ENTERTAINMENT LAW ROUNDTABLE

What Media, Sports and Gaming Professionals Need to Know

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As the legal landscape continues to evolve for the various worlds of entertainment, including media, film, television, online, music, sports and gaming, the Los Angeles Business Journal has turned to some of the leading entertainment law attorneys and experts in the region to get their assessments regarding the current state of legislation, the digital realm and how it has changed the playing field for sports and entertainment, the new rules of copyright protection, IP, and the various trends that they have been observing, and in some cases, driving.

Here are a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of entertainment law in 2017 – from the perspectives of those in the trenches of our region today.

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ARTHEL MCDANIEL III

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◆ What is the biggest misconception about entertainment lawyers?

MCDANIEL: I've always thought the term "entertainment lawyer" is a misnomer that invites misconception. There are so many different kinds of lawyers that practice in the entertainment industry that the term isn't useful for understanding what role a particular lawyer serves in the industry. I'm a transactional entertainment lawyer. Whether licensing a reality television show to a network on behalf of a creator, negotiating a distribution deal with a major on behalf of a record label, or acquiring the film rights to a novel on behalf of a production company, I'm responsible for helping my client enter into and consummate an entertainment business transaction. Entertainment litigation and trial lawyers that represent parties in disputes regarding entertainment transactions are also referred to as entertainment lawyers. Tax, real estate, estate planning, and criminal lawyers also provide important services to entertainment industry participants, but aren't traditionally thought of as "entertainment lawyers."

◆ In your opinion, what is the most important service an entertainment law professional provides to his or her clients?

PAGNANELLI: As a litigator, my most important contribution to my clients is helping them avoid IP pit falls, and therefore avoid litigation.

◆ What should an entertainment sector business look for when selecting a law firm to represent their IP or licensing interests?

PAGNANELLI: A mix of transactional and litigation expertise in high volume, specifically on notable cases, which provides a very healthy level of preventative medicine advice.

◆ What are some of the most meaningful recent changes in the world of entertainment law?

BURROW: The case I have been watching was argued a couple of weeks ago in the Supreme Court, and involved a Portland, Oregon band called "The Slants." All of the members of The Slants are Asian American, and they chose the name as an act of "reappropriation," much as African Americans have reclaimed derogatory names as their own. The Patent and Trademark Office denied trademark registration to The Slants on the ground that it violated a law that prohibited trademarks that disparage persons, institutions, beliefs or national symbols—the same ground on which the Washington Redskins' mark was cancelled. Based on the argument, it seemed that several of the justices thought that the ban on offensive trademarks violated the First Amendment, but questioned what the limits might be. I'm looking forward to seeing how the Court decides in June.

PAGNANELLI: There is a trend toward more direct licensing of content, especially music, to distributors and digital services, thereby bypassing more traditional compulsory and collective licensing regimes. This is more prominent with top line companies and artists, but the distributors and digital services are finding benefit in bypassing the regulatory systems that have served the music community for quite some time. Also, growing uncertainty between right's holders and content distributors, and a general overall dissatisfaction with the collective licensing systems, is pushing direct licensing as a viable option. Some significant services, like Sirius/XM, have been trying, and to a large extent succeeding in getting indie record labels and publishers to sign direct deals with them, and not through SoundExchange. The recent controversy at the Department of Justice over the ASCAP/BMI Consent Decrees, withdrawal by publishers of interactive rights, fractional licensing, and the ongoing lawsuit between BMI and the DOJ, are unfortunate by-products of these uncertain times. It should also be mentioned that user generated content has forced the entire entertainment community to reassess its views on fair use. The courts seem to be landing on the side of an expanded legal definition of fair use, using the rationale that if it's good for our culture, then unauthorized use of others property is justified. The Google book case is a perfect example of this expanding fair use paradigm.

◆ Is there pending new IP legislation coming soon that will be meaningful to entertainment industry companies?

PAGNANELLI: In no particular order – some bills have been introduced, others are issues whereby legislation has been promised, and others are ongoing Copyright Office and Congressional studies that are intended to result in some form of legislation:

- The Copyright Small Claims Court initiative (a bill has been introduced by Rep. Chu), that will create a copyright small claims court, administered by the Copyright Office.
- There will be legislation regarding the reorganization of the Copyright Office. The bill will most likely call for greater autonomy of the Copyright Office within the structure of the Library of Congress. The House Judiciary has called for public comment on the issue, which will lead to some form of legislation that will most likely enhance the role of Congress with the Copyright Office. It also might mandate the creation of a definitive database created and administered by the Copyright Office, but this has engendered stiff opposition from stakeholders wanting a private industry solution to the database problem.
- The Copyright Office Study on reforming the Digital Millenium Copyright Act (DMCA), is supposed to lead to some form of legislation. This is possibly the most controversial initiative and study, as the views of the stakeholders are not at all uniform. Yet, Congress is intent on some form of reform that will solve some of the inherent problems with the DMCA, like the whack-a-mole-problem with takedown notices.
- The Copyright Office Study on Moral Rights. This study, and possible legislation to follow, explores creating new causes of action for authors to sue parties on grounds that their rights of attribution and integrity have been violated.
- There have been numerous bills, all of which will be re-introduced in one form or another, that will change the way the Copyright Royalty Board and the BMI/ASCAP rate court will set rates and resolve conflicts in the future. There is a movement toward making the rules and procedure uniform through all of the affected industries. This includes the long-standing terrestrial radio act that will, for the first time if finally passed after many years, pay recording artists and labels for airplay on terrestrial radio.

◆ What was the most surprising entertainment-related decision the Supreme Court issued last term?

PAGNANELLI: The Supreme Court's recent decision in Apple v. Samsung may have unexpected applications in the entertainment industry. As the entertainment industry becomes more technology based, these types of court decisions can inform an entertainment company's on how to best protect certain content, and how to set themselves up for the largest damages award if that content is infringed.

◆ What are some common copyright issues that show business entities face? How can they best be addressed?

PAGNANELLI: Music clearances are always a huge challenge. In particular, pre-1972 sound recordings can trip up a lot of businesses. Also, with respect to video games, because the DMCA was passed in 1998 when video games were simpler, how to apply the DMCA and its anti-circumvention component continues to evolve.

◆ Turning to the world of sports, what is a current trend in sports law with respect to athletes obtaining insurance coverage against permanent disability and/or a reduction in earnings based on an injury?

GILLER: There is an emerging trend in college and professional sports involving high profile athletes purchasing Permanent Total Disability (PTD) insurance policies, including Loss-of-Value (LOV) coverage, as a hedge against the potential impact an injury might have on the value of their first or their next professional contract. If an athlete suffers a career ending injury during the policy period, he/she would receive the policy limits under the PTD portion of the policy. If an athlete suffers a non-career ending injury during the policy and that injury results in a reduction between the pre-established value of their anticipated next contract and the value of the contract he/she ultimately signs after the injury, the athlete should be paid the difference. A number of athletes have successfully collected PTD payouts and, while I have assisted several athletes in obtaining LOV payouts, insurance companies are, in my experience, more reticent to pay LOV claims than they are to pay out on PTD claims.

◆ Who can purchase PTD/LOV insurance protection?

GILLER: Professional athletes are free to buy PTD/LOV insurance whenever they desire but, for a student-athlete to be eligible to purchase the same insurance he/she must be projected to be drafted in the first round of the MLB, NBA or WNBA drafts; or the first three rounds of the NFL or NHL drafts. It is estimated that less than 2% of the 460,000 student-athletes competing in collegiate athletics at 1,100 schools, might fall within these parameters. A number or actors and musicians have also purchased PTD/LOV insurance to protect against lost contracts because of an injury sustained before or during a movie production or tour.

◆ What are the potential limits of insurance coverage available for PTD/LOV insurance and how much does it cost?

GILLER: As a general rule, the limits of LOV protection cannot exceed the limits of the PTD coverage. In other words, if an athlete has a $5 million PTD policy he/she can only purchase an additional $5 million worth of LOV coverage. The NCAA has

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established maximum limits of coverage available to athletes based upon their sport. For example, football and men's basketball can purchase a maximum of $5 of PTD and $5 million of LOV coverage. The limits for other sports are $1.5 million for baseball, $1.2 million for men's ice hockey and $250,000 for women's basketball. The premiums for PTD policies with an LOV endorsement typically cost, for a one-year policy, between $8,000 to $10,000 for every $1 million of coverage so a policy with $5 million in PTD coverage and $5 million in LOV coverage might cost between $80,000 and $100,000 to purchase.

◆ How can college athletes afford to buy PTD/LOV coverage?

GILLER: In 2014, the NCAA issued a ruling which allowed student-athletes to borrow against their potential future earnings in order to secure a loan to pay the premiums associated with purchasing loss-of-value (LOV) insurance protection. Over the past few years another growing trend has emerged by which individual schools are using money received from the NCAA Student Assistance Fund (SAF) program – money typically earmarked to help student-athletes pay for unexpected and extraordinary expenses such as bereavement travel, child care, summer school tuition and utility bills – to pay the insurance premiums for combined PTD/LOV policies that protect the future earnings of a handful of high-profile student-athletes. According to the NCAA, a total of $73.5 million in SAF money was provided to Division I conference offices in late August 2013. It has been widely reported that some of that money has been used by schools to pay insurance premiums to secure LOV coverage for star athletes.

◆ What's a piece of advice that some clients don't follow as often as they should?

GILLER: Insurance policies are not usually paradigms of clarity and the use and placement of particular terms in a PTD/LOV policy, together with the structure of a specific policy provision or the use and positioning of punctuation, could mean the difference between securing a payout and not being paid at all. As a result,

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athletes, their parents, financial advisors, and collegiate athletic departments should all consider engaging the services of an experienced sports insurance attorney at the earliest possible stage of the process, whether that is prior to securing a policy and negotiating its terms (which would be the optimum circumstance) or, at the very least, engaging an attorney prior to submitting a claim after suffering an injury and a resulting loss.

◆ What should an athlete look for when selecting a law firm to represent their insurance interests?

GILLER: In a word, experience. Insurance policies have a nomenclature and vocabulary unlike most other types of contracts and, as a result, an athlete needs to find a lawyer who is not only well-versed in insurance jargon and terminology but who understands the specialized PTD/LOV insurance space. Athletes should research the handful of lawyers in the country who have experience with these types of insurance protection by looking for those who have published articles and been quoted in national publications and by researching pending cases involving PTD/LOV claims filed by attorneys on behalf of athletes.

◆ Has the internet and file sharing made copyright laws more challenging to manage? What recourse to creative entities have?

BURROW: Piracy continues to be an enormous problem for content owners. Recent studies show that hundreds of millions of internet users seek infringing content every month, with nearly a quarter of all internet traffic being devoted to infringing content. And it is incredibly difficult even for large copyright holders to police infringing uses of their works on the internet, let alone individual creators, who often lack the resources necessary to discover on-line infringement. At the moment, the best legal tools continue to be the Copyright Act, including the Digital Millennium Copyright Act, which is intended to define the circumstances under which internet service providers can, and cannot, be liable for infringers who use their services.

PAGNANELLI: Having worked on Napster, Grokster, and Aimster, MSK has been at the center of this discussion for almost 2 decades. Congress attempted to address the issue by passing the DMCA, but the law has significant holes, and is still opaque to many copyright owners and creatives. Further, in a distributed world, the pervasive and increasingly anonymous nature of the internet has made it progressively more difficult to track down certain infringers. So, unfortunately for many creatives, that means protecting their content requires hiring lawyers.

◆ How has the recent emergence of Internet radio and television, digital download sales platforms and streaming services impacted the business of music?

MCDANIEL: Not that long ago, record companies were concerned primarily, if not exclusively, with selling physical copies of master audio recordings. Now, the music business is much more than just selling physical records. Record companies and artists are mutually engaged in the business of selling a lifestyle experience in the form of exclusive video content, concert performances, branded merchandise, and fashion designs. Recording Agreements between major record companies and their recording artists now routinely include provisions or additional agreements where the artist grants to the company the right to manage and control the artist's Internet brand, (including an artist website), logos and graphic designs, and the right to receive a percentage of all revenue from the exploitation of such brand items, as well as a percentage of revenue from touring and other entertainment related activities of the artist. Record companies no longer view artist touring, merchandising and content licensing activities as just marketing and promotions for records. These activities can generate substantial revenue for the record company and the artist alike.

◆ What can creators do to best protect themselves from pirates?

PAGNANELLI: The best thing creatives can do to protect their content is a combination of registering, instituting technological copy protection (if available), and policing.

◆ What legal issues need to be considered in terms of an entertainment company's website?

PAGNANELLI: In particular for entertainment companies that distribute worldwide, Terms of Use/Service and End User License Agreements (EULA) should be written by someone who has a depth of understanding of U.S. and international copyright and trademark laws, paying particular attention to service of process, choice of law, and venue issues.

◆ What are some of the biggest challenges major record companies face in this new digital distribution environment?

MCDANIEL: The majors have to become experts at harnessing the Internet and digital distribution platforms to generate revenue in the same way they mastered manufacturing, sales and distribution of physical records. Most importantly, they have to develop appropriate monetization and compensation models that close the value gap for artists. Although fan consumption of music is at an all-time high, mostly as a result of record participation in streaming services, album sales are at an all-time low. Major artists are already starting to reap large licensing fees directly from digital retailers like iTunes and Amazon for exclusive rights to music videos and other audio visual content. Major record companies need to figure out how to capture a larger share of subscription and advertising revenue being generated by streaming services in order to justify their participation. If sales of physical records continue to decline as a percentage of overall revenue generated from the exploitation of music, you can imagine that more artists will seek direct licensing arrangements with digital retailers and streaming services. More than just followers and likes, it's important that the audience engage and identify with the artists.

◆ What role do entertainment lawyers play in this new environment?

MCDANIEL: Obviously, lawyers play a big role in marshaling all of the intellectual property rights being created by artists and exploited by record companies. I suspect that lawyers will also be the chief architects of the contractual agreements that frame the business relationships among artists, record companies, independent social media strategists, digital retailers and streaming services. As new models emerge, lawyers will play a key role in figuring out how to appropriately allocate risks and rewards.

◆ Are there any hurdles to consider (pertaining to intellectual property) when one entertainment company acquires another?

PAGNANELLI: Absolutely. Do both companies have appropriate chain of title to the assets being acquired? Are there historical disputes or claims that could arise from any of the assets? Did all of the intellectual property get built/coded/programmed with clear contracts with the creators? In essence, extensive due diligence is necessary.

◆ How has "fair use" changed in recent times?

BURROW: Fair use has always been a fact-based inquiry, based on four factors: the purpose and character of the use—whether the new work "transforms" the old; the nature and character of the work; the amount and substantiality of the work that was used; and the effect of that use on the potential market for the work. The fourth factor has long been the one that courts most emphasized, and while that continues to be the case, there has also been an evolving view on the first prong. In 2015, the Second Circuit ruled that Google Books, which digitized books, made them searchable and provided snippets of those works in response to searches, was fair use, while a number of recent cases have rejected claims that reposting content on social media, with little or no commentary, let alone transformation, falls outside fair use protection.

PAGNANELLI: As the internet has grown, the public has increasingly assumed that, if it's on the internet, "it's free." Combining User Generated Content with traditional content has further blurred the public's understanding and therefore, forced the entertainment community to reassess its views on fair use. The courts seem to be landing on the side of an expanded legal definition of fair use, using the rationale that if it's good for our culture, then unauthorized use of others property is justified. The Google book case is a perfect example of this expanding fair use paradigm. Copyright owners, as a result, have had an increased challenge in protecting their content.

◆ What's the first thing a band should do in terms of protecting its band name?

PAGNANELLI: The first thing a new band should do is conduct a trademark search to determine if it's proposed name is clear. Then the band should immediately start using the name while also filing

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'The primary goal for any new band is, and always has been, to find its core audience and establish a connection. When I first started in the mid-nineties as an intern at Perspective Records, label acts discovered their "sweet spot" by touring the U.S. and abroad on a bus with the Director of Sales and Tour Marketing. At substantial expense, they visited every local record store and radio station that would open its doors.'
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trademark applications in the U.S. and perhaps, other countries. Then policing is critical.

◆ From your perspective, how has marketing and promotions for new bands changed in the digital age?

MCDANIEL: The methods are different, but the objective is still the same. The primary goal for any new band is, and always has been, to find its core audience and establish a connection. When I first started in the mid-nineties as an intern at Perspective Records, label acts discovered their "sweet spot" by touring the U.S. and abroad on a bus with the Director of Sales and Tour Marketing. At substantial expense, they visited every local record store and radio station that would open its doors. If the fan reception was favorable, the label acts would follow up with additional appearances and product in the market. If the fan reception was less than favorable, the market would be avoided. Today, social media and the Internet are far more efficient tools for identifying and engaging a core audience. Facebook, Instagram and Twitter facilitate direct daily personal interaction with fans in a way that just wasn't possible before.

◆ In a nutshell, what are artists' legal rights when it comes to the work they've created?

BURROW: Ideas themselves are not protectable, so copyright protection comes from the expression of those ideas. A work does not have to be registered with the copyright office to be protected, but registration is a prerequisite to filing a lawsuit, and there are certain remedies—specifically, attorneys' fees and statutory damages—that are not available if the work is not timely registered. The owner of a copyright in a work then has the exclusive right to reproduce, perform, distribute, display, or create derivative works from the owner's work. A creator may also trademark the title of a work, or the use of a work as a logo. Trademark does not protect the work itself, but protects others from infringing on the trademark owner's goodwill.

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Los Angeles County Bar Association Introduces Flat Fee Legal Service

Program takes the guesswork out of legal fees for consumers: get a fixed rate and access to qualified attorneys

THE Los Angeles County Bar Association (LACBA), one of the largest voluntary metropolitan bar associations in the country, is introducing SmartLaw Flat Fee Legal Service to connect consumers with qualified attorneys who can help them handle uncontested divorces, LLC business formation and trademark registration.

While lawyers generally consider these matters to be very basic, they can still be complicated and confusing for consumers who aren't familiar with legal documents and filings.

"SmartLaw Flat Fee Legal Service enables consumers to be confident that their matters are being handled with the oversight of qualified attorneys," said Margaret P. Stevens, LACBA president. "It's a great service for consumers because it gives them the peace of mind of having a lawyer to guide them through the process without having to worry about paying extra fees."

Nationwide, consumers have spent nearly $5 billion downloading basic legal forms without the oversight of a legal professional.

"While it can be convenient to download and complete forms on a computer, it puts consumers at risk. They may not know whether the forms comply with current law or whether they are for a specific geographic area. Most importantly, they don't have an attorney to advise them whether there is a better legal solution available to meet their needs," Stevens added.

Consumers who utilize SmartLaw Flat Fee Legal Service will pay $800 for an uncontested divorce, $800 for LLC business formation and $500 for trademark registration.

SmartLaw is a public service of LACBA and is available to consumers in Los Angeles, Riverside, San Bernardino and Ventura counties.

All participating lawyers have been vetted for experience, insurance and good standing with the State Bar of California. Established in 1937, SmartLaw is the oldest and largest lawyer referral service in the country and is certified by the State Bar of California (#0042). It has served hundreds of thousands of consumers over the years.

Consumers can visit www.smartlaw.org/flat-fee or call (866) SMARTLAW / (866) 762-7852 to learn more about SmartLaw Flat Fee Legal Service. SmartLaw Flat Fee Legal Service does not include filing fees or other court costs.

The Los Angeles County Bar Association (LACBA) is one of the largest voluntary metropolitan bar associations in the nation, with nearly 24,000 members. LACBA is engaged in advancing the administration of justice and meeting the professional needs of lawyers. For more information on LACBA, visit www.lacba.org.

A Closer Look at Financial Advisors and the Important Role they Play

IN a society that grows more complex every day, consumers are presented with the constant pressures of family, career, and community responsibilities and personal enrichment. The financial marketplace is ever-changing with new laws, regulations, economic events, market changes, product offerings and conflicting media messages. Making the right financial moves at the right time is critical to achieving security and accomplishing personal objectives.

A personal advisor guides the financial planning process: goal identification, data organization, analysis, problem identification, recommendations, and most important - plan implementation and results monitoring. Your advisor will help you save, spend, invest, insure and plan wisely for the future.

A Registered Financial Consultant has met the qualifications required to serve the public effectively, and moreover, is committed to essential professional continuing education. You can't delegate your job, career, civic or family responsibilities - but you can obtain qualified, professional financial advice and service.

WHAT IS THE RFC DESIGNATION?

The Registered Financial Consultant (RFC) is a professional designation awarded by the International Association of Registered Financial Consultants to those financial advisors who can meet the high standards of education, experience and integrity that are required of all its members.

The IARFC is a non-profit professional credentialing organization of proven financial professionals formed to foster public confidence in the financial planning profession, to help financial advisors exchange planning techniques, and to give deserved recognition to those practitioners who are truly committed to ethical standards and continuous professional education.

Because there are no consistent licensing requirements for the various persons who call themselves "financial planners" the public has a critical need for a method of distinquishing the qualified and dedicated financial advisor.

WHAT IS THE PURPOSE OF THE IARFC?

The primary purpose of the IARFC is to provide the public with a convenient access to a pool of well-qualified practitioners from which to choose a personal financial advisor. It is the only professional organization that requires all of its members to meet and document seven stringent requirements of education, experience, examination, integrity, licensing, ethics and a significant amount of continuing professional education.

RFC EXAMINATION PROCESS

The comprehensive RFC examination covers a wide range of subject matter; Priciples of Personal Finance, Debt and Cash Flow Management, Employee and Government Benefits, Annuities, Securities, Investments and Asset Allocation, Life, Health and Casualty Insurance, Education and Special Needs Funding, Estate Planning, Survivor Income Needs Analysis, and Retirement Income.

RFC CONTINUING EDUCATION REQUIREMENTS:

Each year the RFC must complete a minimum of 40 units (hours) of professional continuing education. This includes college courses, educational symposiums, credentialing courses, distance learning programs and practitioner conferences. Many RFCs are instructors at colleges and conferences.

WHAT ABOUT OTHER PROFESSIONAL DESIGNATIONS?

We hold the RFC designation to be different and perhaps more encompassing. However, the IARFC does not assert that many other professional designations or their organizations are inferior. The public is not served by divisive criticism, but rather by dedicated and well-prepared professionals. Our goal is to encourage professional conduct and collaborate between professional advisors, with strong emphasis on the importance of continuing education.

HOW DOES THE IARFC MAINTAIN AND PUBLISH THE CREDIBILITY OF ITS MEMBERS?

The IARFC removes the designation from anyone who fails to maintain proficiency through substantial continuing education, or who betrays the public trust by failing to live up to its Code of Ethics or by having a professional license revoked or suspended for misconduct or any reason.

This article was provided by the International Association of Registered Financial Consultants.

HOW TO KEEP YOUR MONEY FROM SLIPPING AWAY

As with virtually all financial matters, the easiest way to be successful with a cash management program is to develop a systematic and disciplined approach.

By spending a few minutes each week to maintain your cash management program, you not only have the opportunity to enhance your current financial position, but you can save yourself some money in tax preparation, time, and fees.

Any good cash management system revolves around the four As — Accounting, Analysis, Allocation, and Adjustment.

Accounting quite simply involves gathering all your relevant financial information together and keeping it close at hand for future reference. Gathering all your financial information — such as mortgage payments, credit card statements, and auto loans — and listing it systematically will give you a clear picture of your overall situation.

Analysis boils down to reviewing the situation once you have accounted for all your income and expenses. You will almost invariably find yourself with either a shortfall or a surplus. One of the key elements in analyzing your financial situation is to look for ways to reduce your expenses. This can help to free up cash that can either be invested for the long term or used to pay off fixed debt.

For example, if you were to reduce restaurant expenses or spending on non-essential personal items by $100 per month, you could use this extra money to prepay the principal on your mortgage. On a $130,000 30-year mortgage, this extra $100 per month could enable you to pay it off 10 years early and save you thousands of dollars in interest payments.

Allocation involves determining your financial commitments and priorities and distributing your income accordingly. One of the most important factors in allocation is to distinguish between your real needs and your wants. For example, you may want a new home entertainment center, but your real need may be to reduce outstanding credit card debt.

Adjustment involves reviewing your income and expenses periodically and making the changes that your situation demands. For example, as a new parent, you might be wise to shift some assets in order to start a college education fund for your child.

Using the four As is an excellent way to help you monitor your financial situation to ensure that you are on the right track to meet your long-term goals.

This material was written and prepared by Emerald.