Navigating the Matrimonial Preliminary Conference So You Don't Sink the Ship, Revisited—Part I

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Preface

In "Navigating the Matrimonial Preliminary Conference So You Don't Sink the Ship," which appeared in the Winter 2020 issue of this publication, we discussed each provision in the Preliminary Conference Stipulation/Order Form and explained that input from the client and others may be necessary before agreeing to certain of its provisions. We wrote about the dangers of signing a Preliminary Conference Stipulation/Order Form without making changes and/or striking out portions of it.

In the last issue of the Family Law Review we explained in our article "New Rules Governing Matrimonial Actions" that effective July 1, 2022, the matrimonial rules were revised to incorporate many of the Commercial Division rules. In that article we discussed the revisions to 22 N.Y.C.R.R. § 202.16 and § 202.16-b and some of the Part 202 Uniform Rules. In the endnotes we pointed out that the administrative order which adopted the new rules also adopted a revised Preliminary Conference Stipulation/Order-Contested Matrimonial Form (PC Order) for use in matrimonial matters effective July 1, 2022.

In this article we revisit and update "Navigating the Matrimonial Preliminary Conference So You Don't Sink the Ship." It is a substantial revision of our earlier article brought up to date to cover the rules governing matrimonial actions that must be considered when attending a Matrimonial Preliminary Conference after June 30, 2022.

The Matrimonial Preliminary Conference

After a matrimonial action is commenced and a Request for Judicial Intervention (RJI) is filed, the court will schedule the case for a "Preliminary Conference." The Preliminary Conference is a vital point in your case. At the conclusion of the Preliminary Conference, the parties and their attorneys are asked to sign a stipulation that will be "so ordered" by the court, in which your client may give up certain statutory rights. This stipulation may bar your client from exercising rights that you subsequently discover you need to exercise to be prepared for trial. Counsel *must* be cautious before stipulating to anything that waives your client's rights under the Civil Practice Law and Rules or the Domestic Relations Law. While a waiver cannot be inferred from mere silence,[1] it may arise by a failure to act so as to evince an intent not to claim the purported advantage or right.[2] Therefore, you must make sure that the stipulation is clear as to what rights your client is not waiving.

It is essential that you prepare for the matrimonial Preliminary Conference and review the matters that may be considered at the conference, which are specified in the Uniform Rules.[3] It is suggested that you review the Matrimonial Preliminary Conference Stipulation/Order (Contested Matrimonial) form in advance of the Preliminary Conference with your client; fill it out, striking out and/or modifying the portions that you do not agree with, and bring it with you to the conference for reference. Prior to doing so, contact the Supreme Court clerk's

office to determine if they have additional requirements to be added in an addendum to the form, if any.

The Mechanics of the Preliminary Conference

22 N.Y.C.R.R. § 202.16 (f) was amended in 2022 to add subdivision (1-a). It requires counsel to consult with each other before the Preliminary Conference and discuss in good faith the matters in 22 N.Y.C.R.R. § 202.16 (f)(2) and 22 N.Y.C.R.R. § 202.11.[4] Section 202.11 requires counsel for all parties to consult prior to a Preliminary or Compliance Conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of Alternate Dispute Resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel must make a good-faith effort to reach agreement on these matters in advance of the conference. Any agreements reached must be submitted to the court in writing, which the court shall "so order" if approved and in proper form. This provision applies only where both parties are represented by counsel.[5]

The Preliminary Conference may be held in the courtroom, unless the judge is engaged in a trial in the courtroom. In such event it may be held in the robing room. If the judge is busy, his "court attorney" may conduct the conference, and the judge will address the parties at the conclusion of the conference. It is strongly suggested that the conference be held "on the record," with a court reporter transcribing the conference, so that there are no misunderstandings as to what has been orally agreed upon by counsel during the conference. Counsel should request that a court reporter be present well in advance of the conference. Usually, the courtroom clerk gives the Preliminary Conference Stipulation/Order form to the plaintiff's attorney, and asks him or her to fill it out before the conference, with the cooperation of the defendant's counsel. Sometimes the judge or court attorney fills out the stipulation/order during the conference.

All of this may have changed for some or all judges since the COVID-19 pandemic and the promulgation of the new Uniform Rules. The conference may be held virtually on Microsoft Teams. The court rules now provide that any party may request to appear at a conference by electronic means; where feasible and appropriate, the court is encouraged to grant such requests.[6]

Counsel must make sure to strike out anything in the Preliminary Conference Stipulation/Order that was written in by opposing counsel which has not been mutually agreed upon. This should be done before giving the Preliminary Conference Stipulation/Order to the judge when both attorneys meet with him or her. If something is not stricken from the form that is handed to the judge, they will naturally assume that counsel agreed to it. It is important to remember that counsel *does not have to sign* a Preliminary Conference Stipulation that contains *anything* that has not been mutually agreed upon. Counsel should also remember that the attorneys have the right to add anything to the Preliminary Conference Stipulation and cannot be compelled by the judge to sign it. If both attorneys are not in complete agreement, neither can be compelled to sign it.

Counsel should read and explain the terms of the Preliminary Conference Stipulation to the client after it is completed by the court, before signing it. The client should know before it is signed what, if any, of his rights will be waived, and should agree to his attorney signing it. It should be emphasized to the client that the stipulation will become an order when the judge signs it, and he will be required to comply with the provisions of the stipulation setting deadlines for the production of financial documents and information. Care should be exercised, because once the stipulation is signed by counsel and the parties and then signed by the judge, it becomes an order, which can only be modified upon motion for good cause.

The Official Form Preliminary Conference Stipulation/Order

The Official Form Preliminary Conference Stipulation/Order requires the parties to provide certain information regarding the case. The sections which can have a profound effect on the case are: (1) the ones that state that a particular matter is "resolved," and (2) those sections which require that an act be completed by a certain date. If an issue is marked "resolved," the court may not let the parties try that issue, even when it becomes evident during the trial that it was not actually resolved.

Because the Preliminary Conference is often held before any pleadings are served, or service of the pleadings is not complete at the time of the Preliminary Conference, counsel must be careful in making commitments that cannot later be complied with due to circumstances which may or may not occur until after the conference. Until counsel knows what the allegations are in the pleadings, what causes of action and counterclaims are pleaded, what affirmative defenses are alleged, and what is admitted or denied, counsel should not stipulate to make any kind of motion with respect to the pleadings.

For the same reason, until issue is joined on the answer and counterclaims, if any, defense counsel cannot properly serve disclosure demands or make any motions with regard to any agreements that may be in issue. Counsel should write into the Preliminary Conference Stipulation a provision that disclosure will not commence until after all of the pleadings are served.

A. Background Information

Section A of the Preliminary Conference Stipulation is titled "Background Information." It has spaces available for counsel to fill in the contact information for the attorneys, the date the summons was served and filed, the date of the marriage, the names and birth dates of the children, whether an Order of Protection has been issued and information about where and when it was entered (it requires copies to be attached), whether either party is requesting a translator, and information as to whether any Premarital, Marital or Separation Agreements "are asserted." We have no idea why the word "asserted" is used in this sentence, since it appears to request information as to whether there are any premarital, marital or separation agreements between the parties. If there are any agreements it requests information about the nature of each agreement and the date of the agreement. It contains a place for the party who is or may be challenging an agreement to indicate the final date that any challenge to the agreement may be asserted, providing: "Any challenge shall be asserted no later than_____."

Comment

Under established New York law, a challenge to an agreement must be made in a plenary action, in which the parties have the right to conduct disclosure,[7] and not by motion.[8] A challenge may be made in a separate cause of action interposed in the complaint. A stipulation in an action can be challenged on motion only where the action in which the stipulation was made is still pending and judgment has not yet been entered.[9] There are exceptions to this general rule that a challenge to an agreement must be made in a plenary action. It may be challenged where reformation of a separation agreement is sought to conform the agreement with the intent of the parties, or where the matrimonial action is still pending and was not terminated with entry of a judgment, or in certain circumstances where enforcement of child support is sought.[10] The invalidity of an agreement may be raised as an affirmative defense or counterclaim in an action for a divorce where the plaintiff seeks to have the agreement incorporated into the Judgment of Divorce.[11]

Thus, unless both attorneys agree in writing to permit an agreement to be challenged in the action by a motion, such a challenge may not be made. It may only be made in a cause of action or counterclaim.

By agreeing to make a motion regarding the validity of an agreement by a date certain, counsel may be waiving the right to conduct disclosure with regard to the circumstances surrounding the execution of the agreement. If the date that disclosure must be completed is before issue is joined, counsel may be limited to making a motion to dismiss pursuant to CPLR 3211,[12] and may be waiving the right to move for summary judgment, which can only be made after all of the pleadings are served.[13] As a practical matter, a motion for summary judgment is not usually made until after the depositions of the parties are completed. Counsel should also be cautious about stipulating to an outside date by which to make a motion with respect to an agreement, without specifying what kind of motion will be made, since a motion for summary judgment cannot be made until after issue is joined with respect to the cause of action or counterclaim relating to the agreement. Moreover, until issue is joined there is no way of intelligently framing such a motion.

It is suggested that counsel should not agree to assert any challenge to an agreement by a certain date. There is simply no reason to agree to such a limitation. If counsel is going to sign such an agreement, he or she should specify the exact type of motion that will be made. The stipulation should provide that the attorneys are not waiving their rights to make any other motions with regard to the agreement, and that the failure to make such a motion by the time agreed upon will not constitute a waiver of the right to make any other motion with regard to that agreement at a later date.

B. Grounds for Divorce

The Preliminary Conference Stipulation/Order form contains a section B titled "Grounds for Divorce," which contains space for the parties to indicate if the grounds for divorce are resolved. If fault is resolved, counsel must indicate in the Preliminary Conference Stipulation/Order form the grounds upon which a divorce will be obtained. The form does not leave space for counsel to recite what steps must be taken by the party who is going to obtain the divorce, nor does it contain a deadline for that party to submit the required papers to obtain a Judgment of Divorce. The Preliminary Conference Stipulation/Order form merely provides, if the issue of grounds is resolved: "The parties agree that _____ will proceed on an uncontested basis to obtain a divorce on the grounds of _____." This language does not anticipate a situation where the party who has agreed to go forward with the divorce changes his or her mind. If that happens, the party who has agreed to obtain a divorce cannot be compelled to obtain a divorce, since a contract to obtain a divorce violates the public policy of New York State.[14]

Comment

It is suggested that counsel write into the stipulation the following:

> The Plaintiff shall proceed on his/her cause of action for a divorce, by submitting to the court the required papers for an uncontested divorce on the grounds of _____ upon 10 days' Notice of Settlement, and withdraws all other causes of action for a divorce. The Defendant withdraws his/her answer to

> that cause of action, and counterclaims for a divorce, on the condition that the Plaintiff submits all of the required papers on or before _____ in which case the Plaintiff withdraws his/her reply to the counterclaims for divorce. In the event that the Plaintiff has not submitted such papers by _____ the Defendant shall proceed on their counterclaim for a divorce, by submitting the required papers for an uncontested divorce on the grounds of _____ upon 10 days' notice of settlement, and withdraws all other counterclaims for a divorce. In such case, the Plaintiff hereby withdraws his/her reply to that counterclaim.
>
> The Preliminary Conference Stipulation/Order form also provides: "If the issue of grounds is unresolved: ____ A trial of this issue shall be held on _____ and a jury_____ is or_____ is not requested."

There is a statutory right to trial by jury on the grounds for divorce, and a constitutional right to a jury trial where the grounds for divorce are adultery.[15] Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a Note of Issue containing a Demand for Trial by Jury. Any party served with a Note of Issue not containing such a demand may demand a trial by jury by serving upon each party a Demand for Trial by Jury and filing such in the office where the Note of Issue was filed within 15 days after service of the Note of Issue.[16] Once a jury demand is timely served, it may be waived only by failing to appear at trial or by filing a written waiver or by making an oral waiver in open court.[17] The general rule is that a jury trial in a civil case may be waived by the agreement of the parties. If a jury trial is not demanded by either party in a Note of Issue the right to a jury trial is deemed waived.[18] After first requesting a jury trial, the plaintiff cannot, without the consent of the defendant, place the case on the non-jury calendar.[19]

If, at the time of the Preliminary Conference counsel does not know whether he or she wants a jury trial, the safer course is to select neither option, and write into the form that "counsel for the _____ reserves the right to request a jury trial in accordance with the provisions of the Civil Practice Law and Rules and the Uniform Rules for Trial Courts."

C. Custody

The Preliminary Conference Stipulation/Order form contains a section C titled, "Custody," which contains space to indicate whether the issue of custody has been resolved, whether the issue of parenting time has been resolved and whether the issue of "decision-making" has been resolved. It provides that, "[I]f custody issues, including parenting time and decision-making are resolved the parties are to submit an agreement/stipulation no later than _____."

Comment

The form does not leave space for counsel to recite who will be awarded custody, decision-making or parenting time. This language does not anticipate a situation where a party changes his or her mind after the Preliminary Conference before executing an agreement. If that happens, the party who has agreed to custody off the record cannot be compelled to be bound by his or her oral agreement, since such an oral agreement would violate the public policy of New York State.[20]

If the parties have an oral agreement settling the issues relating to custody and visitation, they must enter into a stipulation that is either dictated on the record in open court[21] or in writing, duly signed and acknowledged by both parties to be valid and enforceable in a matrimonial action.[22]

Since an agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded, there is a question as to the validity of such open court stipulations, which has yet to be resolved by the Court of Appeals.

The Appellate Division, First Department has sustained the validity of open court stipulations in lieu of formal agreements.[23] So has the Second Department.[24] The Third Department has refused to recognize open-court stipulations as valid where the agreement involved equitable distribution, requiring that a stipulation be reduced to writing, signed and acknowledged in order to meet the statutory requirements.[25] However, in *Charland v. Charland*,[26] the Third Department appeared to relax its rule, recognizing an open court stipulation pursuant to CPLR 2104, on the theory that the statute only applies to agreements that effect the equitable distribution of marital property. The court rejected defendant's assertion on appeal that reversal was mandated because the Supreme Court's determinations as to custody, child support and equitable distribution improperly relied on certain stipulations by the parties which did not conform to the requirement of Domestic Relations Law § 236[B][3] in that they were not "in writing subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."

It found this assertion to be without merit, stating:

> The requirements of Domestic Relations Law 236[B][3] pertain to stipulations which effect the equitable distribution of marital property. Here, the parties' stipulations related to the value of certain marital property (and debt); equitable distribution, which was determined by the court: custody; and the manner in which child support was to be calculated. As such, their stipulations were

> not marital agreements within the meaning of Domestic Relations Law 236[B][3], but rather agreements by the parties, through their counsel in open court, within the purview of CPLR 2104.[27]

The Fourth Department has required that the stipulation be reduced to writing, signed and acknowledged in order to meet the statutory requirements.[28] However, in *Kelly v Kelly,*[29] it held that the requirements of Domestic Relations Law § 236[B][3] pertain to stipulations that effect the equitable distribution of marital property, not provisions of the stipulation that pertained to custody, which was binding pursuant to CPLR 2104. While a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action where the defendant did not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement was held to be enforceable in other types of actions despite the alleged insufficiency of the acknowledgment.

Subdivision C. 2. Provides: "If the parties do not notify the Court that all issues related to custody are resolved, a conference shall be held on at which time the Court shall determine the need for an Attorney for the Child/Guardian ad Litem and/or a forensic evaluation and set a schedule for resolving all issues relating to custody."

Subdivision C. 3. provides:

> ATTORNEY FOR CHILD(REN) or GUARDIAN AD LITEM: Subject to judicial approval, the parties request that the Court appoint an Attorney for the parties' minor child(ren) ("AFC"). The cost of the AFC's services shall be paid as follows: _____.
>
> FORENSIC: Subject to judicial approval, the parties request that the Court appoint a neutral forensic expert to conduct a custody/parental access evaluation of the parties and their child(ren). Subject to Judicial approval, the cost of the forensic evaluation shall be paid as follows: _____.
>
> Any appointment of an Attorney for the Child/Guardian ad Litem or forensic evaluator shall be by separate order which shall designate the individual appointed, the manner of payment, source of funds for payment, and each party's responsibility for such payment.

Comment

If the parties agree to this provision, they must indicate in the stipulation how the fees are of the attorney for the child and neutral forensic expert to be allocated. They are waiving their right to have the court decide that question after a motion on notice. While the fees of the attorney for the child and the neutral forensic expert may mount up, the less-monied spouse will not be able to receive a *pendente lite* award for these fees and must wait until trial for a re-allocation of these fees. This is like playing roulette. The attorney for the less-monied spouse should be cautious about agreeing to this provision, which may effectively waive the presumption in DRL § 237 that counsel fees and experts' fees are to be awarded to the less-monied spouse. Moreover, counsel should be aware that this provision contains an open-ended obligation for the fees of the attorney for the child and a neutral forensic expert before they even know what the hourly rate or estimated fee of that person will be.

Counsel should be wary about agreeing to allow the court to make such a financial determination without a formal motion on notice. Such a stipulation denies the client the right to a determination of the counsel fee obligation on the merits, a hearing if there are disputed issues of fact, and the right to an appeal from such an order. It is suggested that the client should be advised of the effect of such a stipulation, and give his informed consent[30] to it in writing before counsel makes such an agreement.

This provision, which authorizes the judge to appoint an attorney for the child, guardian ad litem or forensic evaluator, may be construed as a waiver by the clients of the right to select their own forensic evaluator, and challenge the necessity for, reasonableness and amount of the fees of the attorney for the child or court-appointed expert.

To prevent a waiver, the wording of the stipulation form should be modified to add: "Neither party waives the right to retain their own forensic expert and each party shall have the right to obtain their own forensic evaluation. Neither party waives the right to challenge the reasonableness of the fees requested by the AFC or the neutral forensic expert."

This provision can be construed as authorizing the judge to appoint an attorney for the child, guardian ad litem or forensic evaluator and determine who shall pay such fees and the amount of fees to be paid. It may be construed as a waiver by the clients of the right to select their own forensic evaluator, and challenge the necessity for, reasonableness and amount of the fees of the attorney for the child or court-appointed expert.

To prevent this from happening, the wording of the form should be modified to add the following sentence after the word "payment": "The separate order shall be made after formal motion by either of the parties in accordance with 22 N.Y.C.R.R. 202.16(k), which shall include a current Statement of Net Worth."

D. Financial

The Preliminary Conference Stipulation/Order form contains a section D titled "Financial," which contains spaces to indicate whether maintenance, child support, equitable distribution and counsel fees are resolved.

The Preliminary Conference Stipulation/Order form requires the parties to "List all other causes of action and ancillary relief issues that are unresolved." It then states: "Any issues not specifically listed in this Order as unresolved may not be raised in this action unless good cause is shown."

Comment

If these issues are not resolved and reduced to a written agreement, which is duly signed and acknowledged, or dictated on the record in open court, the spaces should be marked "Unresolved."

If all of the pleadings have not yet been served, counsel should strike out the sentence in the order which provides that "[a]ny issues not specifically listed in this Stipulation as unresolved may not be raised in this action unless good cause is shown."

Until such time as all pleadings are served, counsel cannot anticipate what claims are going to be interposed in an answer or counterclaim. Counsel should not have to guess which issues should be listed in the stipulation that have not yet been raised.

E. Other

The Preliminary Conference Stipulation/Order form contains a section E titled "Other." It requires that parties to "List all other causes of action and ancillary relief issues that are unresolved." It states in D: "Any issues not specifically listed in this Stipulation as unresolved may not be raised in this action unless good cause is shown."

If all of the pleadings have not yet been served, counsel should strike out the sentence which provides that "[a]ny issues not specifically listed in this Stipulation as unresolved may not be raised in this action unless good cause is shown."

Until such time as all pleadings are served, counsel cannot anticipate what claims are going to be interposed in an answer or counterclaim. Counsel should not have to guess which issues should be listed in the stipulation that have not yet been raised.

F. Pendente Lite Relief

The Preliminary Conference Stipulation/Order form contains a section F. titled "Pendente Lite Relief," where the court can indicate any directions it has made or any stipulation of the parties. Absent the consent of the parties, the court cannot make any directions, unless it is determining a motion or the parties have so stipulated.[31] Counsel should object to any directions which are inserted by the court without their consent, and they have the right to refuse to sign such a stipulation.

G. Discovery

The Preliminary Conference Stipulation/Order form contains a section G titled "Discovery."

1. Maintain Financial Records

The first part of this section requires each party to maintain all financial records in his or her possession through the date of the entry of a judgment of divorce, including electronic evidence.

Comment

Counsel should obtain his client's approval before committing him or her to maintain these records, and should make sure that his client has these records in their possession before making such a commitment. If counsel decides to leave this provision in the stipulation, he or she should insert the dates that the term "relevant dates" refers to. If his client is not sure which of these records he has in his possession, counsel should not make this commitment, or should condition this commitment upon the client having first ascertained what records he or shes has in their possession. In such a case, counsel should add to the stipulation the following: "This provision shall not become effective unless and until the attorney for the _____ notifies the attorney for the _____ that his or her client has such documents in his possession."

The second part of the Preliminary Conference Stipulation/Order form contains spaces for filling in the dates for the service of disclosure devices. This portion of the statement may impose limitations upon a party's right to conduct pretrial disclosure. Although it does not state so, some New York courts have construed the dates filled into the form by counsel as limitations upon the right to serve disclosure demands and request expert fees.

Very frequently, all of the pleadings have not been served prior to the Preliminary Conference. This often occurs in cases where the action is commenced by the filing of a Summons With Notice and the Defendant does not serve a Demand for a Complaint with his Notice of Appearance. The pleadings define the issues between the parties. The admissions in an adverse party's pleading "require no proof."[32] A party may not raise an issue which he has admitted in his answer or reply to a counterclaim. Admissions in an answer or reply to a counterclaim are conclusive upon the parties and upon the court, and no other evidence can properly be received. If countervailing evidence is received, either by inadvertence or consent, it may not be considered.[33]

Unless all of the pleadings have been served before the Preliminary Conference, the plaintiff's counsel may find himself

in the unenviable position of being asked to agree to a timetable for discovery before issue is joined on the complaint. Similarly, the defendant's counsel may be asked to agree to such a timetable before issue is joined on the counterclaims. It is unwise to agree to a timetable to conduct discovery before all of the pleadings have been served and all of the issues are defined. Discovery conducted before all of the issues are defined may amount to no more than the proverbial "fishing expedition."

Article 31 of the Civil Practice Law and Rules deals with disclosure. It permits a party to serve disclosure demands after the commencement of the action. The only limitation is in CPLR 3108(a), which provides, inter alia, that leave of the court granted on motion shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired. This provision gives the plaintiff priority in taking the defendant's deposition. However, Domestic Relations Law § 236(B)(4)(a) limits the use of the disclosure devices listed in CPLR 3101. It provides for "compulsory financial disclosure" in matrimonial actions. It does not permit the commencement of financial disclosure until after issue is joined. It provides, in part, as follows: "In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered."

Disclosure on fault or custody grounds is not permitted in matrimonial actions except in "rare circumstances."[34] The only disclosure that is permitted is financial disclosure. The Domestic Relations Law only allows disclosure in matrimonial actions and proceedings in which alimony, maintenance or support is in issue. Therefore, based upon the provisions of Domestic Relations Law § 236(B)(4)(a), financial disclosure is not available in a matrimonial action until issue is joined. The disclosure provisions in Domestic Relations Law § 236(B)(4), an inconsistent statute, take precedence over the disclosure provisions in the CPLR.[35]

Domestic Relations Law § 236(B)(4) also provides that: "A sworn Statement of Net Worth[36] shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said Statement is not demanded, it shall be filed with the clerk of the court by each party, within ten days after joinder of issue, in the court in which the proceeding is pending." Thus, if a Statement of Net Worth is not demanded by the adversary, it need not be filed until 10 days after issue is joined. A Statement of Net Worth is not a disclosure device.[37]

The Statement of Net Worth is not available where there is an existing Separation Agreement, unless and until the agreement is set aside.[38]

2. Document Production

Paragraph 2(a) of this part of the Preliminary Conference Stipulation/Order form contains an agreement that the parties will exchange the following documents no later than ____ days after the date of the order: "Federal, state and local tax returns, including all schedules, K-1 s, 1099 s, W-2 s and similar data; credit card statements for all credit cards used by a party; joint checking account statements, checks and register; individual checking account statements, checks and register; brokerage account statements; savings account records, other: (specify)."

The Preliminary Conference Stipulation/Order form provides that: "Absent any specified time period records are to be produced for the three years prior to the commencement of this action through the present. If a party does not have complete records for the time period, the party shall provide a written authorization to obtain such records directly from the source within five days of presentation."

Comment

There is no provision in the CPLR or rule or law that requires a party to provide a written authorization to obtain financial records directly from the source. This last sentence should be modified for the circumstances of your case, or struck out of the Preliminary Conference Stipulation/Order form. If issue has not yet been joined, counsel may have to strike all or part of this provision.

2. Dates for Service

Paragraphs 2(b)(c), (d) and (e) also contains space for the parties to fill in dates for the service by each party of a Notice for Discovery and Inspection, and Interrogatories and Responses by each party to those documents.

Comment

This is no rule or law that requires counsel to conduct discovery in the order set forth in the Preliminary Conference Stipulation/Order form, and signing a stipulation that provides otherwise may result in a waiver of a client's rights to disclosure under Article 31 of the CPLR. Counsel is entitled to conduct disclosure in accordance with the provisions of the Civil Practice Law and Rules and is entitled to do so in the order he or she chooses. Unless he or she signs a stipulation providing otherwise, he or she is not limited to conducting disclosure within the time fixed in the Preliminary Conference Stipulation/Order form, or in any particular order. The law does not require counsel to use a second disclosure device until he or she has received responses to or completed the use of a prior disclosure device. The general rule is that a party is "free to choose both the pretrial disclosure devices it wishes to use and the order in which to use them."[39]

Since the dates for disclosure in the Preliminary Conference Order can be and often are construed by the court to limit the rights of the parties to conduct pre-trial disclosure, the dates for service of disclosure devices in the Preliminary Conference Order must indicate the dates that responses will be served, and must condition the service of additional disclosure devices by that party upon the full and complete compliance by the adverse party with that party's previously served disclosure demands. If not, counsel may find they are in a position where they will be compelled to conduct a deposition before receiving full and complete answers to interrogatories or a complete response to a Notice for Discovery and Production and, once counsel conducts the deposition without such responses, it may be argued that counsel waived the right to the responses.

Many matrimonial attorneys try to conduct disclosure by serving interrogatories first, then serving notices for discovery and production and then conducting depositions of the parties.

Counsel should write into the Preliminary Conference Stipulation/Order form the order in which he/she intends to conduct disclosure. Counsel should indicate that they will not be required to proceed with a second disclosure device before receiving full and complete answers to the first disclosure device, unless an order of the court, granted upon motion, provides otherwise.

The paragraphs of the Preliminary Conference Stipulation/Order form where the parties are required to indicate dates for the service of disclosure devices do not take into consideration the possibility that: (a) a motion for a protective order will be made by the adverse party, pursuant to CPLR 3103, staying disclosure; (b) that the requested disclosure will not be timely provided, or will not provided at all; or (c) a disclosure demand will not served by the date it is required to be served because of a delay in receiving responses from the adverse party to a prior disclosure demand.

For that reason, counsel should strike out the provision in the form which states: "Compliance with discovery demands shall be on a timely basis pursuant to the CPLR. Failure to comply may result in sanctions, including the award of legal fees."

It should be replaced with the following provision: "The failure of a party to serve any of the disclosure devices in accordance with the schedule set forth above shall not constitute a waiver of the right of the parties to use such device or any other disclosure device where a motion has been made pursuant to CPLR 3103, staying disclosure; other requested disclosure has not been timely provided, or has not been provided at all;

there has been a delay in receiving responses from the adverse party, to a prior disclosure demand; or for other good cause."

Preclusion

22 N.Y.C.R.R. § 202.16(f)(1-b)(5) now provides that, absent good cause, in accordance with 22 N.Y.C.R.R. § 202.20-c (f),[40] a party may not use, at trial or otherwise, any document that was not produced in response to a request for the document or category of document where the request was not objected to or where an objection to the request was overruled by the court.[41] The court may exercise its discretion to impose other or additional penalties for non-disclosure authorized by law which may be more appropriate in a matrimonial action, other than preclusion or where there is a continuing obligation to update documents.[42]

Comment

22 N.Y.C.R.R. § 202.16(f)(1-b)(5) creates a self-executing remedy not authorized by CPLR 3124 or CPLR 3126. It appears to constitute a denial of due process because preclusion is automatic. The rule does not require that a motion be made by the proponent of the document discovery before the document may not be used. In contrast, under the CPLR a party seeking document production under CPLR 3120 may move for an order under CPLR 3124 with respect to any objection to, or other failure to respond to, as requested by the notice.[43] The party seeking disclosure may also obtain a preclusion order under CPLR 3126.

This rule changes the statutory burden to obtain relief by a disclosure enforcement motion. It automatically precludes the party who has failed to produce the document or category of documents (and failed to object, or who objected and was overruled) from using the document(s) at trial or for any other purpose. The rule places the burden on the party who has failed to produce the document or category of documents he has not objected to or provided, to make a motion to obtain permission to use the document(s). This rule places the burden on the party who wants to use the document(s) to make a showing of good cause for his or her failure to object to the demand for it.[44] It appears that this rule violates N.Y. Constitution, article VI, § 30. This rule appears to abridge rights conferred by statute.[45]

Subdivisions (f) (g), (h) and (i)

Subdivisions (f) (g), (h) and (i) were added in accordance with the matrimonial rules that became effective on July 1, 2022. 22 N.Y.C.R.R. §§ 202.16, 202.16-a, 202.16-b, and 202.18, of the Uniform Rules for the Supreme Court and the County Court ("Uniform Rules") are the "matrimonial rules." Effective July 1, 2022, the matrimonial rules were revised to specifically incorporate 22 N.Y.C.R.R. Part 202 which contains many of the Commercial Division rules.[46]

(f) Interrogatories

22 N.Y.C.R.R. § 202.20(f)(1-b)(2)(ii) provides that unless otherwise stipulated by the parties or ordered by the court, interrogatories shall be no more than 25 in number including subparts; and depositions shall be no more than seven hours long.[47]

New subdivision (f) Interrogatories states that interrogatories are limited to 25 including subparts unless the parties stipulate, or the court orders otherwise. In this proceeding The parties stipulate OR the court orders ___ Interrogatories including subparts.

Both 22 N.Y.C.R.R. § 202.16(f)(1-b) as amended effective July 1, 2022, as well as 22 N.Y.C.R.R. § 202.20 which has been incorporated into the matrimonial rules effective July 1, 2022, limit the use of interrogatories in matrimonial actions to 25 in number, including subparts, unless the parties agree or the court orders otherwise.

We do not understand the justification for limiting the number of the use of interrogatories in matrimonial actions to 25, which cost much less than taking a deposition, can be drafted by a paralegal and approved by counsel, but allowing seven-hour depositions which require the attendance of two lawyers billing at their hourly rates, at least one or possibly both clients taking time off from work, and a court reporter, charging them for their attendance by the page.

The new matrimonial rules that limit the use of interrogatories in matrimonial actions to 25 in number are contrary to the established policy of full and fair disclosure in matrimonial actions. Domestic Relations Law § 236(B)(4) provides for compulsory financial disclosure in matrimonial proceedings where support is in issue, without any showing of special circumstances. In the interest of an orderly trial of the issue of equitable distribution, the statute requires broad disclosure in the form of a searching exploration of the parties' assets and financial dealings, including their interests in business entities, before, at the time of and during the marriage. The purpose of such a probe is to allow a determination as to what constitutes marital property, to distinguish it from separate property, uncover hidden assets of the marriage, and generally gather any information bearing on the issue of equitable distribution. The entire financial history of the marriage is open for inspection by both parties. Discovery under CPLR 3101 may be directed not just to property held at the commencement of the action, but also to holdings and financial resources of a party going back over a considerable period of time. In complicated equitable distribution cases, the use of interrogatories as an initial discovery device is often the best and most realistic tool for full and expeditious financial disclosure.[48]

Due to the usual animosity of the parties in contested matrimonial actions, we doubt that a monied spouse would agree to let their spouse serve more than 25 interrogatories.

This rule places the burden on the proponent of the interrogatories to make a motion or an application at the Preliminary Conference to serve more than 25 interrogatories.

Interrogatories may relate to any matters embraced in the disclosure requirement of CPLR 3101. The answers may be used to the same extent as the deposition of a party. Interrogatories may require copies of documents or photographs as are relevant to the answers required unless an opportunity for this examination and copying be afforded."[49] Interrogatories may be used to impeach or contradict the testimony of a party—provided that the interrogatories are answered in proper form.[50] In *Kaye v. Kaye,*[51] the Appellate Division held that the use of interrogatories as an initial disclosure device in complex equitable distribution cases will expedite the discovery process.[52] The general rule is that a party is "free to choose both the pretrial disclosure devices it wishes to use and the order in which to use them." It noted that Special Term's direction that the parties proceed to Depositions Upon Oral Examination, rather than interrogatories, would not expedite disclosure but may instead operate to prejudice the plaintiff by preventing the use of another, more appropriate, intermediate device.

Interrogatories are frequently used as the first disclosure device in matrimonial actions because they are far less costly than counsel spending hours at a deposition. They take less time than a deposition because the answers are due within 30 days of their service, and they may be used to ascertain the existence of identification documents that may be requested to be returned with the answers to the interrogatories.

The new 25-question limit effectively precludes the parties from using interrogatories in matrimonial actions to expedite the discovery process. Moreover, it conflicts with CPLR 3130, which contains no limit on the number of interrogatories a party may serve. The limit prevents a party from serving comprehensive questions related to all of the elements of maintenance, child support, property distribution, and counsel fee awards and defenses, as well concerning the 16 maintenance factors, the 10 child support factors, the 20 equitable distribution factors, and the counsel fee factors.

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Under the state constitution, the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature.[53] There are some matters which are not subject to legislative control because they deal with the inherent nature of the judicial function.[54] Generally, however, the Legislature has the power to prescribe rules of practice governing court proceedings, and any rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute.[55] In addition, court rules must be adopted in accordance with procedures prescribed by the Constitution and statute.[56]

N.Y. Constitution, Article VI, § 30, which is the source of the Appellate Division's broad judicial rule-making authority, does not afford *carte blanche* to courts in promulgating regulations. A court may not significantly affect the legal relationship between litigating parties through the exercise of its rule-making authority. No court rule can enlarge or abridge rights conferred by statute, and this bars the imposition of additional procedural hurdles that impair statutory remedies.[57] This rule appears to abridge rights conferred by statute.

(g) Depositions

New subdivision (g) titled "Depositions" contains a list for including dates for the depositions of plaintiff, defendant, nonparties and a place for the date of completion of nonparty deposition. It also contains the following language: "All depositions shall be limited to 7 hours in length, except as follows: _____."

Comment

The provisions of 22 N.Y.C.R.R. § 202.20-b(a)(l) limiting the number of depositions taken by plaintiffs, or by defendants, or third-party defendants, do not apply to matrimonial actions.[58]

(h) Electronically Stored Information

Subdivision (h) titled "Electronically Stored Information" merely indicates that parties and non-parties should adhere to the Guidelines on Electronically Stored Information (ESI) contained in Appendix A to the Uniform Civil Rules for Supreme and County Courts in accordance with 22 N.Y.C.R.R. § 202.20(j).

Comment

22 N.Y.C.R.R. § 202.16(g)(5) was added to the matrimonial rules to state that the parties "should" adhere to the ESI guidelines set forth in an Appendix to the Uniform Civil Rules.[59]

(i) Privilege Logs

Subdivision (i) titled "Privilege Logs" contains a place for the court to order or decline to order that the provisions of 22

N.Y.C.R.R. § 202.20-a relating to privilege logs be applicable to this case.

Comment:

22 N.Y.C.R.R. § 202.16(g),(4) was added to the matrimonial rules to indicate that 22 N.Y.C.R.R. § 202.20-a regarding privilege logs do not apply to matrimonial actions and proceedings unless the court orders otherwise.

We will continue to address the new preliminary conference form in Part 2 of this article.

Endnotes

1. *In re City of Rochester*, 208 N.Y. 188, 197, 101 N.E. 875 (1913) (*citing Jewell v. Jewell*, 84 Me. 304, 24 A. 858 (1892); *Golfo v. Kycia Associates, Inc*., 45 A.D.3d 531, 845 N.Y.S.2d 122, 124 (2d Dep't 2007).
2. *See Hadden v. Consolidated Edison Co. of New York, Inc*., 45 N.Y.2d 466, 469, 410 N.Y.S.2d 274 (1978); *Peck v. Peck*, 232 A.D.2d 540, 649 N.Y.S.2d 22 (2d Dep't 1996).
3. 22 N.Y.C.R.R. § 202.16(f)(2)(iv). See https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Matri.pdf (Last accessed August 6, 2022).
4. 22 N.Y.C.R.R. § 202.11.
5. 22 N.Y.C.R.R. § 202.16(f), effective July 1, 2022.
6. 22 N.Y.C.R.R. § 202.10(a) Appearance at Conferences**.**
7. However, financial disclosure is limited to the period up to and prior to the execution of the agreement and disclosure is permitted only with regard to all matters relating to the claims to set aside the agreement. *See Oberstein v. Oberstein*, 93 A.D.2d 374, 462 N.Y.S.2d 447 (1st Dep't 1983).
8. *See Marin v. Anisman*, 69 A.D.3d 440, 892 N.Y.S.2d 390 (1st Dep't 2010).
9. *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56, 421 N.Y.S.2d 556 (1979); *Arguelles v. Arguelles*, 251 A.D.2d 611, 675 N.Y.S.2d 551 (2d Dep't 1998); *Zeppelin v. Zeppelin*, 245 A.D.2d 504, 666 N.Y.S.2d 486 (2d Dep't 1997).
10. *Jagassar v. Deonarine*, 139 N.Y.S.3d 639, 641, 2021 N.Y. Slip Op. 00549, 2021 WL 359472 (2d Dep't 2021).
11. *See Campbell v. Campbell*, --- N.Y.S.3d ----, 2022 WL 3094725, 2022 N.Y. Slip Op. 04875 (4th Dep't 2022) (affirmative defense).
12. CPLR 3211 provides, in part:

    (a) Motion to Dismiss Cause of Action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

    1. a defense is founded upon documentary evidence; or

    2. the court has not jurisdiction of the subject matter of the cause of action; or

    3. the party asserting the cause of action has not legal capacity to sue; or

    4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

    5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

    6. with respect to a counterclaim, it may not properly be interposed in the action; or

    7. the pleading fails to state a cause of action; or

    8. the court has not jurisdiction of the person of the defendant; or

    9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

    10. the court should not proceed in the absence of a person who should be a party.
13. *See* CPLR 3212.
14. *See* GOL § 5-311; *see Taft v. Taft*, 156 A.D.2d 444, 548 N.Y.S.2d 726 (2d Dep't 1989); *Charap v. Willett*, 84 A.D.3d 1003, 925 N.Y.S.2d 94 (2d Dep't 2011).
15. DRL § 173; there is a right to a trial by jury on the grounds for annulment, except physical incapacity. *See* DRL § 143.
16. CPLR 4102(a).
17. CPLR 4102(c). In *Calabro v. Calabro*, 133 A.D.2d 604, 519 N.Y.S.2d 633 (2d Dep't 1987), the Appellate Division affirmed an order granting the wife's motion to vacate an untimely jury demand stating that the decision of whether to relieve the husband of his waiver of the right to a jury trial rested within the sound discretion of the Supreme Court.
18. CPLR 4102(a).
19. *Schnur v. Gajewski*, 207 Misc. 637, 140 N.Y.S.2d 82 (Sup 1955).
20. *See* Domestic Relations Law § 236(B)(3) which requires that such agreements be in writing, duly signed and acknowledged.
21. CPLR 2104 provides that an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.
22. *See* DRL § 236(B)(3).
23. *Eliot v. Eliot*, 70 A.D.2d 612, 416 N.Y.S.2d 328 (2d Dep't 1979); *Rubenfeld v. Rubenfeld*, 279 A.D.2d 153, 720 N.Y.S.2d 29 (1st Dep't 2001).
24. *Harrington v. Harrington*, 103 A.D.2d 356, 479 N.Y.S.2d 1000 (2d Dep't 1984).
25. *Lischynsky v. Lischynsky*, 95 A.D.2d 111, 466 N.Y.S.2d 815 (3d Dep't 1983); *Harbour v. Harbour*, 243 A.D.2d 947, 664 N.Y.S.2d 135 (3d Dep't 1997).
26. *Charland v. Charland*, 267 A.D.2d 698, 700 N.Y.S.2d 254 (3d Dep't 1999).
27. *See also Birr v. Birr*, 70 A.D.3d 1221, 895 N.Y.S.2d 252 (3d Dep't 2010).
28. *Giambattista v. Giambattista*, 89 A.D.2d 1057, 1058, 454 N.Y.S.2d 762 (4th Dep't 1982); *Hanford v. Hanford*, 91 A.D.2d 829, 458 N.Y.S.2d 418 (4th Dep't 1982); *Tomei v. Tomei*, 39 A.D.3d 1149, 834 N.Y.S.2d 781 (4th Dep't 2007).
29. *Kelly v. Kelly*, 19 A.D.3d 1104, 797 N.Y.S.2d 666 (4th Dep't 2005).
30. 22 N.Y.C.R.R. Part 1200, Rule 1.0 (j) of the Rules of Professional Conduct provides: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

31. *See* CPLR 2214, 2215.

32. *Paige v. Willet*, 38 N.Y. 28, 1868 WL 6161 (1868).

33. *Id*.

34. *See Howard S. v. Lillian S.*, 14 N.Y.3d 431, 902 N.Y.S.2d 17 (2010).

35. CPLR 101 provides, in part: "The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute." *See Ling Ling Yung v. County of Nassau*, 77 N.Y.2d 568, 569 N.Y.S.2d 361 (1991).

36. A Statement of Net Worth is not a disclosure device. *See* CPLR 3101, which lists the disclosure devices.

37. *See* CPLR 3101 which lists the disclosure devices.

38. In *Kaufman v. Kaufman*, 125 A.D.2d 293, 509 N.Y.S.2d 85, 86 (2 Dep't 1986) so much of the plaintiff's interrogatories as requested information regarding the defendant's financial condition after May 13, 1977, the date the parties entered into the Stipulation of Settlement, which was incorporated, but not merged, in the Judgment of Divorce, was premature. The defendant's financial circumstances after May 13, 1977, were not relevant to the plaintiff's claim, *inter alia,* that she was deceived regarding the true extent of her husband's income at the time the stipulation was entered into, and would not become an issue unless and until the Separation Agreement or its support provisions have been vacated or set aside (*see Potvin v. Potvin,* 92 A.D.2d 562, 459 N.Y.S.2d 313; *Wiecek v. Wiecek,* 104 A.D.2d 935, 480 N.Y.S.2d 553; *Schisler v. Schisler,* 106 A.D.2d 441, 482 N.Y.S.2d 533).

    Wiecek v. Wiecek (2 Dept. 1984) 104 A.D.2d 935, 480 N.Y.S.2d 553 held that former husband's current net worth was not relevant, unless the challenged portions of the Separation Agreement were set aside. However, he was required to provide the former wife with statement of his net worth as of date that Separation Agreement was executed by the parties.

    *Picotte v. Picotte (*3 Dept. 1981) 82 A.D.2d 983, 440 N.Y.S.2d 959, held that the wife was not entitled to compulsory disclosure of the husband's net worth statement where the support terms of the Settlement Agreement would not become an issue unless and until the agreement was set aside. However, she could the utilize discovery procedures in the prosecution of counterclaims that the Settlement Agreement was fraudulent and constituted overreaching.

39. *Kaye v. Kaye*, 102 A.D.2d 682, 692, 478 N.Y.S.2d 324 (2d Dep't 1984)

    > ("Finally, we find that plaintiff's initial use of interrogatories as a disclosure device in this case did not constitute an abuse necessitating an exercise of discretion by Special Term to expedite disclosure. The general rule is that a party is 'free to choose both the [pretrial disclosure] devices it wishes to use and the order in which to use them,' (*Barouh Eaton Allen Corp. v. International Business Machs. Corp.*, 76 AD2d 873, 874). Further, the use of interrogatories as an initial disclosure device in complex equitable distribution cases will, in our view, expedite the discovery process (*see Myers v. Myers*, 108 Misc. 2d 553; Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY. Book 14, Domestic Relations Law, C2366:6; Brandes, Disclosure Requirements Under Equitable Distribution, N.Y.L.J., June 21, 1983, p.1, col. 2). Accordingly, Special Term's direction that the parties proceed to depositions upon oral examination will not expedite disclosure but may instead operate to prejudice plaintiff by preventing use of another, more appropriate, intermediate device.").

40. 22 N.Y.C.R.R. § 202.20-c (f) provides: Absent good cause, a party may not use at trial or otherwise any document which was not produced in response to a request for such document or category of document, which request was not objected to or, if objected to, such objection was overruled by the court.

41. 22 N.Y.C.R.R. § 202.16(f)(1-b), effective July 1, 2022.

42. *Id*.

43. CPLR 3122 (a)(1).

44. 22 N.Y.C.R.R. § 202.16(f)(1-b), effective July 1, 2022.

45. *People v. Ramos*, 85 N.Y.2d 678, 651 N.E.2d 895, 628 N.Y.S.2d 27 (1995); *see also Gormerly v. McGlynn*, 84 N.Y. 284, 1881 WL 12807 (1881); *Moot v. Moot*, 214 N.Y. 204, 108 N.E. 424 (1915).

46. *See* AO142/22, amended on June 13, 2022, effective on July 1, 2022. *See also* AO270/2020, Added on Dec. 29. 2020, effective Feb. 1, 2021. The Administrative Order also adopted the revised Preliminary Conference Stipulation/Order-Contested Matrimonial Form ("PC Order") for use in matrimonial matters effective July 1, 2022.

47. 22 N.Y.C.R.R. § 202.20(f)1-b)(2)(ii).

48. *Lobatto v. Lobatto*, 109 A.D.2d 697, 487 N.Y.S.2d 326 (1st Dep't 1985); s*ee also Snow v. Snow,* 209 A.D.2d 399, 618 N.Y.S.2d 442 (2d Dep't 1994); *Briger v. Briger*, 110 A.D.2d 526, 487 N.Y.S.2d 756 (1st Dep't 1985).

49. CPLR 3131.

50. CPLR 3117.

51. *Kaye v. Kaye*, 102 A.D.2d 682, 692, 478 N.Y.S.2d 324 (2d 1984).

52. *Citing* (see *Myers v. Myers*, 108 Misc. 2d 553; Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law, C236B:6; Brandes, *Disclosure Requirements Under Equitable Distribution*, N.Y.L.J., June 21, 1983, p 1, col 2).

53. N.Y. Const., art. VI, § 30.

54. *See,* e.g., *Riglander v. Star Co*., 98 App. Div. 101, 90 N.Y.S. 772, *aff'd,* 181 N.Y. 531, 73 N.E. 1131.

55. *Cohn v. Borchard Affiliations,* 25 N.Y.2d 237, 303 N.Y.S.2d 633 (1969).

56. *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 511 N.Y.S.2d 216 (1986).

57. *People v. Ramos*, 85 N.Y.2d 678, 651 N.E.2d 895, 628 N.Y.S.2d 27 (1995); *see also Gormerly v. McGlynn*, 84 N.Y. 284, 1881 WL 12807 (1881); *Moot v. Moot*, 214 N.Y. 204, 108 N.E. 424 (1915).

58. 22 N.Y.C.R.R. § 202.20(f)(1-b)(2)(ii).

59. *See* https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/Ex%20A%20-%20Appendix%20A.pdf.