

Chapter 23

Counsel Fee Awards

23-1. Counsel Fee Awards - In General

Counsel fee awards are made in the court's discretion. Their primary purpose is not to reward or punish a spouse, but to enable a needy person to carry on or defend an action or proceeding so that the parties are as close as possible to being economic equals in the action, and one spouse does not have greater leverage during the litigation process.¹

The authority to award counsel fees in a matrimonial action is derived from statute, not from the common law.² Thus, the court may award counsel fees only in certain actions where specifically authorized by statute, and then the statute is to be strictly construed. Counsel fee awards are not authorized by any provision of the Domestic Relations Law in actions or proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce in actions commenced before October 10, 2010.

Domestic Relations Law §237 (a) which is applicable to post trial counsel fee awards in actions commenced on or after October 10, 2010³ authorizes counsel fee awards in any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, (5) to obtain maintenance or distribution of property following a foreign judgment of divorce, or (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce.

Domestic Relations Law § 238, which deals with expenses in enforcement and modification proceedings is not discussed in this Chapter. Neither is Domestic Relations Law § 237 (b) which deals with, among other things, counsel fee awards in custody proceedings and writs of habeas corpus.

The principals and cases applicable to counsel fee awards, which were decided before October 10, 2010, and are discussed in this chapter, are relevant and applicable to counsel fee applications made after that date.

1 Hinden v. Hinden, (1983) 122 Misc. 2d 552, 472 NYS2d 248.

2 Romaine v. Chauncey (1892) 129 NY 566, 29 NE 826; Kagan v. Kagan (1986) 21 NY2d 532, 289 NYS2d 195, 236 NE2d 475; Caldwell v. Caldwell (1948) 298 NY 146, 81 NE2d 60; Erikenbrach v. Erikenbrach (1884) 96 NY 456; Griffin v. Griffin (1872) 47 NY 134.

3 Laws of 2010, Ch. 329, § 1, effective October 12, 2010. Laws of 2010, Ch. 329, §3 as amended by Laws of 2010, Ch. 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

Counsel fees may be awarded without a showing of need. Pursuant to Domestic Relations Law § 237(a), a court in a divorce action may award counsel fees to a spouse “to enable that spouse to carry on or defend the action or proceeding as, in the court’s discretion, justice requires, having regard to the circumstances of the case and the respective parties.” Courts have flexibility when considering applications for counsel fees. Indigence is not a prerequisite to an award of counsel fees. Rather, in exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties’ positions.⁴

The court has discretion to grant counsel fees to a spouse for legal services in connection with the hearing to determine the amount of the fee award. This is not to say that awards for legal services for fee hearings should be routinely expected or freely granted any more than those for pre-action services. It is a matter of discretion, to be exercised in appropriate cases, to further the objectives of litigational parity, and to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation.⁵

The court, in awarding counsel fees under Domestic Relations Law § 237, may, inter alia, determine the reasonable value of the services rendered by the attorney for a party and direct the other spouse to pay all or a portion thereof. An application for counsel fees in a matrimonial action is not based solely on the reasonable value of the legal services rendered. The court is instructed to review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties’ positions.⁶

Some of the factors courts are required to consider in the fixation and determination of counsel fees awards in matrimonial actions are the nature and extent of the services rendered; the actual time spent; the necessity for the services; the nature of the issues involved; the professional standing of counsel, including his experience and background; the results achieved; the income and assets and financial circumstances of the parties; a party’s obstructionist tactics and the amount of the distributive award.⁷

It should also review the billing records of counsel and exercise its discretion in crediting the testimony related to the fees in finding that they are reasonable.⁸ In determining the amount of legal fees to be awarded to an attorney the court may not rely on documents that constitute inadmissible hearsay, such as statements from his client’s former attorney who previously represented the client in the action.⁹

4 DeCabrera v. Cabrera-Rosete, 518 N.E.2d 1168, 1169, 524 N.Y.S.2d 176, 177, 70 N.Y.2d 879, 881–82 (1987)

5 O’Shea v. O’Shea, 711 N.E.2d 193, 197, 689 N.Y.S.2d 8, 12, 93 N.Y.2d 187, 193–94 (1999)

6 De Cabrera v. De Cabrera, (1987) 70 NY2d 879, 524 NYS2d 176, 518 NE2d 1168] Re Potts’ Estate, (1925) 213 App Div. 59, 209 NYS 655, app dismd 241 NY 510, 150 NE 533 and affd 241 NY 593, 150 NE 568; Re Estate of Freeman, (1974) 34 NY2d 1, 355 NYS2d 336, 311 NE2d 480; W. v. W. (1977) 89 Misc. 2d 681, 392 NYS2d 957. See 22 NYCRR 1200.

7 Re Potts’ Estate (1925) 213 App Div. 59, 209 NYS 655, app dismd 241 NY 510, 150 NE 533 and affd 241 NY 593, 150 NE 568; Re Estate of Freeman (1974) 34 NY2d 1, 355 NYS2d 336, 311 NE2d 480; W. v. W. (1977) 89 Misc. 2d 681, 392 NYS2d 957; Silver v. Silver (1978, 2d Dept.) 63 App Div. 2d 1017, 406 NYS2d 352; Fabrikant v. Fabrikant (1967) 19 NY2d 154, 278 NYS2d 607, 225 NE2d 202.

8 Ralph D. v. Courtney R., 999 N.Y.S.2d 416, 417 (1 Dept., 2014)

9 Lydia D. v. Thomas B., 89 A.D.3d 630, 933 N.Y.S.2d 269 (1st Dept., 2011).

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An award of substantial counsel fees is appropriate where the monied spouse is found to have engaged in obstructionist tactics or discovery misconduct, which resulted in increased litigation costs and expenses.¹⁰

Obstructionist tactics and lack of merit can result in the denial of a counsel fee award or a small award to a client pursuant to Domestic Relations Law § 237. For example in *Meyn v. Meyn*,¹¹ the Appellate Court reversed an order which awarded the wife counsel fees in connection with her successful motion to vacate an uncontested divorce that had been granted under Domestic Relations Law 170(6). The court vacated the judgment because “it was based on outright perjury” when it was obvious that the parties lived together after the agreement was signed and the wife participated in the fraud perpetrated upon the court. The court held that the case was not an instance where justice required an award of counsel fees. It is not an abuse of discretion on the part of the trial Court to deny a party or his attorney a counsel fee award based on the fact that a spouse engages in delaying and obstructionist tactics.¹²

However, it is improper to award the more affluent spouse counsel fees to offset the litigation costs incurred in defense of unsupported claims. Such an award to the more affluent spouse would not “level the playing field” but would merely serve to punish a spouse for what the court viewed as wasteful, frivolous litigation.¹³

The First Department has held that a husband should be denied a counsel fee award where he had engaged in a vicious attack on the wife and attempted to kill her.¹⁴

A mere request for a hearing or trial should not carry with it a label of intransigence. An award of an attorney’s fee is designed to redress the economic disparity between the spouses. It is not intended to address a party’s decision to proceed to trial rather than agree to a settlement. Although the relative merit of the parties positions and a spouses conduct in the litigation are among the factors to be considered by the court in determining a counsel fee application, the financial circumstances of both parties is the primary consideration.¹⁵

The application for counsel fees in a matrimonial action must be made prior to the entry of the final judgment. In *Redgrave v Redgrave*,¹⁶ the Supreme Court granted defendant’s motion to dismiss the complaint at trial. Thereafter it granted defendant’s application for counsel and expert fees. The Appellate Division rejected plaintiff’s contention that Supreme Court lacked the jurisdiction to award the fees because the action was terminated by the dismissal of the complaint prior to defendant’s fee application. It held that in a divorce action, the court is authorized to direct a party to pay the counsel fees and expenses of the other spouse, provided that direction is “made prior to final judgment” (citing Domestic Relations Law §237 [a]). That language has been interpreted to permit

10 See *Johnson v. Chapin*, 12 N.Y.3d 461, 881 N.Y.S.2d 373, 909 N.E.2d 66 (2009) (\$885,000 in legal and expert fees affirmed); *Branche v. Holloway* (1 Dept. 2015) 124 A.D.3d 553, 2 N.Y.S.3d 450.

11 119 App Div. 2d 645, 501 NYS2d 88 (2nd Dept., 1986)

12 *Stern v. Stern*, 67 App Div. 2d 253, 415 NYS2d 225 (1st Dept. 1979); *Riportella v. Riportella* (1980, 1st Dept.) 75 App Div. 2d 503, 426 NYS2d 738; *Schussler v. Schussler* (1985, 2d Dept.) 109 App Div. 2d 875, 487 NYS2d 67; *Lohmiller v. Lohmiller*, NYLJ, 9-16-86, p 15, col 2, Sup Ct, West Co, (Buell, J).

13 *Silverman v. Silverman*, 304 A.D.2d 41, 756 N.Y.S.2d 14 (1st Dept. 2003)

14 *Havell v. Islam*, 301 A.D.2d 339, 751 N.Y.S.2d 449 (1st Dept. 2002)

15 *O’Shea v. O’Shea*, 93 N.Y.2d 187 (1999) See also *Comstock v. Comstock*, 1 AD3d 307, 766 N.Y.S.2d 220 [2 Dept., 2003] [“... an award of an attorney’s fee is designed to redress the economic disparity between spouses. It is not intended to address a party’s decision to proceed to trial rather than agree to a settlement (see *O’Shea v. O’Shea*, 93 N.Y.2d 187 (1999))”].

16 304 AD2d 162, 759 NYS2d 23 (3d Dept.,2003)

the court to direct payment of fees and expenses “at any time after the start of the action up through the entry of final judgment.” Here, defendant made his application eight days after the oral dismissal of the complaint, which was several months prior to the entry of the final order dismissing the action, and under such circumstances, Supreme Court was authorized to entertain the application. The Appellate Division agreed with plaintiff’s argument that it was error for Supreme Court to award counsel and expert fees without a hearing in the absence of a stipulation consenting to a determination upon written submissions, despite her failure to request a hearing.¹⁷ It made it clear that this was now the rule in the Third Department (as it is in the other Departments), stating that “[T]o the extent that other decisions of this Court have held to the contrary, they should no longer be followed.”

Where, as a result of an equitable distribution or distributive award, a spouse will have sufficient funds to pay his or her own attorney’s fees, it is an abuse of discretion to award counsel fees.¹⁸

A counsel fee award made pursuant to Domestic Relations Law § 237 in a matrimonial action is not a remedy of an attorney against his client. While the attorney for a party has a right to make an application for counsel fees in his or her own name that right is limited to making an application for an award of fees from the opposing party. There is no statutory authority for the court to make an award of counsel fees in favor of an attorney against his own client in a matrimonial action. The Supreme Court lacks authority to interfere with the contract between a party and her attorney. Although the Domestic Relations Law authorizes a court to order one spouse to pay the other’s counsel’s fees, it does not authorize a court to determine what amount of fees is due to counsel from his client, and the attorney may still recover from his client for breach of contract.¹⁹

“Expenses” are defined in Domestic Relations Law § 237(d) and include, but are not limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses as the court may determine to be necessary to enable a spouse to carry on or defend one of the actions or proceedings designated in section 237(a).

Domestic Relations Law § 237(c) provides that an award of counsel fees in favor of the petitioner is mandatory in any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award, upon a finding that the failure was willful. However, the amount of the award is discretionary.²⁰

17 Citing *Carlson-Subik v. Subik*, 257 AD2d 859, 862; see also *Matter of Flynn v. Rockwell*, 295 AD2d 672, 675; *Ott v. Ott*, 266 AD2d 842; *Stricos v. Stricos*, 263 AD2d 659; *Sim v. Sim*, 248 AD2d 781, 781, 782.

18 In *Rodgers v. Rodgers*, (1983, 2d Dept.) 98 App Div. 2d 386, 470 NYS2d 401 the court held that since the wife had sufficient funds it was not an abuse of discretion to deny her counsel fees.

In *Basile v. Basile*, (1986, 2d Dept.) 122 App Div. 2d 759, 505 NYS2d 448, the Appellate Division overturned the counsel fee award to the wife. In view of the assets the wife was to retain she demonstrated no need for an award of counsel fees.

19 *Bisca v. Bisca*, (1985, 2d Dept.) 108 App Div. 2d 773, 485 NYS2d 302; *Ferraro v. Ferraro*, 257 AD2d 596, 684 NYS2d 274 (2d Dept., 1999).

20 Domestic Relations Law § 237(c).

Counsel Fee Awards

23-2. Counsel Fee Awards - Actions Commenced On or After October 10, 2010

Domestic Relations Law § 237 was amended in 2010 to create a rebuttable presumption²¹ that counsel fees shall be awarded to the “less monied spouse,”²² and actions to obtain maintenance or distribution of property after a foreign judgment of divorce have been added to the list of actions in which such fees shall be awarded.

The principals and cases applicable to counsel fee awards, which were decided before October 10, 2010, and discussed in Section 15-1, are relevant and applicable to counsel fee applications made on or after October 10, 2010.

In exercising the court’s discretion, under Domestic Relations Law § 237 the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis *pendente lite*, so as to enable adequate representation from the commencement of the proceeding.²³

In addition, the court is specifically authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action.²⁴

The parties and their attorneys are required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing there under, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.²⁵

The prior law placed an onus upon the party in a matrimonial action seeking counsel fees *pendente lite*, to show why the interests of justice require it. The burden is now on the “more-monied” spouse to show why, in the interests of justice, a counsel fee award should not be made.

Domestic Relations Law § 237 does not define the term “less monied.”²⁶ This uncertainty as to the definition of “less monied” will certainly spawn legal arguments that the “less monied” spouse should be defined as (1) the party with fewer assets; or (2) the party with a lower net worth; or (3) the party with less liquid assets; or (4) the party with less income available to pay his or her own counsel fees.²⁷

According to the sponsor’s memorandum these amendments require that in a matrimonial action an order for *pendente lite* counsel fees and expenses should be granted at the outset of the case to ensure adequate representation of the less monied spouse from the commencement of the proceeding. Nothing precludes an award of counsel fees to a nonprofit legal service organization, where the organization provides legal services without charge

21 In *Scott M v Ilona M.*, 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct 2011) the Supreme Court found that the shift in financial resources that results from the maintenance guideline calculation rebuts the presumption of the payor spouse being the “monied” spouse.

22 Laws of 2010, Ch. 329, § 1, effective October 12, 2010. Laws of 2010, Ch. 329, §3 as amended by Laws of 2010, Ch. 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

23 Domestic Relations Law §§ 237 and 238. Laws of 2010, Ch. 329, § 1, effective October 12, 2010.

24 Domestic Relations Law §§ 237 and 238. Laws of 2010, Ch. 329, § 1, effective October 12, 2010.

25 Domestic Relations Law §§ 237 and 238. Laws of 2010, Ch. 329, § 1, effective October 12, 2010.

26 The word “monied” does not appear in Black’s Law dictionary, nor in other dictionaries, except as a variant of “moneyed”.

27 In *Scott M v Ilona M.*, 31 Misc.3d 353, 915 N.Y.S.2d 834 (Sup. Ct 2011) the Supreme Court found that the mandatory *pendente lite* maintenance guidelines and *pendente lite* counsel fee statutes enacted by the legislature should be deviated from where the calculations will result in the payee spouse having more monies available than the payor spouse as a result of the calculation.

to a party who is eligible for counsel fees. The amendment is not intended to preclude a court's discretionary power to award counsel fees for services and expenses incurred before the action begins.²⁸

23-3. Counsel Fee Awards - Actions Commenced On or After October 10, 2010 - Domestic Relations Law §237(a) and (d)

The principals and cases applicable to counsel fee awards, which were decided before October 10, 2010, are relevant and applicable to counsel fee applications made after that date.

Domestic Relations Law §237(a) provides²⁹ as follows:

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, (5) to obtain maintenance or distribution of property following a foreign judgment of divorce, or (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing there under, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. An unrepresented litigant shall not be required to file such an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself. Any applications for fees and expenses may be maintained by the attorney for either spouse in his or her own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.³⁰

Domestic Relations Law §237(d) provides³¹ as follows:

²⁸ See NY Legis Memo., Laws of 2010, Ch. 329.

²⁹ Laws of 2010, Ch. 329, § 1, effective October 12, 2010. Laws of 2010, Ch. 329, §3 as amended by Laws of 2010, Ch. 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

³⁰ Laws of 2015, Ch. 447, effective November 20, 2015. § 2. This act shall take effect immediately and apply to all actions whenever commenced. NY LEGIS 447 (2015), 2015 Sess. Law News of N.Y. Ch. 447 (A. 7221)

³¹ Laws of 2010, Ch. 329, § 1, effective October 12, 2010. Laws of 2010, Ch. 329, §3 as amended by Laws of 2010, Ch. 415, § 1 and applicable to actions and proceedings commenced on or after such effective date.

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(d) The term “expenses” as used in subdivisions (a) and (b) of this section shall include, but shall not be limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses that the court may determine to be necessary to enable a spouse to carry on or defend an action or proceeding under this section. In determining the appropriateness and necessity of fees, the court shall consider:

1. The nature of the marital property involved;
2. The difficulties involved, if any, in identifying and evaluating the marital property;
3. The services rendered and an estimate of the time involved; and
4. The applicant’s financial status.³²

23-4. Counsel Fee Awards - Actions Commenced On or After October 10, 2010 - Relevant Case Law – No Counsel fees to Monied Spouse – Sanctions

In *Silverman v. Silverman*,³³ the IAS court awarded the husband \$50,000 in attorney’s fees, noting that this award was based upon the dilatory conduct of both the wife and her then-counsel. This conduct was principally founded upon the wife’s adherence, throughout the litigation, to the contention that the husband had secret offshore assets, which contention she was ultimately unable to prove, although it also included other acts by the wife that the court considered having substantially increased the amount of fees the husband had to incur in the course of litigation. The Appellate Division held that the award of attorney’s fees was not proper under Domestic Relations Law § 237 because awarding attorney fees to the monied spouse does not comport with the purpose and policies of that section of the Domestic Relations Law. Furthermore, although the ruling may be better characterized as a sanction rather than an attorney fee award under section 237, under the Rules of the Chief Administrative Judge, Part 130.1 (22 NYCRR 130-1.1), such a sanction may only be awarded where the procedures set forth in Part 130 are followed. Those procedures were not followed here. Section 237(a) permits the court to direct either spouse to pay counsel fees to the other spouse “to enable that spouse to carry on or defend the action or proceeding as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties.” The intent of the provision is to ensure a just resolution of the issues by creating a more level playing field with regard to the parties’ respective abilities to pay counsel, “to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the evidence.” Therefore, where the parties’ respective financial positions gives one a distinct advantage over the other, the court may direct the monied spouse to pay counsel fees to the lawyer of the non-monied spouse. The statute’s reference to “having regard to the circumstances of the case and of the respective parties” permits consideration of many factors, but focuses primarily on the paramount factor of financial need.

The Second Department adopted this rule in *Hathaway v. Hathaway*³⁴ where the Appellate Division held that Supreme Court erred in directing that the plaintiff’s “outstanding legal fees ... and those fees paid previously

32 Added L.1962, c. 313, § 10. Amended L.1963, c. 341, § 1; L.1963, c. 685, § 7; L.1978, c. 444, § 1; L.1980, c. 281, § 10; L.1983, c. 86, § 1; L.1983, c. 287, § 1; L.1986, c. 149, § 1; L.1986, c. 892, § 5; L.1987, c. 482, § 1; L.1992, c. 422, § 1; L.2010, c. 329, § 1, eff. Oct. 12, 2010; L.2015, c. 447, § 1, eff. Nov. 20, 2015.

33 304 AD2d 41, 756 N.Y.S.2d 14 (1st Dept., 2003); See also *Wells v. Serman*, 92 A.D.3d 555, 938 N.Y.S.2d 439 (1st Dept., 2012 (Supreme Court’s award of interim counsel fees to plaintiff, the monied spouse, based solely on defendant’s conduct in delaying the litigation, was improper under Domestic Relations Law § 237. An award of counsel fees under DRL § 237 cannot be made merely to punish a party for claimed discovery delays or for seeking a jury trial on grounds.)

34 16 AD3d 459, 791 N.Y.S.2d 631 (2d Dept,2005)

from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties." This provision effectively made the defendant, the non-monied spouse, pay a substantial portion of the counsel fees of the monied spouse, the plaintiff who was worth over \$1 million, in violation of Domestic Relations Law § 237 and, therefore, was improper.

23-5. Counsel Fee Awards - Right to a Hearing

A party is entitled to a hearing on the issue of counsel fees and may not be compelled to have the issue determined upon the submission of affirmations or affidavits. In *Sadofsky v Sadofsky*,³⁵ the Second Department held that the husband was entitled to an evidentiary hearing on the wife's attorney's request for counsel fees so that the extent and value of respondent's services could have been scrutinized in an adversarial context by the trial court and intelligently reviewed by the appellate court. Although counsel fees may be fixed on affidavits, the final fixation of counsel fees should be based on testimonial or other trial evidence unless the parties stipulate otherwise. There was no binding stipulation, and absent an evidentiary hearing, the husband had no meaningful way of testing the respondent's claims relative to time and value.

23-6. Counsel Fee Awards - Time for Application

The application for counsel fees in a matrimonial action must be made prior to the entry of the final judgment. In *Redgrave v Redgrave*,³⁶ the Supreme Court granted defendant's motion to dismiss the complaint at trial. Thereafter it granted defendant's application for counsel and expert fees. The Appellate Division rejected plaintiff's contention that Supreme Court lacked the jurisdiction to award the fees because the action was terminated by the dismissal of the complaint prior to defendant's fee application. It held that in a divorce action, the court is authorized to direct a party to pay the counsel fees and expenses of the other spouse, provided that direction is "made prior to final judgment" (citing Domestic Relations Law §237 [a]). That language has been interpreted to permit the court to direct payment of fees and expenses "at any time after the start of the action up through the entry of final judgment." Here, defendant made his application eight days after the oral dismissal of the complaint, which was several months prior to the entry of the final order dismissing the action, and under such circumstances, Supreme Court was authorized to entertain the application. The Appellate Division agreed with plaintiff's argument that it was error for Supreme Court to award counsel and expert fees without a hearing in the absence of a stipulation consenting to a determination upon written submissions, despite her failure to request a hearing.³⁷ It made it clear that this was now the rule in the Third Department (as it is in the other Departments), stating that "[T]o the extent that other decisions of this Court have held to the contrary, they should no longer be followed."

23-7. Counsel Fee Awards - Effect of Rules of Professional Conduct

22 NYCRR 1400.2 and 22 NYCRR 1200.10-a require that a statement of clients' rights be provided to a prospective client in "domestic relations matters". The form of the statement is prescribed in the rule. It is intended to

35 78 A.D.2d 520, 431 N.Y.S.2d 594 (2d Dept.,1980); See also *Rubin v Rubin* 119 AD2d 852, 506 NYS2d 44 (1st Dept.,1986); *McCauley v Drum*, 217 AD2d 829, 629 NYS2d 838 (3d Dept.,1995)

36 304 AD2d 162, 759 NYS2d 23 (3d Dept.,2003)

37 Citing *Carlson-Subik v. Subik*, 257 AD2d 859, 862; see also *Matter of Flynn v. Rockwell*, 295 AD2d 672, 675; *Ott v. Ott*, 266 AD2d 842; *Stricos v. Stricos*, 263 AD2d 659; *Sim v. Sim*, 248 AD2d 781, 781, 782.

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tell the prospective client what he or she is entitled to, as a client, “by law or by written retainer agreement”. It must be provided at the initial consultation and must be signed by the attorney and the client.

22 NYCRR 1400.3 provides in its first sentence that an attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client, must execute a written agreement with the client, setting forth in plain language the terms of compensation and the nature of the services to be rendered. In addition, the agreement, and any amendment to it must be signed by the attorney and the client. In actions in the Supreme Court, the signed agreement must be filed with the court, with the statement of net worth. A duplicate copy of the filed agreement and any amendment must be provided to the client. The rule sets forth what the written retainer agreement must contain.

22 NYCRR 1400.1 limits the application of these rules to “all attorneys who, on or after November 30, 1993, undertake to represent a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings. The rules do not apply to attorneys representing clients without compensation paid by the client, except that where the client is other than a minor, section 1400.2 applies to the extent it is not applicable to compensation. The rules apply only to domestic relations matters to which Part 1400 of the joint rules of the appellate division are applicable. Actions for equitable distribution following a foreign judgment of divorce, and actions to declare the validity or nullity of a foreign divorce or of a foreign marriage are not within the ambit of section 1400.1 and 1400.7.

22 NYCRR 1200.11, sections (c)(2)(B), (c)(2)(c) , and (e) make it a violation of the Rules of Professional Conduct for an attorney to fail to comply with §§1400.4, (which prohibits a non-refundable retainer fee), 1400.5 (which allows an attorney to obtain a confession of judgment or promissory note or lien on real property, or obtain a security interest to secure payment of his or her fee, only where the retainer agreement provides that a security interest may be sought, notice of an application for the security interest is given to the adversary spouse and the court approves of the security interest; and which limits mortgage foreclosure) and 1400.7 (fee arbitration) and the first part of §1400.3 (which requires that there be a written retainer agreement setting forth the nature of the relationship and details of the fee arrangement.)

The failure to comply with 22 NYCRR 1400.2 and 1400.3 does not preclude the right to make application, pursuant to Domestic Relations Law §237, for an award of counsel fees from the other spouse in a case where there was “substantial compliance” with those requirements, the client waived her right to arbitration of the attorney’s fee dispute, and counsel rendered substantial services and achieved reasonably favorable results.³⁸

Rule 1.5 of the Rules of Professional Conduct requires that lawyer’s charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Rule 1.5 also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred

³⁸ Flanagan v Flanagan, 267 AD2d 80, 699 NYS2d 406 (1st Dept., 1999). See also Mulcahy v. Mulcahy, 285 A.D.2d 587, 728 N.Y.S.2d 90 (2d Dep’t 2001) (an attorney may recover a fee from an adversary spouse where there is substantial compliance with 22 N.Y.C.R.R. 1400.3.)

in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

The Rules of Professional Conduct contains a list of factors to be considered when determining if a fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.³⁹

23-8. Counsel Fee Awards - Expert Fees

The “expert fee” provisions of the Domestic Relations Law were amended in 1992⁴⁰ to codify the decision in *Ahern v Ahern*,⁴¹ which set forth the requisites for a pendente lite expert fee application. The amendment added to the definition of “expenses,” as used in Domestic Relations Law §237(a) and (b), the requirement that “in determining the appropriateness and necessity of fees” requested pursuant to Domestic Relations Law §237(a) and (b) the court shall consider: “1. The nature of the marital property involved; 2. The difficulties involved, if any, in identifying and evaluating the marital property; 3. The services rendered and an estimate of the time involved; and 4. The applicant’s financial status.”

In 2010 Domestic Relations Law §237(a) was amended to provide that” the court may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court’s discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Any applications for fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.”⁴²

³⁹ Rules of Professional Conduct, Rule 1.5

⁴⁰ Laws of 1992, c. 422.

⁴¹ *Ahern v Ahern* (1983, 2d Dept) 94 App Div 2d 53, 463 NYS2d 238.

⁴² 2010 Sess. Law News of N.Y. Ch. 329 (A. 7569-A)

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In 2015 Domestic Relations Law §237(a) was amended to provide that an unrepresented litigant shall not be required to file such an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself.⁴³

A literal reading of Domestic Relations Law §237(a) and (d) indicates that a party seeking “counsel fees and fees and expenses” and his or her attorneys, must file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. In establishing entitlement to fees requested pursuant to Domestic Relations Law §237(a) the party seeking such fees must prove the necessity for and reasonableness of such fees, as well as: 1. The nature of the marital property involved; 2. The difficulties involved, if any, in identifying and evaluating the marital property; 3. The services rendered and an the time involved; 4. The applicant’s financial status.”⁴⁴ Since the term ‘expenses’ as used in subdivisions (a) and (b) of this section shall include, but shall not be limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses that the court may determine to be necessary to enable a spouse to carry on or defend an action or proceeding under this section they may include fees of a medical professional or forensic psychiatrist.

There is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. Does this presumption apply to expert fees? It would appear from the language of the statute, which uses the terms counsel fees and fees and expenses of experts separately, that the rebuttable presumption in Domestic Relations Law §237 (a) does not apply to interim expert fee applications and applications made after trial.

There is a paucity of case law dealing with expert fee awards made after trial. It has been held that an award of expert witness fees in a matrimonial action is left to the sound discretion of the trial court. In that case the Appellate Division held that the defendant’s failure to provide any affidavits from her expert witnesses supporting her post trial motion for experts fees left the Supreme Court with an insufficient basis upon which to grant that branch of her motion which was to compel the plaintiff to pay the fees and costs associated with the appearance and testimony of those expert witnesses at the trial of the action.⁴⁵

43 2015 Sess. Law News of N.Y. Ch. 447 (A. 7221)

44 See Domestic Relations Law §237(d)

45 O’Donnell v. O’Donnell, 2 A.D.3d 604, 605, 769 N.Y.S.2d 282, 282–83 (2 Dept., 2003) (citing Corrao v. Corrao, 209 A.D.2d 573, 574, 619 N.Y.S.2d 647; Fischler v. Fischler, 184 A.D.2d 680, 681, 587 N.Y.S.2d 178; Coppola v. Coppola, 129 A.D.2d 760, 762, 514 N.Y.S.2d 754).