmed during divorce only as a result of the unilateral actions on one party. What actions are problematic? Acting alone when \textit{unilateral authority is absent} or acting unreasonably when such \textit{unilateral authority is present}. Conversely, the duty to preserve and protect (or not impair or dissipate) property is satisfied by transferring management decision making to both parties or the court, when the authority to act alone is absent, or acting reasonably, when the authority is present.\(^{29}\) The foregoing is summarized in the following table:

<table>
<thead>
<tr>
<th>OUTCOME:</th>
<th>AUTHORITY OF MANAGING PARTY TO ACT ALONE:</th>
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<tbody>
<tr>
<td></td>
<td>Absent</td>
</tr>
<tr>
<td>Satisfaction</td>
<td>Transfer decisions to both parties or court</td>
</tr>
<tr>
<td>Breach</td>
<td>Act alone</td>
</tr>
</tbody>
</table>

\(^{28}\) The appearance of consent can be vitiated by an improper disclosure that materially influenced the consent, making the decision the product of one party, and thereby subjecting it to the remedies of one party acting alone.

\(^{29}\) Remember that the fiduciary duty has multiple aspects to it, which are sequential to each other. For instance, the managing party may give proper disclosure (such as an intention to sell stock) but still violate the duty to preserve and protect property by proceeding to act alone (such as actually selling the stock).
The dividing line between when the authority to act unilaterally is present and when it is absent is drawn mostly\(^{30}\) by the ATRO’s. As a practical matter, this means that the managing party has more authority to act unilaterally for a business than a non-business asset. Any doubt should be resolved in favor of transferring the risk of decision making to both parties or the court, accompanied with full disclosure.

b. **The duty to preserve and protect assets by transferring management decision making to both parties or the court (because the former authority during marriage to act alone has been restrained by order and revoked by reason)**

1) **Overview:** Divorce is more than an invitation to the non-managing party to show up at the end to fairly distribute what remains of the community estate. Rather, it is also about the many decisions that the non-managing party must participate in along the way to protect and ready the estate for distribution, decisions that the managing party cannot, or would not want to, make alone.

2) **The old authority during marriage to act alone is largely revoked in divorce:** During marriage, the managing spouse has broad authority over community property, akin to a general power of attorney. (Family Code section 1100 (a).) Reason concludes, however, that the death of the marriage likewise means the death of this unilateral authority. And the scrutinizing lights of divorce litigation further chill the managing fiduciary from acting alone.

But the law goes further. It restrains the former unilateral authority conferred during marriage by the powerful combination of restraining orders [*People v. Wallace* (2004) 123 Cal.App.4th 144, 151 [*“the Family Code confers on each spouse ‘absolute power of disposition’ of community personal property until service of a reciprocal temporary restraining order to the contrary (Fam. Code §§ 1100, 2040, subd. (a)(2)”*] and expanded fiduciary duties. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2007) 8.607, p. 8-156.7 [*“expanded fiduciary obligations with regard to management of the community estate are triggered when spouses separate …”*] [emphasis added].)

As to the restraining order (“ATRO”), the first judicial act in every divorce proceeding in California is the issuance of an order “[r]estraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent\(^{31}\) of the other party or an order of the court\(^{32}\), except in the usual

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\(^{30}\) The term “mostly” is used here out of an abundance of caution because there may be a situation where conduct not restrained by an ATRO may be otherwise restrained by an aspect of the fiduciary duty.

\(^{31}\) “Written consent” is also required in section 1100 (b) and (c). A fair question is whether the unilateral disposition of property during divorce violates 2550, which provides that property can be divided only by agreement of the parties or order of the court.
course of business or for the necessities of life . . .” (Section 2040 (a) (2) [emphasis added].)

The Family Law Act “contemplates an equal division of community assets tendered to the court for adjudication. In Civil Code sections 4351 and 4359 [the predecessor to the ATRO in 2040], the Legislature has provided a statutory remedy that allows the courts to preserve assets until an equal division can be accomplished.” (In re Marriage of Van Hook supra, 147 Cal.App.3d at 986 [emphasis added]; In re Marriage of McTiernan & Dubrow (2005) 133 Cal.App.4th 1090, 1103 [ATRO is “designed to preserve the parties' property interests from unilateral disposition”].)

Examples of the broad scope of this order (and of unilateral actions which violate it) are when the managing party during divorce changes an asset from its marital nature or form, such as transferring stock to cash [In re Marriage of McTiernan & Dubrow supra, 133 Cal.App.4th at 1103] or transferring cash to a loan. (In re Marriage of Quay supra, 18 Cal.App.4th at 964, 971-973.)

The ATRO and duty of disclosure work as teammates – the former plays defense by restraining unilateral decision making, thereby out of necessity giving rise to joint decision making, and the latter plays offense by allowing joint decision making to act on a level playing field.

3) Both parties or the court are the new decision makers: The new restraint on the old unilateral authority means, as a matter of necessity, that the new decision makers in divorce are both parties or the court.

4) Joint decision making and full disclosure are inextricably linked together: The expanded, multiple dimensions of the fiduciary duty to initiate full disclosures in divorce, discussed supra, are purposeful – when the parties are called upon to make a decision, neither party will have an advantage of information over the other party:

“[E]ach party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues [“assets and liabilities”], or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts. (Family Code section 2100 (c) [emphasis added].)

32 If the court is inclined to grant relief from the ATRO, it has broad discretion to fashion “adequate safeguards for the other [party].” (Lee v. Superior Court (1976) 63 Cal.App.3d 705, 710.)

33 The “usual course of business” exception is discussed infra.

34 It is not suggested that joint decision making is defined solely by what is unilaterally restrained by the ATRO. That is, unilateral decision making again may be restrained in ways beyond the ATRO.
The “strong policy of ensuring a division of community property … can only be implemented with full disclosure of community, quasi-community, and separate assets, liabilities, income, and expenses, as provided in Chapter 9 (commencing with Section 2100), and decisions freely and knowingly made.” (Family Code section 2120 (a) [emphasis added].)

“[T]he Family Code presumes spouses will have sufficient, accurate information from which informed decisions can be made.” (In re Marriage of Brewer & Federici, supra, 93 Cal.App.4th at 1347 [emphasis added].)

Community property is divided by both owners or the court, not the managing party acting alone. (Section 2550.)

In short, full disclosure and joint decision making are the heads and tail of the same coin. They are the “notice and opportunity” of fiduciary “due process” law. The managing party cannot give full disclosure of an intended action to the other party out of respect, and then proceed to disrespect that party by acting alone as though he/she or the court do not exist or matter.

“A spouse who is unable to obtain the consent of the other spouse is not completely without recourse.” (Droeger v. Friedman, Sloan & Ross (1991) 54 Cal.3d 26, 38 n. 8; In re Marriage of McTiernan & Dubrow supra, 133 Cal.App.4th at 1103 [“husband could have consulted wife, and if she had not agreed to sell he could have sought court approval – ‘but he did neither’”].) In this event, the legislature invites the managing party to petition the court for instructions, as discussed more fully infra.

c. The duty to preserve and protect assets by acting reasonably when the authority to act alone is present

1) Overview: In limited situations, the managing fiduciary has authority to act alone. But this power is not autonomous or immune from liability. Rather, it is encumbered by the duty to act reasonably, where there is a consequence for acting unreasonably.

2) When the authority to act alone is present (mostly in connection with a business)

a) Section 1100 (d): “Except as provided in subdivisions (b) and (c), and in Section 1102, a spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest. Primary management and control means that the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale,

35 In this regard, it is worth noting that the disclosure statutes (2100+) and ATRO’s (2040) are twins of sorts - they enjoy the same birthday, January 1, 1993. (See the timeline in Exhibit 1.)
lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes), whether or not title to that property is held in the name of only one spouse. Written notice is not, however, required when prohibited by the law otherwise applicable to the transaction.” (emphasis added.)

b) Section 2040 (a) (2): The ATRO excepts “the usual course of business” from its reach. (Section 2040 (a) (2) [both parties are restrained “transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life”].)

But the “usual course of business” exception in 2040 applies to a business for financial gain. (In re Marriage of Gale (2004) 122 Cal.App.4th 1388, 1393 [“Management VI is a bona fide business entity … whose business it is to hold and manage property”]; accord (In re Marriage of McTiernan & Dubrow supra, 133 Cal.App.4th at 1103, n. 9 [the “usual course of business” exception does not apply because the managing party “had always managed the community property. Such a construction would nullify the plain purpose of the statutory restraining order”].)

Warning #1: The “usual course of business” is an exception to the ATRO. It is not an exception to the duty of disclosure. (See In re Marriage of Feldman supra, 153 Cal.App.4th at 1492.)

Warning #2: The authority to act alone does not excuse the acting party from his/her duty to act reasonably.

3) The managing party’s authority to act unilaterally is subject to the standard of reasonableness: A fiduciary managing property that is the subject of pending litigation must behave as a reasonable fiduciary would behave under the same or similar circumstances. For example, an “executor could be held liable for negligence if it failed to exercise the skill and knowledge ordinarily possessed by such professional fiduciaries.” (Estate of Gerber supra, 73 Cal.App.3d at 110.) “It is the duty of the personal representative to collect estate assets and preserve them until distribution … He is accountable for all of the decedent’s estate that comes into his possession and is chargeable with the losses resulting from his default or neglect.” (Id. at 109; see also Timmsen v. Forest E. Olson, Inc. supra, 6 Cal.App.3d at 871 [“An agent who violates his duty to use reasonable care, skill, and diligence is liable for any losses which his principal may sustain as the result of his negligence or breach of duty”].)

Family Law recognizes the standard of care during a divorce proceeding. “It is the policy of the State of California … to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid
dissipation of the community estate before distribution …” (Family Code section 2102 (a).) Therefore, when property is dissipated, wasted, or impaired during the pendency of a divorce, the managing spouse will be charged with loss that is a result of his actions falling short of the fiduciary standard.

<table>
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<tr>
<th>Case</th>
<th>Nature Of Breach “During Divorce”</th>
<th>Consequence</th>
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<tbody>
<tr>
<td><em>In re Marriage of Hokanson</em></td>
<td>Wife lived in home listed for sale by court order; she breached her fiduciary duty by “withholding information from her spouse and acting in a dilatory manner” while the value of the asset [the home where she lived] decreased.” (<em>In re Marriage of Duffy,</em> supra, 91 Cal.App.4th at 940 [emphasis added].)</td>
<td>Wife charged with the loss that would not have occurred had she not concealed or acted dilatory.</td>
</tr>
<tr>
<td><em>In re Marriage of Quay</em></td>
<td>Husband’s “making a loan, based on friendship, to a company whose financial situation was uncertain are not the hallmarks of a prudent fiduciary.”</td>
<td>Husband awarded the entire note at the face value of $980,000, even though there was no evidence of the actual value of the loan, if any.</td>
</tr>
<tr>
<td><em>In re Marriage of Czapar</em></td>
<td>“William was guilty of wasting community assets by his actions in managing ACE and of violating the standard of care owed to Phyllis [relating to disbursements for a car, charity, and hiring of girlfriend].” (emphasis added.)</td>
<td>Husband ordered to reimburse the community.</td>
</tr>
</tbody>
</table>
Just as the foregoing courts were equipped to decide what is “dilatory”, what are the “hallmarks of a prudent fiduciary”, and what amounts to “wasting community assets”, the court is likewise equipped to deal with what is “unreasonable.” Section 2108 empowers the court “to order the liquidation of community or quasi-community assets so as to avoid **unreasonable** market or investment risks …” (emphasis added.) Thus, family law judges are empowered to decide questions of “reasonableness” and “unreasonableness.”

4) **Examples of breach**

   a) **Failure to renew business lease - In re Marriage of Munguia** (1983) 146 Cal.App.3d 853, 859: “[H]usband's fiduciary duty to maximize the value of the Wagon Wheel by securing a continuation of the lease… At oral argument counsel for husband stated that… as of the present time husband has not entered into a renewed lease…. Upon remand the trial court should determine whether the lease has been renewed. If so, it should revalue the property, taking this factor into account. If not, it should determine whether this is due to husband's intentional mismanagement or negligence, and if that is the case, this too should be taken into account in re-determining the value of the Wagon Wheel.”

   b) **Unreasonable business expenditures – In re Marriage of Czapar supra**, 232 Cal.App.3d at 1317-1318: William, who as manager of the business ACE, had authority under 1100 (d) to make disbursements, was found “guilty of **wasting community assets** by his actions in managing ACE and of **violating the standard of care** owed to

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36 Does this argument conflict with Corp. Code section 16404 (c), which provides: “A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law”? (emphasis added.) A preliminary question is whether “winding up” is synonymous with “dissolution.” If yes [see section 16801], one might argue that 16404 (c) establishes the standard of care during marriage as well as dissolution of marriage. But while this subsection is clearly applicable to marriage by 721 (b), because of SB 1936 (effective January 1, 2003), and is clearly the new standard of care during marriage, the real question is whether it was also intended to overrule the existing standard of care during divorce. No. First, dissolution of marriage is materially different than dissolution of partnership. For instance, the former is governed by ATRO’s and expanded fiduciary duties whereas the latter is not. Second, the reasonableness standard of care was recognized by the courts as the standard in divorce before SB 1936. Third, SB 1936 was intended to create a standard of care during marriage (because per Duffy, it did not exist), not defeat the existing standard of care cases for breaches during divorce. Fourth, by virtue of section 771, there arguably is no continuing business to which the business judgment rule, as codified in subsection 16404 (c), applies (which effectively immunizes negligence from liability). And fifth, risk of gain (and therefore of corresponding loss) is permitted during marriage and therefore, negligence is tolerated (because gross negligence is the standard). However, risk tolerance changes in divorce. The end is in sight. The estate is being readied for distribution. To this end, preservation and protection is mandated [2100 (a)], and thus, negligence (or unreasonable risk), tolerable during marriage, becomes intolerable in divorce.
Phyllis [relating to disbursements for a car, charity, and hiring of girlfriend during divorce”] (emphasis added).

c) **Unreasonable loan** – *In re Marriage of Quay* supra, 18 Cal.App.4th at 964, 972: Assume that the loan made by Mr. Quay was in the ordinary course of business and was not “extraordinary”, and therefore, was not in violation of a court restraining order; however, the outcome arguably would not have changed because of the court’s critical finding that “making a loan, based on friendship, to a company whose financial situation was uncertain are not the hallmarks of a prudent fiduciary.” (emphasis added.)

5) **Example of compliance**: In *In re Marriage of McTiernan & Dubrow* supra, 133 Cal.App.4th at 1090, assume the stock sold by husband was in the ordinary course of business and therefore, did not violate the ATRO or 1100 (d). Further assume that other fiduciaries sold the same stock at the same time. Under such circumstances, it would be difficult to charge husband with the loss.

d. The legislature invites either party to petition the court for instructions: In the fog of divorce, the parties may not be able to agree on what to do, even with full disclosure. This is why courts exist – to resolve disputes the parties cannot otherwise resolve on their own. In such situations, the legislature gives instructions on how to seek guidance from the court.

1) **Excuse ATRO**: In particular, the sweeping scope of the ATRO is excused, if written consent cannot be gained, by “order of the court.” (2040 (a) (2) [emphasis added].) This order presumably requires a showing of good cause that the proposed action more likely than not will “preserve and protect” the estate.

2) **Avoid unreasonable risks**: Section 2108 further provides:

At any time during the proceeding, the court has the authority, on application of a party and for **good cause**, to order the liquidation of community or quasi-community assets so as to avoid **unreasonable** market or investment risks, given the relative nature, scope, and extent of the community estate. However, in no event shall the court grant the application unless, as provided in this chapter, the appropriate declaration of disclosure has been served by the moving party. (emphasis added.)

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37 Would the breach during divorce relating to the management of the business been mooted had the court also found that the business should have been valued at the date of separation?

38 This statute raises interesting questions: For example, does the managing party, who has notice of risks that may be “unreasonable”, have an affirmative duty to ask the other party or the court for consent to a proposed action to lessen these risks? And if the managing party does nothing, and the non-managing party, who has knowledge of the same risks, does nothing either, can the latter successfully sue the former if the risks materialize and value is lost?
Section 1101 (e), a “spouse” statute, provides relief when the dispute arises during marriage. But the requirement of “[c]onsent has been arbitrarily refused” arguably does not apply to divorce, where the more specific “party” statutes apply. For example, this high standard is not required for a court order in section 2040 (a) (2). If section 1101 (e) does apply in divorce, the “consent arbitrarily refused” arguably should be softened to “unreasonably refused.” (Sections 1101 (e), 2108, and 2040 (a) (2) are set forth in full in Exhibit 16.)

The court has broad authority to preserve and protect property tendered to it in divorce. Therefore, sections 2108 and 2040 (a) arguably are not the exclusive vehicles for petitioning the court for instructions.

The moving party has the burden of proof. (Evidence Code sections 115 and 500.) For example, if the party managing a business during divorce requests an infusion of personal cash into the business, that party arguably bears the burden of showing “good cause” that the infusion will preserve and protect not just the business but the overall estate, of which both the business and cash are a part.

The responding party, typically the non-managing party, cannot play neutral here. His/her response must likewise be pleasing to the fiduciary standard, as discussed more particularly infra.

The judge hearing the motion conceivably could make two types of orders: Decide the dispute in such a manner that either party is effectively immunized from later attack – that is, the same as if both parties consented. Alternately, the judge could decide the dispute but reserve to the trial court the question whether either party breached his/her fiduciary duty to preserve and protect property or liabilities by acting unreasonably.

In general, the court has broad discretion to fashion “adequate safeguards” [Lee v. Superior Court (1976) 63 Cal.App.3d 705, 710] for the protection of each party – to the moving party should the court deny the motion and to the responding party should the court grant it.

10. Remedies For Mismanagement – Short Of Breach And Amounting To Breach Of The Fiduciary Duty To Preserve And Protect

a. Overview: The managing party may choose to defeat his/her interest in property but cannot defeat the other party’s interest. To this end, the court has broad remedies for mismanagement during divorce – the discretionary (“may”) remedy of 2552 and the mandatory (“shall”) remedies in 1101 (g) and (h).39

39 The set-aside remedies in 2107 and 2120+ are not discussed.
b. The court’s broad discretion (“may”) under 2252 for mismanagement generally (that is, for conduct not amounting to breach of fiduciary duty)

1) Statute: Family Code section 2552 provides:

(a) For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties, except as provided in subdivision (b), the court shall value the assets and liabilities as near as practicable to the time of trial.

(b) Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner. (emphasis added.)

2) Interpretation of statute: Section 2552 became law long before the fiduciary statutes were passed in 1992. Enacted in 1976, it “was designed to remedy certain inequities: one is the situation which results when either spouse dissipates the community estate after separation …” (In re Marriage of Barnert (1978) 85 Cal.App.3d 413, 423 [emphasis added]; see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2007) 8.1383, [section 2552 (b) “is properly utilized where community property is damaged, destroyed or declines in value during the post-separation period because of a spouse’s mismanagement”].) Therefore, section 2552 provides a discretionary remedy for unilateral actions during divorce not amounting to breach of fiduciary duty.

3) Time frame for valuing mismanaged assets: Section 2552 (b) gives the court discretion, upon a showing of good cause, to value an asset “at a date after separation and before trial . . .”

c. The general characteristics or nature of a breach of fiduciary duty

1) Intent irrelevant for constructive fraud, relevant for actual fraud

a) Constructive fraud – damages (1101 (g)): For breach of fiduciary duty, the focus is on what was done which should not have been done, or what was not done which should have been done. The why or motive behind the action or inaction is irrelevant. That is, bad intent is not an element and the noblest of intention is no defense. This is why breach of fiduciary duty is called

40 While a breach of fiduciary duty elevates the “may” in 2552 to a “shall” in 1101 (g), this latter subsection limits the court in measuring damages to three dates, as discussed supra. But the same breach facts, when viewed through Civil Code section 3333, which arguably comes within the broad scope of the “including but not limited to” language of 1101 (g), gives the court the authority to measure damages at any time from the date of separation to the date of distribution.
constructive fraud. (See more particularly the points and authorities attached as Exhibit 17.) When it is committed, the harmed party is entitled under 1101 (g) to be placed in the same position had the breach not been committed, as discussed infra.

b) Actual fraud or malice – damages doubled (1101 (h)): When the breach is accompanied by actual fraud or malice, however, the damages under 1101 (g) are doubled. (1101 (h); see also Exhibit 17.)

2) Non-breaching party protected both ways: A cardinal principle of fiduciary law is that when there is a breach, the “benefits belong to the beneficiaries and the burdens to the trustee.” (Moeller v. Superior Court (1997) 16 Cal.4th 1124, 1134.) Thus, when property appreciates following a breach of fiduciary duty, the beneficiary is entitled to share in the appreciation.41 (Strebels v. Brenlar Investments, Inc. (2006) 135 Cal.App.4th 740, 750

Conversely, where the community has lost value following a breach during divorce, the lost value is charged solely to the breaching spouse (and there is no case to the contrary). (In re Marriage of McTiernan & Dubrow supra, 133 Cal.App.4th at 1102-1103 [husband charged with the value lost to the community for selling stock during divorce that thereafter substantially increased in value]; In re Marriage of Hokanson supra, 68 Cal.App.4th at 991 [wife charged with the lost value as a result of her “dilatory” conduct in selling a home during divorce]; In re Marriage of Quay supra 18 Cal.App.4th at 971-973 (husband charged, dollar for dollar, with the money he loaned a friend during divorce even though the loan was in default, and therefore, was worth less than its face value, if it had any value at all].)

“These two rules [on how to allocate burdens and benefits as a result of breach], taken together, are prophylactic: they discourage trustees from abusing their trusts, because they know that the upside will go to the cestui and the downside will stay with them.” (Chodos, The Law Of Fiduciary Duty (2000), p. 348.)

3) Harmless error rule does not apply: The harmless error rule has found favor only in the dissent in Vai v. Bank of America supra, 56 Cal.2d at 352 (plaintiff wife “would have entered into the contract even had she been informed of the offer [husband did not disclose in violation of his fiduciary duty]”), where it has remained ever since.

d. The court’s mandate (“shall”) is to measure damages resulting from breach of fiduciary duty under section 1101 (g) or Civil Code section 3333, whichever is greater (but only to the extent section 3333 is accepted as part of the “including but not limited” remedy in 1101 (g))

1) The “including but not limited to” language confers on the court broad authority in the event of breach: Family Code section 1101 (g) provides in relevant part:

41 And would be entitled to 100% of the gain if the breach was fraudulent or malicious.
Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. (emphasis added.)

The words “including but not limited to” have been construed to mean terms of illustration, not limitation. (In re Marriage of Walker (2006) 138 Cal.App.4th 1408, 1424, 1426; In re Marriage of Duffy supra, 91 Cal.App.4th at 939.) Thus, for breach of fiduciary duty not involving fraud or malice, the remedies in section 1101 (g) are not exclusive. Rather, such breaches are also entitled to the protections of the broad measure of damages in Civil Code section 3333.

Practice Pointer: The “including but not limited to” language in a mandatory remedial statute confers on the court broad discretion to fashion a remedy, limited only by the rules of statutory construction and constitutional due process. Accordingly, do not allow your client to be put in a position where the court’s imagination is tested here.

For example, in the unpublished case of In re Marriage of Carrino and Camino (1st dist. August 18, 2009) A119681, husband managed an investment fund. He disclosed that this asset was worth $4 on September 1. (The actual numbers are simplified for this illustration.) On November 1, the parties agreed to award the asset to husband in exchange for an equalizing payment to wife of $2. But in the intervening two months, market forces caused the asset to increase in value from $4 to $6, which husband did not disclose. The dispute was the appropriate remedy. Husband contended that the appropriate remedy for his breach of the duty of disclosure (assuming he committed it, which the court found he did) was to vacate the entire judgment awarding the asset to him. Wife disagreed. She argued that the appropriate remedy was for the court to reform the agreement to increase the equalizing payment from 2 to 3. The trial court agreed with wife, and the court of appeal affirmed.

2) Measurement of damages under section 1101 (g)

a) AB 583 changes to 1101 (a): AB 583 expanded the scope of the penalty provisions in 1101 (g) to “any breach” (for example, to include an impairment resulting from a breach of the duty of disclosure).

1101 (a) A spouse has a claim against the other spouse for any breach of the fiduciary duty imposed by Section 1100 or 1102 that results in impairment to the claimant spouse's present undivided one-half interest in the community estate….

42 Notice the requirement of causation – that is, the impairment must be caused by the breach.
- **Legislative intent:** “This bill would expand the fiduciary duties subject to remedies for breach under this section to include *any fiduciary duty between spouses.*” (emphasis in original.)

- **Definition of impairment:** Loss of actual value or the opportunity for gain as a result of a party’s breach of any fiduciary duty.

b) **AB 583 changes to 1101 (g):** AB 583 increased the penalties for “any breach” as well:

   (g) Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney’s fees and court costs. However, in no event shall interest be assessed on the managing spouse. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court.

c) **Legislative intent:**

   - “[T]he intent of the bill is ‘to prevent deceptive, dilatory and fraudulent activity by a party *during the dissolution of marriage*.’” (emphasis added.)

   - “[T]he bill’s intent [is] to *increase* penalties for noncompliance with the disclosure laws …” (emphasis added.)

   - “The bill’s proposed valuation of assets for Section 1101 penalties clearly intends to apply an appropriate penalty for the nondisclosure or *mismanagement of an asset* or potential asset, such as property, stocks, or an investment opportunity, *that may have decreased in value by the time its existence is discovered or a court award is made.* [See, e.g., In re Marriage of Hokanson (1998) 68 Cal.App.4th 987].” (emphasis added.)

d) **AB 583 protects the non-breaching spouse both ways (and conversely, burdens the breaching spouse both ways):** If the asset goes up in value following the breach, the non-breaching spouse shares in the appreciation (by awarding it to the breaching party and awarding offsetting value to the non-breaching spouse).43 Conversely, if the value goes down, the breaching party who

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43 This was the case in *In re Marriage of McTiernan & Dabrow supra,* 133 Cal.App.4th at 1102-1103. But under AB 583, husband would have been charged with the appreciated value of the stock at the time of trial, which was a higher value than he was charged with.
acted alone is alone charged with the loss as though it did not occur (and the non-breaching spouse receives offsetting value from existing assets). Simply, the non-breaching spouse shall be placed in a financial position no worse than the value of the asset at the time of breach.

e) The cases decided before AB 583 establish the floor; new AB 583 cases merit remedies somewhere north of this floor: AB 583 increased the penalties over the existing law as of January 1, 2002. The existing law included Quay, McTiernan, and Hokanson. Therefore, the new cases coming under AB 583 deserve remedies the same as, and arguably greater than, the remedies granted in these cases.

3) Measurement of damages under Civil Code section 3333

   a) Statute: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, *whether it could have been anticipated or not.*” (Civil Code section 3333 [emphasis added].)

   b) Interpretation: In cases involving breach of fiduciary duty, “the ‘broader’ measure of damages provided in sections 1709 and 3333 applies.” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1241; accord *Strebel v. Brenlar Investments, Inc. supra*, 135 Cal.App.4th at 747.) “There is no fixed rule for the measure of tort damages under Civil section 3333. The measure that most appropriately compensates the injured party for the loss sustained should be adopted.” (Ibid. at 749.) Any uncertainty is resolved against the fiduciary whose faithlessness caused it. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 46; *Clemente v. State of California* (1985) 40 Cal.3d 202, 219.)

   c) Time frame for measuring damages: The courts have consistently used a date to calculate damages most generously to the beneficiary. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 568 [at the higher amount when the beneficiary discovered the breach instead of the lower amount when the breach was committed]; *Strebel v. Brenlar Investments, Inc. supra*, 135 Cal.App.4th at 750-751 [beneficiary entitled to share in appreciation following the breach]; *Estate of Anderson* (1983) 149 Cal.App.3d 336, 355 [“what constitutes making ‘good’ the loss may vary according to the circumstances”].)

   d) Summary: In 1101 (g), the court is limited to three dates. But in Civil Code section 3333, the court is not so limited.

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44 This was the outcome in *In re Marriage of Quay supra*, 18 Cal.App.4th at 971-972.
e. The court’s mandate (“shall”) under section 1101 (h) is to double damages measured under section 1101 (g), when the breach is accompanied by fraud or malice

1) Statute: “Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.” (Family Code section 1101 (h) [emphasis added].)

2) Interpretation: Civil Code section 3294 defines “malice” as “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (emphasis added.) “These elements may be proven directly or by implication.” (Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal.3d 785, 792.) Concealing facts (breaching the duty of disclosure) can amount to a conscious disregard of the rights of a co-owner of property. (In re Marriage of Rossi supra, 90 Cal.App.4th at 42; see also In re Marriage of Murray (2002) 101 Cal.App.4th 581, 600-604.)

f. Other remedies for breach of fiduciary duty

1) Attorney fees: Attorney fees are mandatory for constructive fraud under 1101 (g) [In re Marriage of Hokanson supra, 68 Cal.App.4th at 993] but discretionary for actual fraud under 1101 (h). (In re Marriage of Rossi supra, 90 Cal.App.4th at 42.)

2) Prejudgment interest: AB 583 eliminated the former language in section 1101 (g), which prohibited the court from awarding prejudgment interest for breach of fiduciary duty. In this regard, under Civil Code section 3287, subdivision (a), prejudgment interest is allowable on damages that are “certain, or capable of being made certain by calculation.” When the requirement of certainty of damages is met, prejudgment interest is allowable under subdivision (a) as a matter of right. (Wisper Corp v. Cal. Commerce Bank (1996) 49 Cal.App.4th 948, 965.)

Civil Code section 3288 further provides: “In action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury.” (Italics added.) Thus, unlike the prejudgment interest awarded as a matter of right under Civil Code section 3287, subdivision (a), prejudgment interest awarded under section 3288 is discretionary. (Michelson v. Hamada (1994) 29 Cal.App.4th 1566, 1579-1582.)

“When, by virtue of the fraud or breach of fiduciary duty of the defendant, a plaintiff has been deprived of the use of his money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary in order to make the plaintiff whole. It is for this reason that it is proper to have such interest run from the time the plaintiff parted with the money or property on the basis of the defendant’s fraud.” (Baker v. Pratt (1986) 176 Cal.App.3d 370 citing Nordahl v. Department of Real
Estate (1975) 48 Cal.App.3d 657, 665; see also Chazan v. Most (1962) 209 Cal.App.2d 519, 524 ["The fact that the amount due was then unliquidated was due solely to defendant's failure to keep proper books of account and to make a proper accounting to his partner. The law does not permit a defendant thus to profit by his own default. Where the accounting and distribution of partnership assets are delayed through the fault of the partner having possession, interest may be allowed from the date when the balance should have been ascertained and paid over"] [emphasis added].)

g. Table summarizing remedies: The foregoing remedies are summarized in the table attached as Exhibit 18.

11. Vital Questions That Need To Be Answered Regarding The Non-Managing Party

a. Overview: Much of the “fiduciary focus” is on the managing party, as it should be – superior position translates to superior accountability. But there are important questions facing the non-managing party, perhaps never asked and clearly not yet answered. These questions arguably include but are not limited to the following:

b. What are the duties of the non-managing party during divorce?

1) Disclosure duty: The non-managing party is subject to the same disclosure standards as the managing party.

2) Management duty regarding preservation and protection: The non-managing party has no duty to prevent the managing party from breaching his/her fiduciary duty to preserve and protect property from dissipation. But this hardly means that this party may maintain a position of stealth, neutrality, or passivity throughout the proceeding.

To the contrary, the non-managing party, when called upon, must also affirmatively act like a fiduciary. This calling is not limited to participating in how to divide what remains in the end. Rather, during the proceeding, some action may be required where the managing party may be unable to act alone, either by the restraint of an order or the chill of reason.

In such circumstances, the non-managing party will be asked, following full disclosure, to consent to or oppose the course of action that the managing party believes will best “preserve and protect” assets or liabilities in furtherance of section 2100 (a). This arguably places the non-managing party in a position of “management” within the meaning of section 1100 (e), and thereby subjects the non-managing party to the same

45 Subsection 1100 (e) provides in relevant part: “Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court.” (emphasis added.)
fiduciary duty to act reasonably as the managing party – that is, how a reasonable fiduciary would act or not act under the same or similar circumstances.46

Acting reasonably is no guarantee of protection and preservation. Therefore, the test of reasonableness is not whether the estate thereafter experiences loss, either actual or the loss of an opportunity for gain. Rather, the test is whether each party acted reasonably at the time, based on a careful reading and analysis of what was disclosed. And there admittedly may be situations where both parties acted reasonably, even though they took conflicting positions.

c. How should the non-managing party be counseled regarding allegations of breach of duty by the managing party?

1) What not to do: The non-managing party must exercise self-control here and not allow his/her emotions to default to an automatic claim of breach of duty. And attorneys have been trained to walk forward, not backward.

2) What to do: Complex and serious issues are likely involved. Therefore, the non-managing party and his/her attorney must discipline themselves to answering the key questions, including but not limited to the following:

- Can she/he sustain her burden of proving breach?
- What defenses, if any, does the breaching party have?
- Should the breach be viewed in isolation – that is, detached from the other issues and assets of the case (monoscopically) or in context with the other issues and assets (stereoscopically aka the “Judge Ashworth” school)?
- Under what circumstances should the non-managing party be advised to seek a second opinion?
- Is third party expertise required?
- Are there bad emotions between the parties or the attorneys that should be considered (in the sense that such emotions may color judgment or detract from an objective discussion of the pertinent issues)?

46 In In re Marriage of Burkle (2006) 139 Cal.App.4th 712, the court wrote: “The distinction between the two types of fiduciary relationship—trustee-beneficiary on the one hand, and spouses or business partners on the other—is entirely reasonable, because in the latter fiduciary duties run in both directions.” (emphasis added.) But this statement was made in the context of an alleged breach of the confidential relationship. And it is not clear what the court meant when it wrote that “fiduciary duties run in both directions.”
- Who is the judge?
- At what stage is the proceeding?
- Should the claim be prosecuted separately, before trial, or together with all issues, at trial?

12. Concluding Remarks

a. **To attorneys:** The foregoing is summarized in the following chart:

<table>
<thead>
<tr>
<th>DUTY</th>
<th>BREACH</th>
<th>AUTHORITIES</th>
<th>PRIMARY REMEDY (IES)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manage</td>
<td>“Good cause”</td>
<td>2552 (b)</td>
<td>Harmless</td>
</tr>
<tr>
<td>Disclose</td>
<td>Non-disclosure of material facts</td>
<td>2100+, 2040, Feldman, Brewer, Hokanson</td>
<td>2107 (c) (sanctions/fees)</td>
</tr>
<tr>
<td>Preserve/Protect</td>
<td>Act alone when not authorized to act alone</td>
<td>1100 (e), 2040 (ATRO), 2100, McTiernan, Quay, Hokanson</td>
<td>No 1101(g) or damages x 2 (1101 (h))</td>
</tr>
<tr>
<td></td>
<td>Act unreasonably when authorized to act alone</td>
<td>1100 (e), 2100 (a), Czapar, Munguia, executor cases</td>
<td>No 1101(g) or damages x 2 (1101 (h))</td>
</tr>
</tbody>
</table>

b. **To managing party:** Sample letter is attached as Exhibit 15.

c. **To non-managing party:** Sample letter is a work in process.
To judges: How judicial discretion and remedies are influenced by harm and state of mind is illustrated in the following table:

<table>
<thead>
<tr>
<th>Harm From Breach</th>
<th>State Of Mind Of Breaching Party</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unintentional</td>
</tr>
<tr>
<td></td>
<td>Intentional</td>
</tr>
<tr>
<td>Harmless</td>
<td>Remedy #1</td>
</tr>
<tr>
<td></td>
<td>Remedy #2</td>
</tr>
<tr>
<td>Harmful</td>
<td>Remedy #3</td>
</tr>
<tr>
<td></td>
<td>Remedy #4</td>
</tr>
</tbody>
</table>

- Remedy #1: Discretion to do something
  - Remedy example: 271 fees
- Remedy #2: Mandate to do something
  - Remedy example: 2107 (c) sanctions
- Remedy #3: Discretion or mandate to do something greater
  - Remedy examples: 2552 (alt. val.), 1101 (g)
- Remedy #4: Mandate to do the greatest
  - Remedy example: 1101 (h)

Note: This progression of #1 to #4 is inclusive in the sense that a breach meriting the remedy in #2 also gives the court the remedy in #1 and so forth. The examples are illustrative, not exhaustive. Contempt as a remedy is excluded because of its criminal or quasi-criminal nature.

e. Final words of hope: Justice (later Chief Justice) Stone commented early last century: “I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that ‘a man cannot serve two masters.’” (Scott, The Fiduciary Principle (1949) 37 Cal. L. Rev. 539, 555 [emphasis added].) It is hoped that a more favorable history will be written about family law litigation in California, namely, that it will experience success, not failure, in observing this same principle.

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47 This table is adapted from an idea that originated with Mark Gloven, Esq.
# Timeline of The Legislature’s Expanding Scope Of The Fiduciary Duty And The Increasing Penalties For Violating It

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1975</td>
<td>Husbands, who had sole management and control of marital property, held to a fiduciary management standard</td>
</tr>
<tr>
<td>1975</td>
<td>Either spouse awarded management and control of marital property, resulting in the management standard being reduced from “fiduciary” to “good faith”</td>
</tr>
<tr>
<td>January 1, 1993</td>
<td>In divorce, the Legislature imposes on the parties the duty to make full disclosure, in addition to the duty to respond to discovery requests (Family Code §§ 2100 et seq. [emphasis added].) “Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.” (Family Code § 2100 (b) [emphasis added].) The managing party’s duty to make full disclosure is activated “without prodding” from the non-managing party whereas discovery is “upon request”. (In re Marriage of Feldman supra, 153 Cal.App.4th at 1488.)</td>
</tr>
</tbody>
</table>

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1 In the legislative history to SB 1936, effective January 1, 2003 (and discussed infra), the reformers behind the 1975 amendment awarding either party management and control admit “that discarding the fiduciary standard between marital partners had been a mistake …” Therefore, the legislature’s remedy in SB 1936 was to restore the fiduciary standard of care to the managing spouse during marriage, which the court in In re Marriage of Duffy (2001) 91 Cal. App.4th 923 found was lacking in the 1992 amendment from good faith to fiduciary duty.
January 1, 1993  Automatic Temporary Restraining Orders (“ATRO’s”) are granted in every divorce case upon issuance of the Summons. (Family Code § 2040.) The order restraining property has two commands:

**Negative injunction:** Both parties are restrained “from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life …” (Family Code § 2040 (a) (2).)

**Positive injunction:** Each party shall “notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures …” (Ibid.)

January 1, 2002  AB 583, effective January 1, 2002, made breach of “any” fiduciary duty subject to section 1101 penalties, and increased the penalties as well

**Legislative intent in general:**

“[T]he intent of the bill is ‘to prevent deceptive, dilatory and fraudulent activity by a party during the dissolution of marriage.’”

“[T]he bill’s intent [is] to increase penalties for noncompliance with the disclosure laws …”

“The bill’s proposed valuation of assets for Section 1101 penalties clearly intends to apply an appropriate penalty for the nondisclosure or mismanagement of an asset or potential asset, such as property, stocks, or an investment opportunity, that may have decreased in value by the time its existence is discovered or a court award is made. [See, e.g., In re Marriage of Hokanson (1998) 68 Cal.App.4th 987].” (emphasis added.)

January 1, 2003  SB 1936 amended section 721 (b) to incorporate Corporation’s Code section 16404 as the standard of care during marriage, to remedy the holding in In re Marriage of Duffy (2001) 91 Cal. App.4th 923, which found no duty of care. Subsection 16404 (c) provides: “A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”

Timeline of The Legislature’s Expanding Scope Of The Fiduciary Duty
And The Increasing Penalties For Violating It
FLOW CHART OF FIDUCIARY DUTY
DURING DIVORCE

**Relationship**
- Fiduciary
- Confidential

**Timing**
- During Marriage
- During Divorce

**Duties**
- Full Disclosure
- Augment
- When Can't Act Alone: Transfer Decision Making To Both Parties Or The Court

**Compliance**
- Full Disclosure, Without Demand
- Augment
- When Can Act Alone: Act Reasonably

**Breach**
- Less Than Full Disclosure
- Failure To Augment
- Act Alone
- Act Unreasonably

*The dividing line between when the authority to act unilaterally is present and when it is absent is drawn mostly by the ATRO’s. The term “mostly” is used here out of an abundance of caution because there may be a situation where conduct not restrained by an ATRO may be otherwise restrained by an aspect of the fiduciary duty.*
## Interests, Policies, And Duties During Marriage Versus Divorce

<table>
<thead>
<tr>
<th>Topic</th>
<th>During Marriage</th>
<th>Following Separation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Owners’ Interests:</td>
<td>Converge</td>
<td>Diverge</td>
</tr>
<tr>
<td>Public Policy:</td>
<td>Promote marriage</td>
<td>Promote non-adversarial divorce and safety from dissipation</td>
</tr>
<tr>
<td>Statutes:</td>
<td>“Spouse” to a marriage</td>
<td>“Party” to a divorce proceeding</td>
</tr>
<tr>
<td>ATRO’s (+ and -):</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Disclosures:</td>
<td>Mostly “upon request”, but some “without demand”(^1)</td>
<td>No “upon request” language; therefore, all “without demand”</td>
</tr>
<tr>
<td>Decision Makers:</td>
<td>Managing spouse</td>
<td>Both owners or court</td>
</tr>
<tr>
<td>Management Risks:</td>
<td>Risks of gain permitted</td>
<td>Preservation of assets mandated</td>
</tr>
</tbody>
</table>

\(^1\) The “upon request” language for a “spouse” appears in 721 (b) and 1100 (e), and the “without demand” language for the same “spouse” appears in Corp. Code 16403 (c) (1), which is incorporated into 721 (b). But the “without demand” language in subsection 16403 (c) (1) appears inconsistent with the “shall furnish” language in 16403 (c). That is, how can a partner be accused of breaching his/her “shall furnish” duty when there is no demand from the other partner. Perhaps the “shall furnish” means “[t]he right of access”, which is the language with which section 16403 begins. But even this right, in practice, would be preceded typically by some form of a request, however informal.
Respect

"Party" Statutes

Safe Transport Of Assets

Proceeding With Minimal Adversity

Preservation And Protection From Dissipation

Full Disclosure

Failure To Augment

Act Unreasonably With Authority To Act Alone

Less Than Full Disclosure

Augment As To Material Changes

Act Reasonably

Full Disclosure, Without Demand

Transfer Management Decisions To Both Parties Or Court

Act Alone With No Authority To Act Alone

General Duty

New Statutes

New Policies

New Duties

Breach

Compliance

Triangle Of Fiduciary Respect During Divorce

Divorce
Breadth Of Assets/Liabilities That Must Be Disclosed

2100 (c)

“a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest” 2100 (c)

2102 (a)

“The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation”

2104 (c) (1)

“The identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability”

2105 (b)

(1) All material facts and information regarding the characterization of all assets and liabilities.

(2) All material facts and information regarding the valuation of all assets that are contended to be community property or in which it is contended the community has an interest.

1100 (e)

“all assets in which the community has or may have an interest”
Redline Changes To 2102 Per AB 583, Effective January 1, 2002

(a) From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the property and support rights assets and liabilities of the other party, including, but not limited to, the following activities:

(a1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes.

(b2) The accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive. The written disclosure shall be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity. In the event of nondisclosure of such an investment opportunity, the division of any gain resulting from that investment opportunity is governed by the standard provided in Section 2556.

(e3) The operation or management of a business or an interest in a business in which the community may have an interest.

(b) From the date that a valid, enforceable, and binding resolution of the disposition of the asset or liability in question is reached, until the asset or liability has actually been distributed, each party is subject to the standards provided in Section 721 as to all activities that affect the assets or liabilities of the other party. Once a particular asset or liability has been distributed, the duties and standards set forth in Section 721 shall end as to that asset or liability.

(c) From the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees, each party is subject to the standards provided in Section 721 as to all issues relating to the support and fees, including immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party. (Am Stats 2001, C703)

[NOTE: Section 8 of AB583 (Chapter 703) states: "This act shall apply to any judgment that becomes final on or after January 1, 2002." ]

Redline Changes To 2102 Per AB 583, Effective January 1, 2002
Section 721

(a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.

(b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:

(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.

(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property.
Section 2102

(a) From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including, but not limited to, the following activities:

1. The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes.

2. The accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive. The written disclosure shall be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity. In the event of nondisclosure of an investment opportunity, the division of any gain resulting from that opportunity is governed by the standard provided in Section 2556.

3. The operation or management of a business or an interest in a business in which the community may have an interest.

(b) From the date that a valid, enforceable, and binding resolution of the disposition of the asset or liability in question is reached, until the asset or liability has actually been distributed, each party is subject to the standards provided in Section 721 as to all activities that affect the assets or liabilities of the other party. Once a particular asset or liability has been distributed, the duties and standards set forth in Section 721 shall end as to that asset or liability.

(c) From the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees, each party is subject to the standards provided in Section 721 as to all issues relating to the support and fees, including immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party.

721 ("spouse" and "transaction") compared to 2102 ("party" and "activity")
### Section 721 (During Marriage) Versus Section 2102 (During Divorce)

<table>
<thead>
<tr>
<th></th>
<th>721 (during marriage)</th>
<th>2102 (during divorce)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Spouse</strong></td>
<td>Party</td>
<td></td>
</tr>
<tr>
<td><strong>Transactions</strong></td>
<td></td>
<td><strong>Activities (before they become transactions)</strong></td>
</tr>
<tr>
<td><strong>Community property</strong></td>
<td>Property in which the community has or may have an interest</td>
<td></td>
</tr>
<tr>
<td><strong>Providing, Rendering, Accounting</strong></td>
<td>Disclosing</td>
<td></td>
</tr>
<tr>
<td>“Upon request” and “without demand” [CC 16403 (c) (1)] language</td>
<td>No “upon request” language; therefore, all “without demand”</td>
<td></td>
</tr>
<tr>
<td><strong>No duty to augment or update</strong></td>
<td>Duty to augment or update</td>
<td></td>
</tr>
</tbody>
</table>
### Section 1100 (e) Contrasted with Section 2105 (b)

<table>
<thead>
<tr>
<th>1100(e)</th>
<th>2105 (b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>This duty includes the obligation to make full disclosure to the other spouse of all <strong>material facts</strong> and information regarding the existence, characterization, and <strong>valuation</strong> of all <strong>assets</strong> in which the community has or may have an interest and <strong>debts</strong> for which the community is or may be liable.</td>
<td>The final declaration of disclosure shall include all of the following information:</td>
</tr>
<tr>
<td></td>
<td>(1) All <strong>material facts</strong> and information regarding the <strong>characterization</strong> of all <strong>assets</strong> and <strong>liabilities</strong>.</td>
</tr>
<tr>
<td></td>
<td>(2) All <strong>material facts</strong> and information regarding the <strong>valuation</strong> of all <strong>assets</strong> that are contended to be community property or in which it is contended the community has an interest.</td>
</tr>
<tr>
<td></td>
<td>(3) All <strong>material facts</strong> and information regarding the <strong>amounts</strong> of all <strong>obligations</strong> that are contended to be community obligations or for which it is contended the community has liability.</td>
</tr>
</tbody>
</table>
1100 (e) During Marriage, Redlined By 2100+ In Divorce

Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes but is not limited to the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, without demand, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.
Fiduciary Duties Are Personal To The Parties (Emphases Added)

- “Restraining both parties from transferring” (Family Code section 2040 (a)(2))

- “requiring each party to notify the other party of any proposed extraordinary expenditures” (Family Code section 2040 (a)(2))

- “Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships” (Family Code section 1100 (e))

- “each party has a continuing duty” (Family Code section 2100 (c))

- “each party is subject to the standards provided in Section 721” (Family Code section 2100 (a) and (b))

- “each party …shall serve on the other party a final declaration of disclosure” (Family Code section 2105 (a))

- “no judgment shall be entered with respect to the parties' property rights without each party …having executed and served a copy of the final declaration of disclosure” (Family Code section 2106 (a))

Husband (Aaron) attempted to justify why he did not disclose to wife (Elena) the Israeli Bond. The court was unimpressed.

To the extent that Aaron is attempting, through these statements, to excuse his nondisclosure, we conclude that Aaron's position lacks merit. The statutory policy in favor of disclosure contains no exception for debts and assets that offset each other, and Aaron has cited no authority to support such an exception. Instead, Aaron was required to provide a ‘complete disclosure of all assets and liabilities.’ (§2102, subd. (a)(1)). (Id. at 1483 [emphasis added].)


Aaron breached his fiduciary duty to disclose to Elena the 401(k) account. To exonerate his breach, Aaron attempted to argue that “he did not breach his fiduciary duty to Elena by not disclosing the 401(k) account, because Elena had been secretly copying financial documents during their marriage and as a result she had copies of certain account statements from 1998 through 2000 for the 401(k) account, which she produced to Aaron on April 29, 2004.” (Id. at 1487.)

We do not view this fact as in any way exonerative of Aaron's failure to disclose the information about the 401(k) account on the Schedule or to produce documents concerning the account in response to Elena's request for production. The 401(k) account is clearly one of Aaron's assets and may be community property. He was thus required to disclose it in the Schedule and to disclose it upon request from Elena. (See §§2102, subd. (a)(1), 2104, subd. (c)(1), 1100, subd. (e), 721, subd. (b)(2).) “[A] spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse’ and should not expect the spouse who is not in a superior position to search for the information. (Brewer & Federici, supra, 93 Cal.App.4th at p. 1348.)

In sum, Aaron had a fiduciary duty to disclose the existence of the 401(k) account on the Schedule in the first place without prodding from Elena and to produce relevant documents upon Elena's request. The trial court reasonably concluded that Aaron breached that duty by not disclosing the existence of the 401(k) account until July 2004 in response to an inquiry during his deposition. (Id. at 1487-1488 [emphasis added].)
“Despite Aaron's argument to the contrary, this statute does not contain an exception that exempts a spouse from having to disclose transactions ‘in the ordinary course of business.’” (Id. at 1492.)

Wife (“Brewer”) breached her fiduciary duty to fully disclose the specifics of the pension plan in her name. To excuse this breach, she argued that once she disclosed the existence of the asset, her husband (Federici) “had an obligation to search for additional information.” (1348.) The court disagreed. In doing so, the court focused on her fiduciary duties as the managing party, one of which is to make full, accurate, and complete disclosure, including the continuing duty to update and augment information. (Fam. Code, §§ 1100, subd. (e), 2100, subd. (c), 2102; (citation omitted.) It reasonably follows that a spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse.”

Even if Brewer did not intentionally mislead Federici, she was in a superior position to gain access to the information from which valuations for these assets could be determined… There was no evidence suggesting it would have been unreasonable for Brewer to obtain current and accurate valuation information about the pension plans, both of which came from her employer. Federici was entitled to rely upon the information provided to him. (1348; [emphasis added].)

“We find nothing in the language of the statute to justify an exception to the penalty provision of section 1101, subdivision (h) because of the supposed unclean hands of the spouse from whom the asset was concealed. Nor are we cited to legislative history which would suggest such an exception.” (Id. at 42 [emphasis added].)

In this set aside action by wife (Arteena), the issue was the statute of limitations defense asserted by husband (Alan), namely, when she “discovered or should have discovered his alleged fraud or perjury…” (Id. at 1136.)

[I]n resisting Arteena's attack on the judgment, he [Alan] in effect asserts Arteena had no right to rely on his sworn testimony in the underlying proceeding. Alan cannot have it both ways.

Under Alan's theory, as soon as one begins to suspect fraud or perjury, one is deemed to have discovered the facts constituting the fraud or perjury, even though the perpetrator through a course of perjurious conduct may have succeeded in concealing evidence the victim requires to prove the claim. *Alan's theory has no support in logic or in law and it flies in the face of the fiduciary relationship that exists between spouses until such time as the marital assets are divided.* (1150-1151 [emphasis in original].)


Wife (Mary) failed to disclose information to her husband (Jon) about selling their home. But the court was unmoved by her attempt to explain away the breach by arguing that there is no evidence she instructed the real estate agent not to talk to Jon. “Family Code sections 721 and 1100 impose a fiduciary duty to Jon directly on Mary, and there is ample evidence in the record that she delayed the sale and failed to communicate information to Jon.” (Id. at 992 n.3 [emphasis in original].)


“But a ‘conversation’ in no way satisfied Lawrence’s duty under section 2100, subdivision (c) ‘to immediately, fully, and accurately update and augment’ his Final Declaration in the event of material changes”].) (p. 31 [emphasis added].)

“The fact that Janice may have learned of the sale through means other than Lawrence’s update and augmentation of his Final Disclosure did not excuse his compliance with the statute.” (p. 31 [emphasis added].)

“*Lawrence, not Janice, had the burden* of providing updated disclosures…” (p. 32 [emphasis added].)

“[*T]he burden was not on Janice* to inquire.” (p. 34 [emphasis added].)
(a) If one party fails to serve on the other party a preliminary declaration of disclosure under Section 2104 or a final declaration of disclosure under Section 2105, or fails to provide the information required in the respective declarations with sufficient particularity, and if the other party has served the respective declaration of disclosure on the noncomplying party, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.

(b) If the noncomplying party fails to comply with a request under subdivision (a), the complying party may do either or both of the following:

(1) File a motion to compel a further response.

(2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

(c) If a party fails to comply with any provision of this chapter, the court shall, in addition to any other remedy provided by law, order impose money sanctions against the noncomplying party. Sanctions shall be in an amount sufficient to pay to the complying party any deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(d) If a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error.

(e) Upon the motion to set aside judgment, the court may order the parties to provide the preliminary and final declarations of disclosure that were exchanged between them. Absent a court order to the contrary, the disclosure declarations shall not be filed with the court and shall be returned to the parties. (Am Stats 1993, C 1104)2001, C703)
Factors To Consider For Sanctions Under CCP §128.7(d)

- Whether the person being sanctioned
  - was willful or negligent,
  - has engaged in similar conduct in other litigation, or
  - is trained in the law.

- Whether the conduct being sanctioned
  - was part of a pattern of activity or an isolated event,
  - infected the entire pleading or only one particular count or defense, or
  - was intended to injure.

- What amount is needed
  - to deter the person from repeating the conduct, given the person’s financial resources, or
  - to deter similar conduct by other persons.

Dear Client:

You and your spouse are no longer husband and wife to a marriage. You are adverse parties to divorce litigation. Therefore, I need your undivided attention: The rules of divorce are different than marriage. Your fiduciary duties during marriage not only continue. They expand in material ways in which you need to know.

During marriage, you had authority on your own to make decisions regarding the management of assets (subject, of course, to the standard of care that exists during marriage\(^1\)). But following separation, this authority is largely revoked by an order issued in every divorce case, at the moment it is filed, that restrains the unilateral decision making that was lawful during marriage. Thus, the new decision makers in divorce are both parties, or the court, when the parties cannot agree.

In addition, both parties face two questions regarding their fiduciary duties, heightened from marriage due to the adversities unique to divorce: What to disclose? and How to manage the other party’s interest in property in such a way that it is safely transported from the date of separation to the date of distribution?

**What to disclose:** The spouse who managed the asset during marriage enjoys a huge advantage in divorce: He/she knows more than the non-managing spouse. To neutralize this advantage, the law therefore tasks the party enjoying superior knowledge with a superior responsibility, namely, initiating full disclosures to the other party, without a demand from that party. This affirmative duty, unique to divorce, mandates during the course of the proceeding the continuous disclosure of two categories of information:

1. **Assets and liabilities, existing and contingent:** Disclosure of material facts (favorable and unfavorable) relating to the existence, characterization, and valuation of assets and liabilities (actual and contingent) in which the community has or may have an interest (and the same for income and debts relating to support issues).

2. **Contemplated changes to assets or liabilities:** Advance disclosure of activities surrounding a contemplated action, which if acted upon or not acted upon, would materially affect assets or liabilities. Examples are thoughts about changing the form of an asset, such as stock to cash, cash to loan, and stock option to stock, or exercising an opportunity for gain as a result of activities sufficiently connected with the marital period.

\(^1\) The fiduciary duty during marriage is different from the duty during divorce, and hence, merits its own discussion.
At the time of separation, you and your advisors must formulate a plan on how to satisfy these two dimensions of the disclosure duty. This plan must also include augmentations to the extent of any material changes from previous disclosures.

**How to manage:** You are required to make management decisions that preserve and protect property from being dissipated during the divorce proceeding. In saying this, there are legitimate reasons why the estate may decline in value, such as the decisions of both parties, the court, or the market. But if the subtraction is caused by the managing party acting alone without authority to act alone, that party will be charged with the loss. And if the decrease in value is explained by managing party acting alone with the authority to act alone (mostly in connection with the continuing management of a business), that party will be charged with the loss if he/she acted unreasonably.

Resolve any and all doubts in favor of transferring the risk of decision making to both parties. If your spouse does not agree, that is not the end of the matter. The court exists to help parties who cannot agree. Therefore, you can petition the court for instructions on what to do.

The foregoing can be simplified into two commands: “Don’t act alone” and “Disclose what you know”. These commands, in turn, can be merged into one rule: Treat your spouse the same way you would want to be treated if the management roles were reversed. These directives protect you as well. You will not regret honoring them.

You admittedly are being called upon to do something you do not want to do, namely, to devote the highest respect to a person that you may not like or who may not like you. But your spouse’s interests are “present, existing, and equal” to your interests. And you cannot let your feelings reign here. The cost of disrespecting your spouse or the court (by treating them as though they do not exist or matter), is more than you can afford.

Very truly yours,

Name of attorney
Statutory Invitations To Petition The Court For Instructions

Section 1101 (e)

In any transaction affecting community property in which the consent of both spouses is required, the court may, upon the motion of a spouse, dispense with the requirement of the other spouse's consent if both of the following requirements are met:

(1) The proposed transaction is in the best interest of the community.

(2) Consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental incapacity, or prolonged absence of the nonconsenting spouse.

Section 2108

At any time during the proceeding, the court has the authority, on application of a party and for good cause, to order the liquidation of community or quasi-community assets so as to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate. However, in no event shall the court grant the application unless, as provided in this chapter, the appropriate declaration of disclosure has been served by the moving party.

2040 (a) (2)

Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life.

1 A legitimate question is whether such refusal itself could be a breach of the duty to preserve and protect the estate from dissipation, especially if managing party’s motion is not granted. Under such circumstances, the court should at least consider fashioning an order that puts the opposing party on notice that any risk of loss could be assigned to that party at time of trial.
Breach Of Fiduciary Duty At A Minimum Is Constructive Fraud (And Therefore Remedial) As A Matter Of Law, Regardless Of Intent

Constructive fraud - damages: “[A]ny breach of the fiduciary duty that results in impairment” constitutes a cause of action under Family Code section 1101 (a). The breach itself, without more, entitles the non-breaching spouse to the remedies in Family Code section 1101 (g).

In particular, proof of a fraudulent or malicious intent is not required, which is why the law calls breach of fiduciary duty constructive fraud. (Salahutdin v. Valley of California, Inc. (1994) 24 Cal.App.4th 555, 562 [“Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship”].) For example, Mr. Vai’s breach of his “duty as a fiduciary to make a free and full disclosure of all important and relevant facts” “is constructive fraud, whether or not such failure to disclose was accompanied by an actual intent to defraud”. (Vai v. Bank of America, supra, 56 Cal.2d at 335, 342; accord In re Marriage of Brewer & Federici (2001) 93 Cal.App.4th 1334, 1344 [fiduciary duties “arise without reference to wrongdoing”].) In fact, the fiduciary may be innocent of negligence but still guilty of breach of fiduciary duty. (Barrett v. Bank of America (1986) 183 Cal.App.3d 1362, 1370 [“Nor does the finding that Chaffee was not negligent preclude a finding of constructive fraud based on a breach of fiduciary duty by the Bank”].)

Just as bad intent is not an element of breach of fiduciary duty, the best of intent is no defense. (In re Marriage of McTieronan & Dubrow, supra, 133 Cal.App.4th at 1102-1103 [husband who sold stocks during divorce without obtaining the written consent of his wife or the court, charged with the substantial increase thereafter in the value of the stocks as if the stocks had not been sold, even though “faced with a cash shortage, [he used] the proceeds … in part to pay community expenses”].) “And it matters not that the … agent intended no wrong.” (Rezos v. Zahm & Nagel Co. (1926) 78 Cal.App. 728, 731.) “This rule is unyielding… Courts will not permit an investigation into the fairness or unfairness of such a transaction or allow the trustee to show that the dealing was for the best interest of the beneficiaries.” (Cagnolatti v. Guinn (1983) 140 Cal.App.3d 42, 49 [emphasis added].)

Actual Fraud – damages doubled: But when such breach is accompanied by fraudulent or malicious intent, the non-breaching party is entitled to her damages under section 1101 (g), doubled. (Family Code § 1101 (h); accord In re Marriage of Murray (2002) 581, 600-604; In re Marriage of Rossi (2001) 90 Cal.App.4th 34, 41-42.)
# Remedies For Actions And Inactions Resulting In Harm

<table>
<thead>
<tr>
<th>Statute</th>
<th>Shortcoming</th>
<th>State of Mind</th>
<th>Remedy Generally</th>
<th>Remedies Specifically</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Discretion</td>
<td>Description</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2552 (b)</td>
<td>Mismanagement</td>
<td>“good cause”</td>
<td>“may”</td>
<td>Alternate Valuation</td>
</tr>
<tr>
<td>1101 (g)</td>
<td>Breach of FD</td>
<td>Intent not an element</td>
<td>“shall”</td>
<td>Damages</td>
</tr>
<tr>
<td>3333</td>
<td>Breach of FD</td>
<td>Intent not an element</td>
<td>“shall”</td>
<td>Damages</td>
</tr>
<tr>
<td>1101 (h)</td>
<td>Breach of FD</td>
<td>Intent an element</td>
<td>“shall”</td>
<td>2 x (1101 (g) or 3333)</td>
</tr>
</tbody>
</table>

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<sup>1</sup> DOS stands for date of separation and DOD stands for date of distribution.

<sup>2</sup> Civil Code section 3288.

<sup>3</sup> Civil Code section 3287 (a).