New Rules Governing Matrimonial Actions – The Good News and the Bad
By Joel R. Brandes

22 NYCRR 202.16, 22 NYCRR 202.16-a, 22 NYCRR 202.16-b, and 22 NYCRR 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 NYCRR Part 202 (See AO142/22, amended on June 13, 2022) which contains many of the commercial division rules effective February 1, 2021. (All of the Uniform Rules which are incorporated into the matrimonial rules are posted on my website at www.nysdivorce.com.)

Good News

The good news for matrimonial practitioners and their clients is that the Uniform Rules which have been incorporated into the matrimonial rules encourage appearances for the argument of motions and conferences by electronic means. 22 NYCRR 202.8-f provides that oral arguments may be conducted by the court by electronic means and requires each court or court part to adopt a procedure governing requests for oral argument of motions. In the absence of such a procedure by a particular court or part, any party may request oral argument of a motion by a letter accompanying the motion papers. Notice of the date selected by the court must be given, if practicable, at least 14 days before the scheduled oral argument. 22 NYCRR 202.10 (a) provides 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.

As we have learned during the past two years, the use of electronic appearances will mean that clients will no longer have to spend thousands of dollars paying for the travel time of their attorneys to and from court and for the time in court waiting for the argument of motions and conferences that are so frequent in matrimonial actions. And attorneys will have more office time for the practice of law.

The Bad News

As best as we can tell most of the new rules are bad news for matrimonial lawyers and their clients. The newly incorporated rules create additional work for lawyers, and judges and additional expense for clients who, unlike commercial clients, can hardly afford to pay for the additional work involved. It appears to us that the commercial rules which were incorporated into the matrimonial rules make it too expensive for the ordinary person to litigate a matrimonial matter. Most matrimonial litigants don't have the financial resources that commercial clients have to litigate a matter. Under the new rules matrimonial litigants are treated almost the same as commercial clients. One of the major criticisms of the new uniform rules that was ignored by the Office of Court Administration was that they would increase the cost of matrimonial litigation.

Interrogatories, depositions, and document production

22 NYCRR 202.16 (f) (1-b) (2) 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 7 hours long. The provisions of 22 NYCRR §202.20-b(a)(1) limiting the number of depositions taken by plaintiffs, or by defendants, or third-party defendants, do not apply to matrimonial actions. (22 NYCRR 202.16 (f) (1-b) (2)).

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 unlimited 7-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 her attendance by the page.

The new matrimonial rules which 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. (Lobatto v. Lobatto, 109 A.D.2d 697, 487 N.Y.S.2d 326 (1st Dep't 1985); See 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)).

Due to the usual animosity of the parties in contested matrimonial actions, we doubt that a monied spouse would stipulate to let his 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 depositions 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." (CPLR 3131). Interrogatories may be used to impeach or contradict the testimony of a party. (CPLR 3117). In Kaye v Kaye (102 A.D.2d 682, 692, 478 N.Y.S.2d 324 (2 Dept., 1984) the Appellate Division held that the use of interrogatories as an initial disclosure device in complex equitable distribution cases will expedite the discovery process. (Citing, inter alia, Brandes, Disclosure Requirements Under Equitable Distribution, NYLJ, June 21, 1983, p 1, col 2).

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 to complete 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.

There is no obligation on the part of the recipient of the interrogatories to make a motion to strike any interrogatory. The burden to compel compliance is on the party serving the interrogatories. Where a person fails to respond to or comply with an interrogatory or document demand, the remedy for the party seeking disclosure is to move to compel compliance or a response. (CPLR 3124)

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.

Under the State Constitution, the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature. (N.Y. Const., art. VI, § 30). There are some matters which are not subject to legislative control because they deal with the inherent nature of the judicial function.(*see,* e.g., Riglander v. Star Co., 98 App.Div. 101, 90 N.Y.S. 772, affd. 181 N.Y. 531, 73 N.E. 1131). 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. (Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 303 N.Y.S.2d 633 (1969)). In addition, court rules must be adopted in accordance with procedures prescribed by the Constitution and statute. (Matter of A.G. Ship Maintenance Corp. v Lezak, 69 N.Y.2d 1, 511 N.Y.S.2d 216 (1986)).

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. (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)). This rule appears to abridge rights conferred by statute.

22 NYCRR 202.16 (f) (1-b) (5) was added to the matrimonial rules. It provides that absent good cause, a party may not use at trial or otherwise any document which 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. 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. (22 NYCRR 202.16 (f) (1-b)).

After an action is commenced, any party may serve on any other party a notice or on any other person a subpoena duces tecum (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served. (CPLR 3120(a)). CPLR 3120 (2) provides that the notice … shall ... set forth the items to be inspected, copied, tested, or photographed by individual item or by category, and shall describe each item and category with reasonable particularity. When “an inspection, copying, testing or photographing” of an item or items is sought, CPLR 3120(2) requires that the seeking party set them forth by individual item or by category, and describe each item and category with reasonable particularity.

If a party or person objects to the disclosure, inspection or examination, he must serve a response within twenty days of service of the notice, stating with reasonable particularity the reasons for each objection. If an objection is made to part of an item or category, the part must be specified. (CPLR 3122 (a)(1)).

A party seeking disclosure under CPLR 3120 may move for an order under CPLR 3124 compelling disclosure with respect to any objection to, or other failure to respond to or permit inspection as requested by the notice or any part of it. (CPLR 3122 (a)(1)). Disclosure enforcement by preclusion may also be obtained under CPLR 3126. The court may make such orders with regard to the failure or refusal to disclose as are just, including, among other things that the issues to which the information is relevant be deemed resolved in accordance with the claims of the party who obtains the order. It

may prohibit the disobedient party from supporting or opposing certain claims or defenses and from producing in evidence designated things or items of testimony. It may also strike all or parts of the pleadings, stay further proceedings until the order is obeyed, dismiss all or part of the action, and grant judgment by default against the disobedient party**. (**CPLR 3126).

22 NYCRR 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.

This rule changes the statutory burden which must be met to obtain relief by a disclosure enforcement motion. It automatically precludes the party who has failed to produce the document or category of documents (or 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 that party to make a motion to obtain permission to use the document(s) and he or she is required to make a showing of good cause for his or her failure to object to the demand for it. (22 NYCRR 202.16 (f) (1-b)).

It appears that this rule violates N.Y. Constitution, article VI, § 30. This rule appears to abridge the broad pre-trial disclosure rights conferred by statute.

Direct testimony of Party's Witness by Affidavit

22 NYCRR 202.16 (n) which has been added to the matrimonial rules provides that upon request of a party, the court may permit direct testimony of that party's own witness to be submitted in affidavit form. The opposing party has the right to object to statements in the direct testimony affidavit, and the court must rule on the objections, just as if the statements had been made orally in open court. Where an objection to a portion of a direct testimony affidavit is sustained, the court may direct that it be stricken. The submission of direct testimony in affidavit form must not affect any right to conduct cross-examination or re-direct examination of the witness. Except as provided in NYCRR §202.18 (Testimony of court-appointed expert witness in matrimonial action or proceeding**)** a party or a party's own witness may not testify on direct examination by affidavit in an action for custody, visitation, contempt, order of protection, or exclusive occupancy.

22 NYCRR 202.16(n) supersedes 22 NYCRR 202.20-i which provides that the court *may require* that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing be submitted in affidavit form. (See 22 NYCRR 202.16(a)).

It appears from the last sentence of this rule, which refers to the testimony of a party or a party's own witness, that the rule applies to both a party and his or her witnesses.

22 NYCRR 202.16(n) does not indicate the procedure to be followed by a party

to obtain the consent of the court to permit direct testimony of that party's own witness to be submitted. It would appear that due process requires that an application to permit the direct testimony of a party's own witness must be made by motion upon notice under CPLR 2214 or 2215. Nor does 22 NYCRR 202.16 (n) establish a procedure for the admission of the affidavit and the method by which the opposing party may object to statements in the direct testimony affidavit, or for the court to rule on the objections, just as if the statements had been made orally in open court.

This rule authorizes direct testimony of the parties at trial by "dueling affidavits" and appears to create a new, and questionable exception to the rule against hearsay, which must be sustained upon objection.

With the permission of the court, it allows the direct prima facie economic case of the plaintiff to be meticulously crafted by his or her attorney in an affidavit, and allows the defendants attorney to draft his direct economic case as well, but does not authorize the opposition testimony of either party by affidavit. In Campaign for Fiscal Equity v State, (182 Misc.2d 676, 699 N.Y.S.2d 663, (Sup.Ct., 1999)) the only reported New York case on the subject, the Supreme Court allowed direct testimony by affidavit where Plaintiffs estimated that they would call as many as 140 non-expert witnesses. It found that it had the power to do so under CPLR 4011, which empowers the court to "regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." However, in that case, there was no objection based upon hearsay.

Hearsay has been defined as evidence of a statement that is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated. (People v. Romero, 78 NY2d 355, 575 NYS2d 802 (1991); People v. Edwards, 47 NY2d 493, 419 NYS2d 45 (1979); People v. Caviness, 38 NY2d 227, 379 NYS2d 695 (1975)) Hearsay includes not only an oral statement or written expression but also the non-verbal conduct of a person which is intended by him as a substitute for words in expressing the matter stated. (People v. Caviness, supra).

The Court of Appeals has explained that "Out-of-court statements offered for the truth of the matters they assert are hearsay and "may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable". In determining reliability, a court must decide "whether the declaration was spoken under circumstances which render [ ] it highly probable that it is truthful." (Nucci ex rel. Nucci v. Proper, 95 N.Y.2d 597, 721 N.Y.S.2d 593 (2001)).

The rule against hearsay prohibits evidence of an out-of-court statement that is offered for its truth where there is an objection to the introduction of the evidence unless there is an exception to the rule. If there is no exception the evidence must be excluded. (Sadowsky v. Chat Noir, Inc., 64 A.D.2d 697, 407 N.Y.S.2d 562 (2d Dep't 1978)).

22 NYCRR 202.16 (n) is neither a recognized exception to the hearsay rule nor does it establish or contain a method for the court to determine that the evidence is

reliable before permitting it to be submitted as direct evidence of a prima facie case.

The credibility of the witnesses is an inquiry within the province of the trial court.(Viles v. Viles, 14 N.Y.2d 365, 251 N.Y.S.2d 672 (1964)) Since the trial court has the opportunity to view the demeanor of the witnesses at the trial, it is in the best position to gauge their credibility, and its resolution of credibility issues is entitled to great deference on appeal. (Schwartz v. Schwartz, 186 A.D.3d 1742, 132 N.Y.S.3d 34 (2d Dep't 2020); Kerley v Kerley, 131 A.D.3d 1124, 17 N.Y.S.3d 150 (2 Dept., 2015))

Under this rule, neither the court nor opposing counsel have an opportunity to observe the demeanor of a party who is offering evidence in support of her prima facie economic case. This rule allows the testimony of a party to be prepared by his or her attorney, who can draft it to avoid the usual evidentiary objections to its introduction. It eliminates from the credibility equation the ability of the court to observe the demeanor and tone of the witness when presenting her direct case. It prevents counsel for the defendant from observing the weakness and hesitation in the direct testimony of that party which would ordinarily enable him to prepare an effective cross-examination. We believe that this rule denies the parties a fair trial by authorizing the use of hearsay evidence to establish a prima facie case.

CONCLUSION

T. Andrew Brown, the President of the New York State Bar Association (NYSBA) submitted a letter dated November 19, 2021, in response to an October 26, 2021 request by the Office of Court Administration for Public Comments on its "*Proposal to Harmonize Matrimonial Rules with new Uniform Civil Rules*." He pointed out that there were many concerns with the proposed rules and that most of the rules should be eliminated. (See https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/received/Oct1UniformRules.pdf)

Three of the NYSBA concerns, which we believe are of particular concern to the matrimonial bar, were their objections to the proposal to limit the number of interrogatories, the proposal which provides for preclusion of the use of a document at trial without a motion under CPLR 3126; and the proposal dealing with testimony by affidavit. (See Report of the Task Force on Uniform Rules at: https://nysba.org/app/uploads/2021/03/Final-Report-NYSBA-Uniform-Rules-with-cover-compressed.pdf).)

Although Mr. Brown's letter did not focus on matrimonial matters and did not address the wholesale inclusion of Part 202 into the matrimonial rules, the NYSBA observed that the limitation on the number of interrogatories "may be totally inappropriate in matrimonial actions." NYSBA recommended that 22 NYCRR §202.20 be eliminated. Moreover, 22 NYCRR 202.20-c (f) was particularly troublesome to the NYSBA because this subsection obviates the need for a motion required under CPLR 3126, imposes the relief in CPLR 3126(2) automatically, and puts the burden upon the

responding party to demonstrate “good cause,” which is not yet defined. This rule is in significant conflict with CPLR 3126.

We do not understand why the Office of Court Administration did not act on these meritorious comments.

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