



## MASSACHUSETTS FAMILY LAW A Periodic Review

By Jonathan E. Fields

### Limits of Attorney-Client Privilege

A recent Superior Court case held that a divorce lawyer who was sued for malpractice by a client could depose the successor counsel who represented that client in a modification action. That the client waives attorney-client privilege when malpractice is asserted is black-letter law. Here, the court extended that waiver to the *successor* counsel hired to fix the problems that the original lawyer had allegedly failed to address. The case should, at the very least, remind mediators that our confidentiality statute isn't bulletproof — in the event of a malpractice claim, the statute will not protect mediation communications from disclosure. See, e.g. *Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 625, 658 n.11 (2003). *DiPietro v. Erickson*, 2010 WL 1178410 (Mass.Super.) (March 16, 2010).

**Merger / Survival** The basis of the malpractice claim in *DiPietro* is also instructive for mediators. The client alleged that the attorney negligently failed to advise him on the difference between “merger” and “survival” as they relate to the subsequent modification of the agreement. Note, too, the client's statements during the judge's colloquy that he understood the agreement and was satisfied with the advice of counsel do not preclude a malpractice action. If there's a lesson

in here — perhaps it is that mediators should ask clients to sign a document confirming their understanding of these terms. *DiPietro v. Erickson*, 2010 WL 1178410 (Mass.Super.) (March 16, 2010).

### Automatic Restraining Order

During the pendency of a divorce action, the Barnstable Probate and Family Court found that the wife's restatement of her revocable living trust so as to no longer provide the husband with a life estate in the marital home was not a violation of the automatic restraining order, Rule 411. Central to the holding was that title to the home was not conveyed or transferred — and that the asset was not placed outside of the Court's reach for purposes of equitable distribution. The restatement only affected Husband's expectancy of a future interest which does not implicate Rule 411. To those who had wondered whether changing a will violated Rule 411, this case provides good ammunition that it does not. *Darden v. Darden* (Lawyers Weekly No. 15-001-09) (October 15, 2009) (published in Lawyers Weekly February 15, 2010).



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