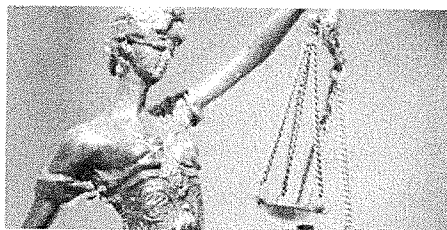




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2020 MATRIMONIAL SERIES #2

Counsel Fees in Matrimonial Actions

FACULTY

Hon. Deborah Poulos Bryan Johnson, Esq.
Alison Leigh Epilone, Esq. Hon. Cheryl A. Joseph
Christopher Chimeri, Esq.

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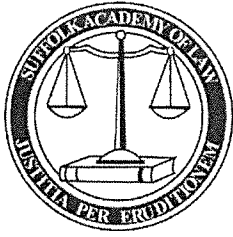
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Alison Leigh Epilone, Esq. is the Principal Law Clerk to Hon. Cheryl A. Joseph, A.J.S.C. Prior to joining the Unified Court System in 2018, Ms. Epilone was in private practice for approximately 10 years and practiced, almost exclusively, in the fields of matrimonial and family law since her graduation from law school in 2008.

Ms. Epilone remains active at Touro Law Center. From 2009 through 2015, she was employed as a bar examination tutor. She also continues to be employed as an adjunct professor at Touro Law Center. Ms. Epilone received numerous awards and accolades throughout her career, including being named one of Long Island's Top Young Professions ("30 Under 30"); she was also nominated to Super Lawyer Rising Stars list every year since 2014. Ms. Epilone is an active member of the Suffolk County Matrimonial Bar Association and was recently elected to the Board of Directors.

QUATELA | CHIMERI PLLC



Christopher J. Chimeri concentrates primarily on divorce and related litigation, with a further focus on appellate matters before the Appellate Division, Second Judicial Department. He has also argued and participated in handling matters in the Courts in the First and Fourth Departments and was the principal attorney for one of the parties on a seminal case litigated in and decided by the Court of Appeals of the State of New York.

Mr. Chimeri sits on the Board of Directors of the Matrimonial Bar Association of Suffolk County and is a co-founder and co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. He actively participates within the Nassau County Bar Association on various committees, regularly attends Matrimonial Law Committee meetings, and authors the Nassau Academy of Law's annual Hon. Elaine Jackson Stack Moot Court Competition problem. Consecutively from 2014 through 2018, he was peer-selected as a Thomson Reuters Super Lawyers® "Rising Star," and is a numerous-times past recipient of the "Top Legal Eagles" award from Long Island Pulse Magazine. In 2017, Chimeri was featured in Forbes Magazine's 2017 *New York Leaders in Law*; New York Magazine's 2017 Leaders in Law and received Long Island Business News's Leadership in Law award. In 2018, Long Island Business News honored Chimeri with a "40 under 40" Long Island professional award.

Chimeri also lectures regularly for the Suffolk County Bar Association, Suffolk County Matrimonial Bar Association, Nassau County Bar Association, and New York State Bar Association on matters in family and matrimonial litigation. He frequently publishes articles concerning matrimonial trial and appellate litigation and maintains a monthly column regarding LGBTQ issues in the law in *The Suffolk Lawyer*.

Charitably, Chimeri and his firm are frequent and major donors to the Long Island LGBT Network, regular donors to the Lesbian and Gay Bar Association of the Greater New York, and he was the principal honoree at the 2018 EAC Network's annual "Golf for Good" charity, setting an organization record for charitable funds raised at the event.

Attorneys and Counsellors at Law

888 Veterans Memorial Highway, Suite 530 • Hauppauge, New York 11788

215 Willis Avenue • Mineola, New York 11501

T: (631) 482-9700 | (516) 750-8811 • F: (631) 482-9707 | (516) 977-3211



Biography of Cheryl A. Joseph

Judge Joseph was appointed by Governor Andrew Cuomo to the NYS Court of Claims on May 5, 2015. She currently presides over matrimonial cases in the Supreme Court, Suffolk County. Her professional experience includes the positions of Adjunct Professor of Law at Touro Law Center in Central Islip, New York, Support Magistrate in Family Court (NYC and Suffolk County), Supervising Court Attorney in Queens Family Court, Domestic Violence Court Coordinator for the Center for Court Innovation, and Assistant District Attorney in Manhattan.

She received her undergraduate degree *magna cum laude*, Phi Beta Kappa, with a double major in Political Science and Philosophy from New York University's College of Arts and Science in 1993. She received her Juris Doctor degree from New York University School of Law in 1996 wherein she also received the Myron L. Greene Award for Oral Advocacy. She is a member of a number of organizations including Alpha Kappa Alpha Sorority Inc., and the Suffolk County Bar Association.

I. Counsel Fee Motion Practice

- a. TALK TO OPA before making motion
 - i. BE REALISTIC: i.e. if you have monied spouse, get counsel fees paid to your adversary
- b. 22 NYCRR 202.16(k) (**FORM**)
- c. c. D.R.L. § 237(a) – (c) and §238
- d. Requirements
 - 1. Billing records
 - a. Provided updated billing records in a reply
 - 2. Retainer
 - 3. Attorney Affirmation
 - 4. Updated SNW (no more than 6-8 months old)
 - ii. No SNW needed for motions pursuant to DRL 237(c) & 238
 - 1. If seeking fees pursuant to an article in a stip, need updated SNW
- e. CAUTION AGAINST TRO asking for counsel fees
 - i. Purpose of TRO
 - 1. EMERGENCY RELIEF ONLY
 - 2. This is not a restatement of all of the ultimate relief you are seeking
- f. See Decisions
- g. Statutory Requirements and Case Law Outline Follows

TEMPORARY MAINTENANCE, CHILD SUPPORT AND CUSTODY POINTS

22 NYCRR §202.16(k): Motions for Alimony, Maintenance, Counsel Fees, *Pendente Lite* and Child Support (Other Than Under Section 237(c) or Section 238 of the Domestic Relations Law):

22 NYCRR §202.16(k)(1): **General:** *Pendente lite* motions should be made before or at the preliminary conference, if practicable. It is important to note that this is not always practicable, and courts will review applications for *pendente lite* relief when they are appropriate which may be after the preliminary conference. Often, in a highly litigated matter, *pendente lite* applications are made throughout the action up to, and until, the commencement of a trial.

22 NYCRR §202.16(k)(2): **A Statement of Net Worth Must Be Attached to The Application:** No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by 22 NYCRR §202.16(b). 22 NYCRR §202.16(b) requires the form of the Statement of Net Worth to comply with the form contained in appendix A of the rules.

22 NYCRR §202.16(k)(4): **Opposition Papers:** Any facts set forth in the moving papers that are not specifically denied in the opposing motion papers will be deemed admitted "for purposes of the motion, but not otherwise." The facts contained in moving papers, or even exhibits such as a Statement of Net Worth, annexed thereto, can be denied using a Statement of Net Worth and other Affidavits or sworn statements.

22 NYCRR §202.16(k)(5): **Failure to Comply With 22 NYCRR §202.16:** The rules are very specific about the form and content of applications for *pendente lite* relief. The failure to comply with the provisions of 22 NYCRR §202.16 allows the judge presiding, at his or her discretion, either: (i) to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure; or (ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.

22 NYCRR §202.16(k)(6): **The Form of the Notice of Motion:** The Notice of Motion submitted with the application for *pendente lite* relief must contain a list of the relief being sought. This holds true even if the application is brought by Order to Show Cause. This section also indicates that motions for *pendente lite* relief "shall be determined within 30 days after the motion is submitted for decision." In practice this is very often not the case.

THE "NEW" RULES FOR MOTIONS

§202.16-b Submission of Written Applications in Contested Matrimonial Actions

(l) Applicability. This section shall be applicable to all contested matrimonial actions and proceedings in Supreme Court authorized by subdivision (2) of Part B of section 236 of the Domestic Relations Law.

(2) Unless otherwise expressly provided by any provision of the CPLR or other statute and in addition to the requirements of 22 NYCRR §202.16 (k) where applicable, the following rules and limitations are required for the submission of papers on *pendente lite* applications for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation unless said requirements are waived by the judge for good cause shown:

- (i) Applications that are deemed an emergency must comply with 22 NYCRR § 202.7 and provide for notice, where applicable, in accordance with same. These emergency applications shall receive a preference by the clerk for processing and the court for signature. Designating an application as an emergency without good cause may be punishable by the issuance of sanctions pursuant to Part 130 of the Rules of the Chief Administrative Judge. Any application designated as an emergency without good cause shall be processed and considered in the ordinary course of local court procedures.
- (ii) Where practicable, all orders to show cause, motions or cross motions for relief should be made in one order to show cause or motion or cross-motion.
- (iii) All orders to show cause and motions or cross motions shall be submitted on one-sided copy except as otherwise provided in 22 NYCRR § 202.5(a), or electronically where authorized, with one-inch margins on eight and one half by

eleven (8.5 x 11) inch paper with all additional exhibits tabbed. They shall be in Times New Roman font 12 and double spaced. They must be of sufficient quality ink to allow for the reading and proper scanning of the documents. Self-represented litigants may submit handwritten applications provided that the handwriting is legible and otherwise in conformity with these rules.

- (iv) The supporting affidavit or affidavit in opposition or attorney affirmation in support or opposition or memorandum of law shall not exceed twenty (20) pages. Any expert affidavit required shall not exceed eight (8) additional pages. Any attorney affirmation in support or opposition or memorandum of law shall contain only discussion and argument on issues of law except for facts known only to the attorney. Any reply affidavits or affirmations to the extent permitted shall not exceed ten (10) pages. Sur-reply affidavits can only be submitted with prior court permission.
- (v) (v) Except for affidavits of net worth (pursuant to 22 NYCRR 5202.16 (b)), retainer agreements (pursuant to Rule 1400.3 of the Joint Rules of the Appellate Division), maintenance guidelines worksheets and/or child support worksheets, or counsel fee billing statements or affirmations or affidavits related to counsel fees (pursuant to Domestic Relations Law §237 and 22 NYCRR 202.16(k)), all of which may include attachments thereto, all exhibits annexed to any motion, cross motion, order to show cause, opposition or reply may not be greater than three (3) inches thick without prior permission of the court. All exhibits must contain exhibit tabs.
- (vi) If the application or responsive papers exceed the page or size limitation provided in this section, counsel or the self-represented litigant must certify in good faith the need to exceed such limitation, and the court may reject or require revision of the application if the court deems the reasons insufficient.

(3) Nothing contained herein shall prevent a judge or justice of the court or of a judicial district within which the court sits from establishing local part rules to the contrary or in addition to these rules.

- DRL §§237 and 238 were amended on August 15, 2010 (effective October 12, 2010 and only as to actions and proceeding commenced on or after the effective date) in several respects:
 - “Counsel fees and fees and expenses of experts” are now explicitly referenced, rather than “such sum or sums of money.”
 - DRL § 237(1)(a) now applies to any action or proceeding brought to obtain maintenance or a distribution of property following a foreign judgment of divorce.
 - DRL § 237(1)(b) now applies to any application brought to enforce an order or judgment of alimony, as well as to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, or distribution of marital property.
 - DRL § 238 now applies to modification as well as enforcement proceedings.
 - DRL § 238 also now applies to actions or proceedings to enforce or modify a provision of judgment or order entered in an action for:
 - Declaration of validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside New York and did not appear therein where such spouse asserts the nullity of such foreign judgment.
 - An injunction restraining the prosecution in any other jurisdiction if an action for divorce.
 - Pursuant to § 237(1)(a) and (1)(b) and §238:
 - There is now a rebuttable presumption that counsel fees shall be awarded to the less monied spouse.
 - In exercising its discretion, the Court must assure that each party is adequately represented and that, where fees and expenses are awarded, they are to be awarded on a timely basis, pendente lite, so that there is adequate representation from the start of a case.

- Applications for fees and expenses can be made at any time or times prior to final judgment.
- Both parties to the action or proceeding and their attorneys must file an affidavit with the Court detailing the financial agreement between the party and the attorney, including the amount of the retainer, the amounts paid and still owing, the hourly rate charged, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.
- Payment of any retainer fees to the attorney for the petitioning party does not preclude any awards of fees and expenses that would be allowed under DRI.

iv. Case Law

Caputo v. Caputo, 2017 N.Y. App. Div. Lexis 5639—affirmed an award of counsel fees to the wife in the sum of \$2,500 as the issue of counsel fees is “controlled by the equities and circumstances of each particular case.”

Minervini v. Minervini, 2017 App.Div. Lexis 5650—affirmed Supreme Court’s award of counsel fees to the wife in the sum of \$5,000 in light of the “disparity in the parties’ incomes and the fact that the defendant’s legal fees were paid by his union.”

Bagielto v. Kolsch, 148 A.D.3d 766 (2d Dept. 2017)—attorney fee award of \$30,000 affirmed based upon the Court’s review of the “financial circumstances of both parties, together with all of the circumstances of the case, which may include the relative merit of the parties’ positions.”

Sansone v. Sansone, 144 A.D.3d 885 (2d Dept. 2016)—affirmed the Supreme Court’s award of \$30,000 in counsel fees to the wife which was based, in part, on the Husband’s “conduct which delayed the proceedings,” in addition to the financial disparity between the parties.

Scott M. v. Ilona M., 31 Misc3d 353 (Kings Co., 2011) “While the purpose of counsel fees is to make sure that the monied spouse does not control by the power of the pocketbook or wallet, the court must realistically assess the available resources to each party as a result of the litigation. The court must leave the payor spouse with funds sufficient to meet their daily living expenses.”

v. Prior Case Law (to the extent still applicable):

Kooper v. Kooper, 74 A.D.3d 6, 901 N.Y.S.2d 312 (2d Dep’t 2010) -- wife entitled to interim counsel fees of \$100,000 in light of significant disparity in

financial circumstances of the parties.

Decabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 523 N.Y.S.2d 176 (1987) -- A spouse is not required to show indigency in order to obtain an award of counsel fees. Also, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the merit of the parties' positions.

Charpié v. Charpié, 271 A.D.2d 169, 710 N.Y.S.2d 363 (1st Dep't 2000) -- On an application for counsel fees in a matrimonial litigation, where a wife has assets that, although considerable, are finite, while her husband's wealth is far greater and his earnings continue to amass, and a wife's expected attorneys' fees will exhaust a large portion of her finite resources, while husband will be able to pay his ongoing attorneys' fees without substantial impact on his estate, the court should not limit itself to inquiry into whether the wife is able to pay her attorney with the funds then in her possession.

Rosenbaum v. Rosenbaum, 55 A.D.3d 713, 866 N.Y.S.2d 234 (2d Dep't 2008) (Case No. 2007-03316) -- Husband (a licensed physician) awarded \$75,000 in interim counsel fees to maintain financial parity in the divorce litigation.

Wald v. Wald, 844 N.Y.S.2d 86 (2d Dep't 2007) -- Award of interim attorney fees in divorce action is designed to redress the economic disparity between monied spouse and non-monied spouse, so that matrimonial scales of justice are not unbalanced by weight of wealthier litigant's wallet.

Pritchep v. Pritchep, 858 N.Y.S.2d 667 (2d Dep't 2008) -- the Supreme Court abused its discretion in denying wife's application for interim counsel fees by deferring the request to trial court, where there was significant disparity in the parties' financial circumstances, wife submitted detailed billing documents and time records showing work her counsel had performed and had billed her for, and husband was able to pay his own counsel fees without any substantial impact upon his lifestyle.

Stubbs v. Stubbs, 41 A.D.3d 832, 839 N.Y.S.2d 511 (2d Dep't 2007) -- Trial court's award of interim counsel fees to the wife in an action for divorce and ancillary relief was a provident exercise of discretion in view of the disparity in the financial circumstances of the parties, with the wife having no independent source of income.

Karas-Abraham v. Abraham, 847 N.Y.S.2d 82 (1st Dep't 2007) -- *Pendente Lite* award of attorney's fees in favor of wife in the amount of \$50,000 was a proper exercise of discretion, in light of husband's greater financial resources, and the fact that his actions had caused protracted litigation.

CH v. RH, 846 N.Y.S.2d 560 (Sup. Ct. Nassau Co. 2007) -- *Pendente lite* counsel fees to plaintiff wife in divorce action was unwarranted, given comparable financial circumstances of parties, indicating ability of each to pay for their individual counsel fees.

Singer v. Singer, 792 N.Y.S.2d 541 (2d Dep't 2005) -- Awarding to wife an interim counsel fee of \$100,000 in a divorce suit was a provident exercise of discretion based upon the financial disparity between the parties, the husband's obstreperous conduct which unnecessarily protracted the litigation, and the quality of the representation afforded the wife by her counsel.

Shanon v. Patterson, 294 A.D.2d 485, 742 N.Y.S.2d 653 (2d Dep't 2002) -- Given disparate earnings of parties, court properly ordered husband to pay interim counsel fees incurred by wife in seeking *pendente lite* child support.

Kerzner v. Kerzner, 281 A.D.2d 215, 726 N.Y.S.2d 388 (1st Dep't 2001) -- Denial of wife's motion in action against husband for award of \$50,000 in interim counsel fees was proper exercise of discretion, where wife had access to \$2 million from sale of former marital residence.

Marr v. Marr, 181 A.D.2d 974, 581 N.Y.S.2d 873 (3d Dep't 1992) -- Wife was entitled to *pendente lite* award of attorney fees where she had had to borrow money from her grandfather to pay retainer fee, husband had an income of more than \$47,000, and wife had no income.

Maharam v. Maharam, 177 A.D.2d 262, 575 N.Y.S.2d 846 (1st Dep't 1991) -- Where husband was a millionaire, and wife had savings of \$2,600, the trial court should have awarded her interim accountant's fees of \$15,000 and that sum would be taken into account in the equitable distribution award and represented an advance of funds necessary to allow the wife to effectively analyze and present evidence involving complex and substantial financial transactions and holdings.

Isaacs v. Isaacs, 71 A.D.3d 951, 897 N.Y.S.2d 225 (2d Dep't 2010) -- Defendant's ability to pay counsel fees was established by in-camera review of financial documents he produced. A hearing was not necessary.

Rodriguez v. Rodriguez, 175 A.D.2d 157, 573 N.Y.S.2d 897 (2d Dep't 1991) - - *Pendente lite* award to wife of \$10,300 in counsel fees and expert fees was appropriate as wife set forth in detail the nature of the marital property involved, the difficulties involved in identifying and evaluating it, the services rendered and to be rendered and an estimate of the time involved and her financial status, and in opposition thereto, the husband did not set forth any evidence regarding his own financial circumstances or the relative merits of his position.

Goodson v. Goodson, 135 A.D.2d 604, 522 N.Y.S.2d 182 (2d Dep't 1987) -- both parties are entitled to searching exploration of each other's assets and, in order to facilitate such investigation, court may direct one spouse to pay fees necessary for expert services.

vi. Genuine Need (to the extent still applicable):

Grant v. Grant, 299 A.D.2d 521, 751 N.Y.S.2d 40 (2d Dep't 2002) -- Wife was not entitled to *pendente lite* award of interim counsel fees of \$25,000 in divorce proceeding, where she failed to show that she lacked sufficient funds of her own to compensate her counsel.

Block v. Block, 296 A.D.2d 343, 746 N.Y.S.2d 15 (1st Dep't 2002) -- There was no justification, either on the basis of need or fairness, for an award to a wife of \$15,000 in interim attorney fees to defend against the husband's appeal of an earlier \$35,000 award of fees; the wife earned a substantial income, approximately \$100,000 annually, received \$49,000 yearly in child support and expenses, had assets of \$142,000, had previously been awarded \$87,750 in legal fees and \$31,081.43 in expert fees, and had already received \$216,000 in equitable distribution to be supplemented by a further distribution.

Demas v. Demas, 125 A.D.2d 441, 509 N.Y.S.2d 479 (2d Dep't 1986) -- Where a genuine need does not appear from the record it was, not error for Special Term to deny request for temporary counsel fees.

Rados v. Rados, 133 A.D.2d 536, 519 N.Y.S.2d 906 (4th Dep't 1987) -- A spouse need not be indigent to receive an award of counsel fees.

Hyman v. Hyman, 56 A.D.2d 337, 392 N.Y.S.2d 455 (1st Dep't 1977) -- A party is not required to exhaust his or her own capital resources in order to qualify for an interim counsel fee.

Zerilli v. Zerilli, 110 A.D.2d 634, 487 N.Y.S.2d 373 (2d Dep't 1985) -- In light of wife's lack of income or significant assets, Special Term should have awarded her counsel fees.

Bergstein v. Bergstein, 207 A.D.2d 285, 615 N.Y.S.2d 382 (1st Dep't 1994) -- Plaintiff's alleged possession of sufficient funds to pay a portion of her outstanding attorneys' fees did not preclude the award of interim counsel fees, the court's exercise of discretion in this respect not being dependent upon a showing of indigency.

Fisher v. Fisher, 159 Misc. 2d 1115, 608 N.Y.S.2d 383 (Sup. Ct. N.Y. Co. 1994) -- Court awards interim counsel fee of \$75,000, citing recommendation from Milonas Committee report that: "The duration of a case would be drastically reduced if the monied spouse were compelled to pay opposing counsel's fees at the outset of the action and at regular intervals. Forced to confront the unpleasant reality of such an obligation, a party would be much less inclined to prolong the litigation."

vii. Complexity (to the extent still applicable):

Piali v. Piali, 247 A.D.2d 455, 668 N.Y.S.2d 711 (2d Dep't 1998) -- Award of interim attorney fees to wife in divorce litigation was justified, given issues

which included ownership rights in various corporations allegedly jointly possessed by parties, appreciation in value of marital residence and vacation home, accusations surrounding custody of parties' child, and parties' unequal financial situation after wife was barred from co-managing family trucking business with husband.

Ahern v. Ahern, 94 A.D.2d 53, 463 N.Y.S.2d 238 (2d Dep't 1983) -- The complexity of the issues, the time and expertise required to properly prepare for trial are factors to consider in awarding counsel fees.

Hinden v. Hinden, 122 Misc. 2d 552, 472 N.Y.S.2d 248 (Sup. Ct. Nassau Co. 1983) -- The Court awarded the wife \$15,000 interim counsel fees in view of the large sums at issue, the complexity of the issues, the standing of counsel and the failure of the husband to disclose his financial arrangements with his own attorney.

Bricker v. Powers, 208 A.D.2d 463, 617 N.Y.S.2d 309 (1st Dep't 1994) -- Award of \$75,000 interim counsel fee affirmed where action already relentlessly litigated and is certain to be protracted, and husband is in far better position to bear the bulk of the litigation expense.

viii. Procedure (to the extent still applicable):

Bush v. Bush, 46 A.D.3d 1140, 848 N.Y.S.2d 721 (3d Dep't 2007) -- To justify an award of counsel fees, a sufficient evidentiary basis must exist for the court to evaluate the respective financial circumstances of the parties and value of the services rendered, and without adequate proof of the financial circumstances of the parties, the matter was remitted to Supreme Court for an evidentiary hearing.

Fraguela v. Fraguela, 177 A.D.2d 910, 576 N.Y.S.2d 669 (3d Dep't 1991) -- Wife's failure to supply attorney's affidavit did not render award for interim counsel fees improper where wife discharged her initial attorney, was not seeking funds to continue counsel's services and, based on substantial efforts to obtain new counsel, indicated that she did not have resources or funds to hire new counsel without payment of substantial sums in advance and statute permitted award of counsel fees to a spouse as, in court's discretion, justice required.

Hughes v. Hughes, 208 A.D.2d 502, 617 N.Y.S.2d 56 (2d Dep't 1994) -- Award of interim counsel fees improper where wife's counsel did not submit time records or otherwise provide breakdown of services rendered, did not confirm wife's statements that she had paid him on account, and neither wife nor her counsel established nature of their relationship or whether they had executed a retainer agreement.

Cronin v. Cronin, 158 A.D.2d 447, 551 N.Y.S.2d 44 (2d Dep't 1990) -- While wife established her inability to pay counsel fees *pendente lite*, an award of

\$20,000 was unwarranted where wife's counsel failed to provide adequate documentation regarding the services rendered, and supplied time records which, for the most part, were illegible.

- ix. 22 NYCRR §130-1 – Awards of Costs and Imposition of Financial Sanctions for Frivolous Conduct in Civil Litigation

EXPERTS--USE THEREOF AND FEES

- i. Use of Neutral Experts and 22 NYCRR §202.18:

- The Court has the power to appoint neutral experts to determine the value of assets including, without limitation, real property; personal property such as jewelry, art, antiques, wine and other collections; business and partnership interests; and intangible assets such as licenses, celebrity status and intellectual property. See NYCRR §202.18.
- Pursuant to NYCRR §202.18 a court may also appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation.
- The courts maintain a list of neutral experts. Most judges will appoint an expert that is mutually agreeable by the parties. If the parties are unable to mutually agree on an expert, each judge has his or her own method for appointing a neutral expert. Some judges have counsel submit on an un-marked piece of paper the names of multiple experts. It is a blind submission. The submission cannot be linked to a specific party or law firm. The judge will then randomly select a name from one of the lists. Other judges simply appoint an expert in the form of a written order. Others literally will pick out of a hat.
- A neutral expert will determine the value of the asset on behalf of both husband and wife.
- Requests for the appointment of experts to determine the value of assets can be made by way of a *pendente lite* application. The request can be for the appointment of a neutral expert or for an expert to represent the interests of a party.
- A request can also be made for an award of fees to cover the expert's fees.

- ii. Requirement for Fees: Applications must contain affidavit or affirmation describing the nature of expert work involved and difficulties in evaluating property.

iii. If an expert is not a neutral expert, and you will require that expert to give testimony at trial certain requirements must be met:

- (a) Pursuant to CPLR §3101(d) a response to a demand for expert information must be served 20 days following the date on which the demand is made.
- (b) Pursuant to NYCRR §202.16(g) an expert who is expected to be called at trial is required to file with the court and exchange with opposing counsel, no later than 60 days before the date set for trial an expert report. The reports are the only reports that will be admissible at trial. Pursuant to CPLR §3101(d)(1)(i) late reports may be filed upon a showing of good cause.

iv. Necessary Showing (to the extent still applicable; see counsel fee section regarding new law):

Ayello v. Ayello, 72 A.D.2d 850, 899 N.Y.S.2d 337 (2d Dep't 2010).
Appellant conceded that she failed to submit an expert affidavit and, as such, lower court properly dismissed her application for expert fees.

Darvas v. Darvas, 242 A.D.2d 554, 662 N.Y.S.2d 87 (2d Dep't 1997) --
Plaintiff did not set forth a sufficient basis upon which to determine an award of expert fees because her application contained no information concerning the anticipated expert work involved, nor an estimate of the number of hours necessary to complete the work, nor any details with respect to the difficulties involved in evaluating the marital property.

Coppola v. Coppola, 129 A.D.2d 760, 514 N.Y.S.2d 754 (2d Dep't 1987)
Pendente lite expert appraisal fees were denied where the moving papers contained only a conclusory letter from an accountant which failed to provide information concerning the anticipated work involved, an estimate of the number of hours necessary to complete the work, or any details of the difficulties involved in evaluating the marital property.

Roach v. Roach, 193 A.D.2d 660, 597 N.Y.S.2d 468 (2d Dep't 1993) --
Interim award to wife of \$7,500 experts' fees would be vacated, where wife failed to provide any information which could serve as basis for determining amount to be awarded; however, wife could renew her application upon submission of proper documentation.

Scagnelli v. Scagnelli, 127 A.D.2d 754, 512 N.Y.S.2d 146 (2d Dep't 1987) --
Application for award of accountant's fees properly set forth the nature of the property involved, the difficulties in evaluating it, plaintiff's financial status, and an affidavit from a refutable accountant setting forth the services to be rendered and an estimate of the time involved.

O'Sullivan v. O'Sullivan, 154 A.D.2d 850, 546 N.Y.S.2d 709 (3d Dep't 1989) -- Defendant was ordered to pay the reasonable costs of an accountant and an appraiser in view of the disparate financial conditions of the parties. The defendant listed assets totaling over \$230,000, an annual salary of \$54,000, and the plaintiff had no assets except \$240 per week maintenance. The Court determined that the assets were many, complex and elusive, and the appointment of an accountant was necessary to trace and evaluate assets for proper equitable distribution.

Raboy v. Raboy, 138 A.D.2d 585, 526 N.Y.S.2d 1678 (2d Dep't 1988) -- Award of accountant's fees, *pendente lite*, was proper where defendant's application set forth in detail the nature of the marital property involved, the difficulty involved in identifying and evaluating that property, the services to be rendered and the movant's financial statement.

Annexstein v. Annexstein, 1060, 609 N.Y.S.2d 131 (4th Dep't 1994) -- Award of \$15,000 in *pendente lite* expert's fees was not an abuse of discretion where the application was supported by affidavits of valuation experts setting forth in detail the nature of the marital property to be appraised, the difficulty in evaluating that property, and the anticipated high cost of the appraisal services to be rendered.

v. Granted (to the extent still applicable):

Dzembo v. Dzembo, 160 A.D.2d 1144, 554 N.Y.S.2d 350 (3d Dep't 1990) -- Awards directing one party to pay for expert services of the other party in a matrimonial action should not be granted routinely and should be based upon sound judicial discretion after weighing such factors as (1) the nature of the marital property involved; (2) the difficulties involved, if any, in identifying and evaluating same; (3) the services to be rendered and an estimate of the time involved; and (4) the movant's financial status. Wife made a sufficient showing that any appreciation of the subject separate property was due in part to her contributions or efforts so as to require an appraisal of the property.

Aronauer v. Aronauer, 112 A.D.2d 261, 491 N.Y.S.2d 708 (2d Dep't 1985) -- In view of averments regarding plaintiff's inability to afford any additional discovery and defendant's uncontested ability to pay for same, it was error for Special Term to deny plaintiff an interim award for the services of an accounting expert to help evaluate defendant's dental practice.

Karnilaw v. Karnilaw, 110 A.D.2d 685, 487 N.Y.S.2d 601 (2d Dep't 1985) -- In light of defendant's net worth statement being incomplete and defendant's contention that his business is close to bankruptcy, award of \$1,000 so as to permit plaintiff's accountant to examine defendant's financial status affirmed.

Gianni v. Gianni, 172 A.D.2d 487, 568 N.Y.S.2d 113 (2d Dep't 1991) -- The accountant's affidavit submitted in support of wife's application for

accounting and appraisal fees was sufficiently detailed with respect to the assets to be evaluated, the services entailed and the estimated time involved, to warrant an interim award.

Brocato v. Brocato, 126 A.D.2d 695, 511 N.Y.S.2d 30 (2d Dep't 1987) -- Error to deny award of appraisal fees to plaintiff where defendant had the more significant financial resources and defendant had business interests and real estate investments which had to be evaluated.

Ganin v. Ganin, 114 A.D.2d 883, 495 N.Y.S.2d 59 (2d Dep't 1985) -- Wife's petition was insufficient to justify award of expert fees *pendente lite* in divorce action for purposes of investigating husband's assets, where affidavits submitted by wife's attorney stated merely that various experts were required and that their fees would be expensive, but did not provide sufficient information concerning experts to be utilized, anticipated work involved, and estimate of approximate costs of services to be rendered.

vi. Denied (to the extent still applicable):

Tassone v. Tassone, 209 A.D.2d 859, 619 N.Y.S.2d 357 (3d Dep't 1994) -- It was not an abuse of discretion to deny wife expert's fees of \$28,000 (which she requested to pay her attorneys and to hire accountant and real estate appraiser to assess value of husband's assets and to determine what, if any, appreciation was attributable to her efforts during marriage), because she had a full-time job and certain tangible assets, her basic needs were being met by husband's court-ordered payments and husband provided comprehensive and detailed financial statement.

Goodson v. Goodson, 135 A.D.2d 604, 522 N.Y.S.2d 182 (2d Dep't 1987) -- Although parties are entitled to searching exploration of each other's assets, the deferred ruling on wife's motion for award of accounts' and counsel fees *pendente lite*, until after trial on cause of action for divorce, was not abuse of discretion.

Rubenstein v. Rubenstein, 117 A.D.2d 593, 497 N.Y.S.2d 950 (2d Dep't 1986) -- Where defendant, subsequent to institution of divorce action, sold her private plane to her mother for \$1 and was earning approximately \$500 per week, not error to deny her *Pendente lite* motion for expert fees, counsel fees and maintenance.

Dunn v. Dunn, 143 A.D.2d 801, 533 N.Y.S.2d 487 (2d Dep't 1988) -- The purpose of a *pendente lite* award of appraisal and valuation fees is to enable the moving party to carry on or defend the action; where plaintiff, a psychologist, had an annual income of over 485,000 and did not challenge the assertion that her 1986 income was as high as \$198,000, it was an improvident exercise of discretion to award her such fees.

II Post-Disposition Counsel Fee Applications

- a. Different Standard – Seminal Case: Decabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 523 N.Y.S.2d 176 (1987) – A spouse is not required to show indigency in order to obtain an award of counsel fees. Also, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the merit of the parties' positions.
- b. Right to a hearing unless waived
 1. Depends whether on trial or post-settlement – are you “submitting” on fees?
 2. Practice tip: Some judges now prefer hearing counsel fees “on the spot” at trial.
- c. Unlike temporary awards, equitable distribution and access to funds are more heavily considered.
- d. The Court will also consider delays during the case, conduct in litigation, positions taken in litigation such as motions and conferences versus the ultimate stipulation of settlement or trial decision.
- e. It is important to “poll” your judge and law secretary before agreeing to submit on fees, regardless of which side you represent.
- f. Unlike temporary awards, which are routinely increased or, if denied, overturned and fees awarded, by the appellate division, post-trial awards are much less frequently modified or overturned by the appellate courts so long as the decision is reasoned and sound.

Compilation of Codes, Rules and Regulations of the State of New York Currentness

Title 22. Judiciary

Subtitle A. Judicial Administration.

Chapter II. Uniform Rules for the New York State Trial Courts

Part 202. Uniform Civil Rules for the Supreme Court and the County Court (Refs & Annos)

22 NYCRR 202.16

Section 202.16. Matrimonial actions; calendar control of financial disclosure in actions and proceedings involving alimony, maintenance, child support and equitable distribution; motions for alimony, counsel fees pendente lite, and child support; special rules

(a) *Applicability* This section shall be applicable to all contested actions and proceedings in the Supreme Court in which statements of net worth are required by section 236 of the Domestic Relations Law to be filed and in which a judicial determination may be made with respect to alimony, counsel fees, *pendente lite*, maintenance, custody and visitation, child support, or the equitable distribution of property, including those referred to Family Court by the Supreme Court pursuant to section 464 of the Family Court Act.

(b) *Form of statements of net worth* Sworn statements of net worth, except as provided in subdivision (k) of this section, exchanged and filed with the court pursuant to section 236 of the Domestic Relations Law, shall be in substantial compliance with the Statement of Net Worth form contained in Chapter III, Subchapter A of Subtitle D (Forms) of this Title.

(c) *Retainer agreements.*

(1) A signed copy of the attorney's retainer agreement with the client shall accompany the statement of net worth filed with the court, and the court shall examine the agreement to assure that it conforms to Appellate Division attorney conduct and disciplinary rules. Where substitution of counsel occurs after the filing with the court of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution.

(2) An attorney seeking to obtain an interest in any property of his or her client to secure payment of the attorney's fee shall make application to the court for approval of said interest on notice to the client and to his or her adversary. The application may be granted only after the court reviews the finances of the parties and an application for attorney's fees.

(d) *Request for judicial intervention* A request for judicial intervention shall be filed with the court by the plaintiff no later than 45 days from the date of service of the summons and complaint or summons with notice upon the defendant, unless both parties file a notice of no necessity with the court, in which event the request for judicial intervention may be filed no later than 120 days from the date of service of the summons and complaint or summons with notice upon the defendant. Notwithstanding section 202.6(a) of this Part, the court shall accept a request for judicial intervention that is not accompanied by other papers to be filed in court.

(e) *Certification.* Every paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.1a of this Title.

Section 202.16. Matrimonial actions; calendar control of financial..., 22 NY ADC 202.16

(h) Statement of proposed disposition

(1) Each party shall exchange a statement setting forth the following:

- (i) the assets claimed to be marital property;
- (ii) the assets claimed to be separate property;
- (iii) an allocation of debts or liabilities to specific marital or separate assets, where appropriate;
- (iv) the amount requested for maintenance, indicating and elaborating upon the statutory factors forming the basis for the maintenance request;
- (v) the proposal for equitable distribution, where appropriate, indicating and elaborating upon the statutory factors forming the basis for the proposed distribution;
- (vi) the proposal for a distributive award, if requested, including a showing of the need for a distributive award;
- (vii) the proposed plan for child support, indicating and elaborating upon the statutory factors upon which the proposal is based; and
- (viii) the proposed plan for custody and visitation of any children involved in the proceeding, setting forth the reasons therefor.

(2) A copy of any written agreement entered into by the parties relating to financial arrangements or custody or visitation shall be annexed to the statement referred to in paragraph (1) of this subdivision.

(3) The statement referred to in paragraph (1) of this subdivision, with proof of service upon the other party, shall, with the note of issue, be filed with the court. The other party, if he or she has not already done so, shall file with the court a statement complying with paragraph (1) of this subdivision within 20 days of such service.

(i) *Filing of note of issue.* No action or proceeding to which this section is applicable shall be deemed ready for trial unless there is compliance with this section by the party filing the note of issue and certificate of readiness.

(j) *Referral to Family Court.* In all actions or proceedings to which this section is applicable referred to the Family Court by the Supreme Court pursuant to section 464 of the Family Court Act, all statements, including supplemental statements, exchanged and filed by the parties pursuant to this section shall be transmitted to the Family Court with the order of referral.

(k) *Motions for alimony, maintenance, counsel fees pendente lite and child support (other than under section 237[c] or 238 of the Domestic Relations Law).* Unless, on application made to the court, the requirements of this subdivision be waived for good cause shown, or unless otherwise expressly provided by any provision of the CPLR or other statute, the following requirements

Section 202.16. Matrimonial actions; calendar control of financial... 22 NY ADC 202.16

shall govern motions for alimony, maintenance, counsel fees (other than a motion made pursuant to section 237[c] or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or child support or any modification of an award thereof:

- (1) Such motion shall be made before or at the preliminary conference, if practicable.
- (2) No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section.
- (3) No motion for counsel fees and expenses shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. Fees and expenses of experts shall include appraisal, accounting, actuarial, investigative and other fees and expenses to enable a spouse to carry on or defend a matrimonial action or proceeding in the Supreme Court.
- (4) The party opposing any motion shall be deemed to have admitted, for the purpose of the motion but not otherwise, such facts set forth in the moving party's statement of net worth as are not controverted in:
 - (i) a statement of net worth, in the official form prescribed by this section, completed and sworn to by the opposing party, and made a part of the answering papers; or
 - (ii) other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth.
- (5) The failure to comply with the provisions of this subdivision shall be good cause, in the discretion of the judge presiding, either:
 - (i) to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure; or
 - (ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.
- (6) The notice of motion submitted with any motion for or related to interim maintenance or child support shall contain a notation indicating the nature of the motion. Any such motion shall be determined within 30 days after the motion is submitted for decision.
- (7) Upon any application for an award of counsel fees or fees and expenses of experts made prior to the conclusion of the trial of the action, the court shall set forth in specific detail, in writing or on the record, the factors it considered and the reasons for its decision.

McKinney's Consolidated Laws of New York Annotated

Domestic Relations Law (Refs & Annos)

Chapter 14. Of the Consolidated Laws (Refs & Annos)

Article 13. Provisions Applicable to More than One Type of Matrimonial Action (Refs & Annos)

McKinney's DRL § 237

§ 237. Counsel fees and expenses

Effective: November 20, 2015

Currentness

(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 thereunder, 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.

(b) Upon any application to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, distribution of marital property or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty of this article provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent 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

§ 237. Counsel fees and expenses, NY DOM REL § 237

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 counsel's 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.

(c) In any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the attorney representing the petitioner.

(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.

Credits

(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.)

McKinney's D. R. L. § 237, NY DOM REL § 237

Current through L.2019, chapter 758 & L.2020, chapter 21. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated

Domestic Relations Law (Refs & Annos)

Chapter 14. Of the Consolidated Laws (Refs & Annos)

Article 13. Provisions Applicable to More than One Type of Matrimonial Action (Refs & Annos)

McKinney's DRL § 238

§ 238. Expenses in enforcement and modification proceedings

Effective: October 12, 2010

Currentness

In any action or proceeding to enforce or modify any provision of a judgment or order entered in an action for divorce, separation, annulment, declaration of nullity of a void marriage, declaration of validity or nullity of a judgement 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, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six of this article, the court may in its discretion require either party to pay counsel fees and fees and expenses of experts directly to the attorney of the other party 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 any such action or proceeding, applications for fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf. 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 representative 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. 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.

Credits

(Added L.1962, c. 313, § 10. Amended L.1963, c. 685, § 8; L.1978, c. 529, § 1; L.2010, c. 329, § 2, eff. Oct. 12, 2010.)

McKinney's D. R. L. § 238, NY DOM REL § 238

Current through L.2019, chapter 758 & L.2020, chapter 21. Some statute sections may be more current, see credits for details.

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INTERIM COUNSEL FEES

1. The Domestic Relations Law empowers this Court to grant interim counsel fees. In matters commenced after October 2010, the Court may direct a party to pay counsel fees "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.*" See Dom. Rel. Law §237(a) (emphasis supplied).

2. Here, there is no question that Plaintiff is the less monied spouse -- she earns less than \$10,000.00 per year and relies solely upon Defendant for support/payment of the household expenses. Therefore, the Defendant should be directed to pay \$15,000.00 in interim counsel fees, as the legislature intended. See Goldberg v. Goldberg, 98 A.D.3d 944, 950 N.Y.S.2d 578 (2d Dept. 2012) (holding that the plaintiff was the less monied spouse and the lower court providently exercised its discretion in directing the defendant to pay plaintiff's interim counsel fees in the amount of \$30,000.00).

3. An award of counsel fees pursuant to Domestic Relations Law § 237(a) is within the sound discretion of the court and, generally, when determining whether to award fees the Court should review, *inter alia*, the financial circumstances of the parties, together with the circumstances of the case. However, with a request for "an interim award of counsel fees, as opposed to a final award, no such detailed inquiry is warranted." See, Prichep v. Prichep, 52 A.D.3d 61, 64-66, 858 N.Y.S.2d 667, 670-71 (2d Dept. 2008). Interim fees, such as the fees requested herein, will ensure that the non-monied spouse will be able to litigate on equal footing with the monied spouse to prohibit the monied spouse "from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation." Id. (internal citations

omitted).

4. The Pritchett Court, citing the Court of Appeals case of Frankel v. Frankel, 2 N.Y.3d 501, 781 N.Y.S.2d 59, 814 N.E.2d 37 (2004), stated that trial courts “should not defer requests for interim fees...” and “an award of interim counsel fees to the nonmonied spouse will generally be warranted where there is a significant disparity in the financial circumstances of the parties. Id. (internal citations omitted); see also Penavic v. Penavic, 60 A.D.3d 1026, 1028-29, 877 N.Y.S.2d 188, 120 (2d Dept. 2009) (awarding the wife \$100,000.00 in *interim* counsel fees given the parties’ respective financial positions).

5. Since the retention of my firm, a total of \$7,500.00 was paid (\$7,250.00 in fees + \$250.00 for out-of-pocket expenses). A copy of the Plaintiff’s retainer agreement is annexed as **Exhibit 3**. I have spent 21.7 billable hours (and .5 hours at no charge) in the matrimonial action, which includes my time to prepare the within application (approximately 10 hours), conducting research, meeting with the client, preparation of pleadings, attending Court conferences, review of the file, corresponding and meeting with my client, corresponding with Defendant’s attorney and the attorney for the children. I also note that \$1,835.00 was spent in the Family Court proceeding prior to the consolidation, but the fees incurred in Family Court are not included in Plaintiff’s request. 7.7 billable hours and 1 hour at no charge have been spent to date by the paralegals/legal interns. I reasonably expect to expend an additional 20 hours of work in regard to the within application on presenting the within application to the Court, conducting any oral arguments, reviewing any opposition papers, drafting reply papers, correspondence, additional client meetings and telephone conferences, court conferences, and perhaps conducting a hearing. A copy of my firm’s billing records, redacted for confidentiality purposes, is annexed as **Exhibit 24**.

6. Given that the instant proceeding is still in the early discovery stage, it is anticipated

that I will require, *at least*, 40 additional hours to perform the following legal services, separate and apart from the preparation of this application: meetings with the client, correspondence with the client, conducting discovery, service of third party subpoenas, court conferences, correspondence and conferences with counsel and attorney for the children, attempting to negotiate a settlement, and preparing this case for trial. The Plaintiff will also incur additional out of pocket expenses, including the \$45.00 motion filing fee herein, and expert fees, if necessary. Plaintiff reserves her right to file subsequent application(s) for future legal fees and/or expert fees, should same become necessary. The non-monied Plaintiff is not prohibited from filing more than one application for interim counsel fees. See e.g. Brody v. Brody, 137 A.D.3d 832, 27 N.Y.S.3d 190 (2d Dept. 2016).

7. The total charges for services rendered to Plaintiff by my firm, to date are **\$6,120.00** for legal services in the Supreme Court (\$140.00 for out-of-pocket disbursement costs (including the \$45.00 motion filing for the within application). The Plaintiff has an outstanding balance with the firm as of this date (please note that this firm's billing system does not distinguish disbursements/attorney fees on the monthly billing statements).

8. The requested counsel fees are neither unreasonable nor excessive given the work that has been performed and will continue to be performed in this matter.

9. I am admitted to practice in both New York and New Jersey and have practiced, almost exclusively, in the fields of matrimonial and family law since my graduation from law school in 2008. From 2009 through 2015, I was employed as a bar examination tutor and adjunct professor at Touro Law Center. Your deponent remains current on changes in applicable law by regularly attending CLEs sponsored by the Suffolk County, Women's and Matrimonial Bar Associations, and I am current in my CLE requirements. During law school, I interned for the former Honorable Ettore A. Simeone, a former Suffolk County Family Court Judge. I also

participated in the Family Law Clinic at Touro Law Center and received the CALI Award for Academic Excellence in the Family Law Clinic. In September 2011, I was the recipient of the Judge George C. Pratt Moot Court Board Alumni Association Award in Appellate Advocacy from Touro Law Center. In 2012, I received the Emerging Leading Award from Touro Law Center. The Law Center also named me "Alumni of the Month, July 2012." In May 2013, I was named one of Long Island's Top Young Professions ("30 Under 30"). I have been nominated to Super Lawyer Rising Stars list every year since 2014, which is awarded to only 2.5% of the attorneys in the New York Metro area. My additional recognitions include: 2015 and 2016 "10 Best Client Satisfaction Award" from the American Institute of Family Law Attorneys; 2016-2017 10 Best Attorneys Under 40 from the American Institute of Family Law Attorneys; and I was selected as one of the Top Attorneys of North America 2015-2016 and 2016-2017 editions of The Who's Who Directories. As a courtesy to Plaintiff, given her financial circumstances, my hourly rate of \$350.00 per hour, which is commensurate with my experience and skills, was discounted to \$250.00 per hour. The paralegal rate is discounted from \$150.00 to \$100.00 per hour. This Court is also empowered to award counsel fees utilizing my normal hourly rate. See e.g., Ross v. Congregation B'Nai Abraham Mordechai, 12 Misc. 3d 559 (Civil Ct., N.Y. Cty. 2006).

10. No prior application for the relief sought herein has been made in this or any Court.

WHEREFORE, it is prayed that this Court grant all of the relief sought herein and award such other and further relief as might be fair and just under the circumstances.

Dated: Hauppauge, New York
May 22, 2017

ALISON LEIGH EPILONE

FINA COUNSEL FEE
SUBMIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----x

[REDACTED]

Plaintiff,

Index No.: [REDACTED]

-against-

[REDACTED]

Defendant.

**AFFIRMATION IN
SUPPORT OF
COUNSEL FEE
SUBMISSION**

-----x

ALISON LEIGH EPILONE, ESQ., an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am an associate at the law office of FELDMAN, KRAMER & MONACO, P.C., counsel for the above-named Defendant and am fully familiar with the facts and circumstances surrounding this application. I make this affirmation in support of Defendant's request for counsel fees in the amount of **\$64,457.05.**

2. I respectfully refer this Court to Defendant's accompanying affidavit which details the history of the parties' twenty-seven (27) year marriage and twenty-six (26) month matrimonial proceeding.

3. An award of counsel fees is an issue within the sound discretion of the Court, which is controlled by the equities and circumstances of each case. Sutaria v. Sutaria, 2014 WL 7152146 (2d Dept., December 17, 2014). As this

case has only been decided within the last week, I am annexing a copy for the Court's Reference. **Exhibit O.** In Sutaria, supra, the Court properly awarded \$73,602.46 as and for the plaintiff's counsel fees and considered, *inter alia*, the significant income disparity between the parties, the financial circumstances and the relative merit of the parties' positions. See also Gluck v. Gluck, 2013 N.Y. Slip Op. 50015 (Nassau County 2013) (awarding defendant \$84,527.40 in counsel fees where defendant earned \$89,695 per year and Plaintiff earned \$365,287.00 per year).

4. Additionally, in matters commenced after October 2012, which is the case here, there is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. See Dom. Rel. Law § 237(a). Here, Defendant is the less monied spouse, ***earning less than five (5%) of the Plaintiff's annual income.***

5. An award of counsel fees in a matrimonial action may also be based on the nature and extent of the services rendered, the complexity of the litigation and the merits of the case. See Dom. Rel. Law § 237(a); see generally Siskind v. Siskind, 89 A.D.3d 832, 834, 933 N.Y.S.2d 60 (2d Dept. 2011) (awarding plaintiff \$340,000.00 in attorney's fees given the parties financial circumstances, nature and extent of services rendered, and the complexity of the litigation).

6. Here, the Plaintiff has a far superior earning power than the Defendant. As detailed in Defendant's accompanying affidavit, Defendant has

been a full time homemaker and mother throughout the entirety of the parties' twenty-seven (27) year marriage, having worked only part-time after the parties' children were of school age. Defendant only possesses an Associate's Degree and lacks skills. She has also been absent from the full-time workforce for more than twenty-five (25) years. While Defendant was able to, more than, double her salary from the date of commencement to the present, she will *never* enjoy the earning capacity than that of the Plaintiff. Plaintiff has the ability to earn in excess of \$600,000.00 per year, while it is likely that Defendant will never earn more than \$30,000.00 per year.

7. In Peritore v. Peritore, 50 A.D.3d 874, 855 N.Y.S.2d 646 (2d Dept. 2008), the Second Department reversed the trial court's award of only \$7,500.00 to Wife as and for counsel fees and found that the Wife was entitled to an awarded of \$35,000.00 of the near \$56,000.00 owed to her attorneys. The Second Department based this award upon the disparity of incomes between the parties (there the Wife's income represented a mere 13% of the family's income compared to the Husband's 87%) and the modesty of the Wife's equitable distribution.

8. As mentioned above, here, there is an even larger disparity in incomes. The Wife earns less than five (5%) percent than that of the Husband. Moreover, the Defendant will be required to utilize her equitable distribution to supplement her income and monthly support, which Defendant enjoys hundreds of thousands of dollars in income each year. Accordingly, an award

of one hundred (100%) percent of Defendant's counsel fees is just and appropriate.

9. More importantly, the Court should not limit itself to inquire into whether a non-monied spouse is able to pay her attorneys with the funds in her possession. Charpie v. Charpie, 271 A.D.2d 169, 171-72, 710 N.Y.S. 363, 365 (1st Dept. 2000). The Charpie Court explained:

“...where a wife has assets that, although considerable, are finite, while her husband's wealth is far greater and his earnings continue to amass. When a wife's...attorneys' fees will exhaust a large portion of her finite resources...her husband will be able to pay his ongoing attorneys' fees without substantial impact on his estate...”

See also, Prichep v. Prichep, 52 A.D.3d 618, 58 N.Y.S.2d 667 (2d Dept. 2008).

10. While Defendant has received considerable assets in equitable distribution, these assets are not entirely liquid (a majority of Defendant's assets are in the form of retirement accounts and real property). Moreover, the assets that are “liquid” will be taxed each time Defendant utilizes them². However, Defendant should not be required to utilize these finite assets to pay her counsel fees.

11. Domestic Relations Law § 237(a) also requires the Plaintiff to disclose the financial agreement between him and his counsel, including “the amount of any retainer, the amounts paid and still owing thereunder, the

² The remainder of Defendant's equitable distribution is from the brokerage accounts where Defendant will incur capital gains tax whenever she liquidates same.

hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses." At this time, the amount of legal fees that Plaintiff has paid for his counsel is unknown. However, as of June 15, 2013 (more than eighteen (18) months ago), Plaintiff had already paid his attorney \$15,000.00. Annexed as **Exhibit P** is a copy of Plaintiff's attorney's billing statement as of June 15, 2013 indicating "payments" as \$15,000.00. Notably, this was before the Court scheduled trial and nearly a year prior to Defendant's May 2014 deposition, which was five (5) hours in length.

12. As detailed in Defendant's accompanying affidavit, I am the Defendant's third attorney (Defendant is not requesting attorney fees incurred with her first counsel). Defendant's second attorney, [REDACTED], Esq., has prepared an Affirmation of fees in support of her request for fees and same is annexed to these papers. Mr. [REDACTED]'s affirmation details the work performed on Defendant's behalf during his representation of her. I also respectfully refer this Court to Defendant's accompanying affidavit for a detailed history of the litigation, which includes the inadequate and unreasonable "counterproposal" with respect to Defendant's request for maintenance and college expenses.

13. Based on the unreasonable position taken by the Plaintiff in connection with the Defendant's support (and the support of the parties' unemancipated child), this Court scheduled a trial for October 2014. After the

scheduling of trial, Defendant was unfortunately left in the untenable position of having to retain new *trial* counsel. It was at that point that Defendant retained my firm. A copy of the firm's retainer agreement is annexed.

14. Based on the fact that a trial was already scheduled and I was unfamiliar with the file, a \$25,000.00 retainer fee was required. Defendant utilized \$10,000.00 from marital funds (which \$5,000.00 could be credited to Plaintiff if the Court grants Defendant's request for fees) and borrowed the remaining \$15,000.00 from her family members. That sum has to be repaid.

15. During this litigation, Defendant was only awarded with \$2,500.00 in interim fees. As detailed in her accompanying affidavit and in Mr. [REDACTED]'s affirmation, she spent \$39,982.19 in counsel fees (excluding the fees incurred for the appeal) and she still owes Mr. [REDACTED] \$32,310.52 (a confession of judgment has been signed and a charging lien agreed to).

16. The legal fees incurred by Defendant are reasonable under the circumstances given the complexity of this litigation and the position taken by the Plaintiff with respect to the issues of maintenance and child support (college contribution). Plaintiff also refused to offer to contribute to Defendant's counsel fees upon the resolution of this case requiring the making of this instant application and despite the fact that he is the monied spouse.

17. While this matter has ultimately settled, Defendant will be forced to utilize her equitable distribution to supplement her monthly income and support. Moreover, the Defendant's support is the minimal amount she could

settle for in order to support herself and her child, all while providing Plaintiff with a tax benefit. The expenses that Defendant incurs, or will soon incur, amount to *at least* \$6,350.00 per month. This does not include the anticipated health insurance Defendant will pay, her basic daily expenses, or many of the child's expenses.

18. The Defendant's retainer agreement and detailed time slips (redacted to protect attorney-client privilege) are annexed respectively as **Exhibit Q** and **R**. The Plaintiff retained this firm on or about August 6, 2014, tendering a retainer in the sum of \$25,000.00 (a large majority of which was borrowed from her family).

19. From the time Defendant retained this firm she has been billed \$17,974.86 for legal fees and costs in the within action (\$16,315.00 for 50.2 hours of attorney's time at \$325.00 per hour; \$1,140.00 for 7.6 hours of billed paralegal's time at \$150.00 per hour; and \$519.86 in costs/disbursements). This amount includes the time expended to finalize the within application. It is anticipated an additional twenty (20) hours will be billed to the client to finalize the matter, including the review of Plaintiff's opposition papers, the preparation, review and submission of the final divorce documents; effectuating the division of the parties' brokerage accounts; and effectuating the division (and necessary tracing) of the parties' retirement assets set forth in the parties' Stipulation of Settlement. Therefore, Defendant seeks **\$64,457.05** as and for the counsel fees expended in this action (\$17,974.86 representing the total

billed to date by this firm + \$39,982.19 for Mr. [REDACTED]'s fees + \$6,500.00 anticipated fees to be incurred).

20. It is respectfully submit that the fees charged by this firm are reasonable under the circumstances. While ordinarily counsel fees for making an application are not awarded under the Domestic Relations Law, (Swift v. Swift, 260 A.D.2d 467; 688 N.Y.S.2d 233(2d Dept 1999)), the Court of Appeals has held that Courts have discretion to include amounts for legal services rendered in connection with counsel fees hearings. O'Shea v. O'Shea, 93 N.Y.2d 187, 711 N.E.2d 193; 689 N.Y.S.2d 1999). In the case at bar, and in the interest of judicial economy the parties agreed to "submit" on the issue of counsel fees in lieu of having to conduct a formal hearing.

21. In determining the award of counsel fees pursuant to DRL § 237, in addition to financial considerations, the Court should consider the value of the services rendered, as measured by the standing of counsel, the time devoted to the action, the nature of the services, the complexity of the matter and the results achieved must also be factored.

22. I am admitted to practice in both New York and New Jersey and have practiced, almost exclusively, in the fields of matrimonial and family law since my graduation from law school in 2008. I am also an adjunct professor at Touro Law Center and New York State Bar Examination tutor. Your deponent remains current on changes in applicable law by regularly attending CLE sponsored by the New York, Suffolk County Women's and Matrimonial Bar

Associations, and I am current in my CLE requirements. During law school, I interned for the former Honorable Ettore A. Simeone, a former Suffolk County Family Court Judge. I also participated in the Family Law Clinic at Touro Law Center and received the CALI Award for Academic Excellence in the Family Law Clinic. In September 2011, I was the recipient of the Judge George C. Pratt Moot Court Board Alumni Association Award in Appellate Advocacy from Touro Law Center. In 2012, I received the Emerging Leading Award from Touro Law Center. The Law Center also named me "Alumni of the Month, July 2012." In May 2013, I was named one of Long Island's Top Young Professionals ("30 Under 30") by the Huntington Township Chamber of Commerce. Most recently, I was nominated to the 2014 Super Lawyer Rising Stars list, which is awarded to only 2.5% of the attorneys in the New York Metro area. My hourly rate of \$325.00 is commensurate with my experience and skills.

23. No prior application for the relief sought herein has been made to this or any other Court, with the exception of my request for interim counsel fees in my June 17, 2013 Order to Show Cause.

WHEREFORE, it is prayed that this Court award the counsel fees and costs incurred herein in the amount of \$64,457.05 and for such other and further relief as might be deemed fair and just under the premises.

Date: December 19, 2014
Hauppauge, New York

ALISON LEIGH EPILONE, ESQ.

COUNSEL FEES

6. The Court has the authority to award attorneys' fees and to assess fines for a party's disobedience of an Order of the Court. (See, DRL § 237(b), DRL 238, Judiciary Law § 773). In pertinent part DRL 238 states:

in any action or proceeding to enforce or modify any provision of a judgment or order entered in an action for divorce... the court may in its discretion require either party to pay counsel fees and fees... to the attorney of the other party 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.

7. The Defendant has incurred approximately 5 hours of legal services preparing this application, will incur fees for submitting this application, and, if a hearing is held, incur fees for the hearing. Therefore, it is respectfully requested that the Plaintiff be directed to pay \$2,500.00 in counsel fees, plus any additional sums which may accrue. In light of the likelihood of additional fees, it is requested that the Defendant be granted leave to apply for additional fees.

8. A copy of the firm's retainer and statement of client's rights is annexed hereto as Exhibit "H." A copy of my firm's invoices are annexed hereto as Exhibit "I."

9. My hourly rate on this matter is [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. Upon information and belief, no one has promised to undertake Defendant's obligation to pay counsel fees in connection with this matter.

12. Upon information and belief, there has been no prior application for the relief requested herein.

WHEREFORE, your affirrant prays for an order for the relief requested herein, and for other and further relief as the Court may deem just and proper.

Dated: Hauppauge, New York
October __, 2019

[REDACTED]

Interim counsel fees
(GRANTED)

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

PRESENT:

HON. CHERYL A. JOSEPH
Acting Justice of the Supreme Court

INDEX NO.: [REDACTED]
NOTICE OF MOTION
Submission Date: July 9, 2019
Motion: 9 - MG

-----X

A [REDACTED] P [REDACTED]
Plaintiff,

- against -

A [REDACTED] J. P [REDACTED]
Defendant.

DECISION & ORDER

Plaintiff's Attorney
[REDACTED]
[REDACTED]
[REDACTED]

Defendant's Attorney
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

-----X

Upon the following papers read on motion sequences 6 and 7, to wit:

1. Defendant's Notice of Motion;
2. Plaintiff's Opposition to Motion & Support Documents; and
3. Defendant's Reply in Further Support of Motion.

Currently before the Court is Defendant's Notice of Motion which seeks an award of interim counsel fees in the amount of \$50,000.00 pursuant to Domestic Relations Law § 237, with leave to seek further fees as may be warranted.

The parties in the above referenced action were married on July 17, 1993 and have two (2) children, to wit: A.N., born September 24, 1997 (emancipated);

and A.A., born April 10, 2002. The Plaintiff ("Wife") commenced the instant action for divorce on November 6, 2017. Therefore, the parties were married approximately 24 years and 3 ½ months as of the date of commencement. The Preliminary Conference was held on April 12, 2018 and the parties have been involved in contentious litigation ever since. In fact, the instant matter is currently scheduled for trial, which is scheduled to commence on September 23, 2019¹.

In this Court's Decision and Order dated July 30, 2018, the Court attributed \$512,823.18 in income to the Wife and \$102,199.13 in income to the Defendant ("Husband"). In his moving papers, the Husband claims he earns approximately \$150,000.00 per year as the Budget Director for Nassau County and in her opposition, the Wife indicates that she was excessed from her job with Ironshore Insurance when it was sold to Liberty Mutual Insurance and that she is currently unemployed. There is a dispute as to the amount of severance the Wife received.

In the Wife's opposition, she states that her last pay check was in December 2018 and she received a single severance payment of \$157,828.34 on March 29, 2019 and a final deferred compensation payment of \$55,050.03. Notably, the Wife did not attach any documentation to substantiate that claim. Annexed to the Husband's reply papers, as Exhibit B, is a copy of a check that was produced via subpoena. The check is dated March 29, 2019 and demonstrates that the gross amount of that check was \$250,301.78 (resulting in a net payment of \$157,828.34 to the Wife). However, the gross year to date amount received by the Wife as indicated on the check was \$330,807.82 (net \$212,878.37) but does not distinguish severance payment(s) from deferred compensation payment(s).

For purposes of this application only, and without prejudice to the parties' respective claims at trial, the Court again finds the Wife's income is \$512,823.18 per year and the Husband's income as \$139,585.20² per year.

COUNSEL FEES

The Defendant relies on Domestic Relations Law § 237 (a) and the long-standing case law in our jurisdiction in support of his request for interim counsel fees.

Domestic Relations Law § 237(a) states in pertinent part:

"In any action or proceeding brought...for a divorce...the court may direct either spouse...to pay counsel

¹ The Court notes that the trial was originally scheduled for July 8 and July 25, 2019 but the Court had to adjourn the aforesaid dates.

² \$150,000.00 less Social Security of \$8,239.80 (6.2% of \$132,900.00) less Medicare of \$2,175.00.

fees...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...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."

It is well settled that an award of counsel fees is within the sound discretion of the court. The issue of counsel fees is controlled by the equities and circumstances of each case. See Nicodemus v. Nicodemus, 98 A.D.3d 604 (2d Dept. 2012); see also DeCabrera v. DeCabrera-Rosete, 70 N.Y.2d 879 (1982). Additionally, an award of interim counsel fees is warranted where there is a significant disparity in the financial circumstances of the parties. See Prichep v. Prichep, 52 A.D.3d 61 (2d Dept. 2008). However, with requests for "an interim award of counsel fees, as opposed to a final award, no such detailed inquiry is warranted." Id. at 64-66. Interim fees will ensure that the non-monied spouse will be able to litigate on equal footing with the monied spouse to prohibit the monied spouse "from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation." Id.

Both parties are (and have been) represented by competent, learned attorneys who are well known to this Court. Here, the Wife is the monied spouse and an award of interim counsel fees is necessary to ensure that the Husband can continue to litigate this matter on equal footing with the Wife. As detailed above, two (2) trial dates in this matter are scheduled for September 23 and 24, 2019. Moreover, the Husband states that the Wife provided over 8,500 pages of discovery, much of which was unorganized, that the Husband's attorney must review in preparation for the impending trial.

The Wife did not voluntarily disclose the amount in her opposition papers. See e.g. Hinden v. Hinden, 122 Misc.2d 552, 558-59 (Nas. Cty. Sup. Ct. 1983); see also Domestic Relations Law §237(a). In the Husband's reply papers, he draws the Court's attention to the Wife's Statement of Net Worth wherein she lists she paid

the following: \$5,250.00 to [REDACTED] (an expert); \$15,000.00 to [REDACTED] (an expert); \$25,000.00 to [REDACTED] (an expert); \$136,223.00 to [REDACTED] (Plaintiff's second attorneys); \$9,762.50 to [REDACTED] Esq. (Plaintiff's first attorney); and \$26,000.00 to [REDACTED] (Plaintiff's current attorneys). Accordingly, the Plaintiff (as of June 19, 2018, which is the date of her Statement of Net Worth) paid a total of \$171,985.50 in legal fees and \$45,250.00 in expert fees³ for a grand total of \$217,235.50.

Pursuant to the Husband's moving and reply papers, including the billing invoices annexed thereto, he has incurred a total of \$43,395.00 in counsel fees. Of the \$43,395.00 incurred, the Husband paid a total of \$5,750.00 and the Wife paid \$25,000.00 (\$15,000.00 per a Court Order and \$10,000.00 voluntarily). The Husband's attorney states that as of June 1, 2019, a total of \$13,395.00 outstanding.

What is most notable to the Court is the amount of money the Wife has expended on counsel and expert fees compared to the Husband. The Wife has paid more in expert fees *alone* than the Husband has incurred in legal fees. Moreover, the Wife has paid nearly 4 times more in legal fees than the Husband has incurred. The disparity is staggering. In determining the counsel fee award herein, the Court has considered the \$15,000.00 previously awarded to the Husband and the voluntary \$10,000.00 payment made by the Wife.

Accordingly, the Defendant is awarded \$50,000.00 in interim counsel fees and the Plaintiff is directed to pay same directly to the Plaintiff's counsel's office, as follows: \$25,000.00 within thirty (30) days from the date of this Order and \$25,000.00 within sixty (60) days from the date of this Order. Defendant is granted leave to apply for additional fees should same be warranted. See e.g. Brody v. Brody, 137 A.D.3d 832, 27 N.Y.S.3d 190 (2d Dept. 2016) (the non-monied spouse is not prohibited from filing more than one application for interim counsel fees). Furthermore, if the Plaintiff is not in compliance, upon the submission of an Affirmation of non-compliance, the Clerk of the County of Suffolk is hereby directed to enter and docket a money judgment in favor of [REDACTED] and against the Plaintiff, A [REDACTED] for such amount and [REDACTED], P.C. shall have execution therefor.

Accordingly, it is hereby

ORDERED that the Plaintiff shall pay directly to the Defendant's counsel, [REDACTED] with offices located at [REDACTED] the sum of \$50,000.00 as and for interim counsel fees,

³ The Plaintiff's papers do not indicate how much she has incurred in counsel and expert fees, only what she has paid.

as follows: \$25,000.00 within thirty (30) days from the date of this Order and \$25,000.00 within sixty (60) days from the date of this Order and the Defendant is granted leave to apply for additional fees should same be warranted; and it is further

ORDERED that upon serving a certified copy of this Decision and Order pursuant to C.P.L.R. §8019(c) on the Suffolk County Clerk along with the filing of an Affirmation of non-compliance, the Clerk of the County of Suffolk is hereby directed to enter and docket a money judgment in favor of [REDACTED], P.C. and against the Plaintiff, A [REDACTED] P [REDACTED] in the sum of the outstanding balance owed and [REDACTED], P.C. shall have execution therefor; and it is further

ORDERED that all relief requested not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 25, 2019
Central Islip, New York

HON. CHERYL A. JOSEPH, A.J.S.C.

Interim counsel fees
- Denied

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

PRESENT:

HON. CHERYL A. JOSEPH

Acting Justice of the Supreme Court

INDEX NO.: [REDACTED]
NOTICE OF MOTION
Submission Date:
July 25, 2019
Motion: 3 - MD

-----X

[REDACTED]

Plaintiff,

- against -

J [REDACTED] R [REDACTED],

Defendant.

-----X

DECISION & ORDER

Plaintiff's Attorney

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Defendant's Attorney

[REDACTED]
[REDACTED]
[REDACTED]

Upon the following papers read on the motions, to wit:

1. Plaintiff's Notice of Motion for Counsel Fees;
2. Defendant's Affidavit in Opposition; and
3. Plaintiff's Reply Affidavit and Affirmation.

By Administrative Order of the Supervising Judge of the Matrimonial Parts of Suffolk County dated April 17, 2019, the instant matter was transferred from Hon. James F. Quinn, A.J.S.C. to the undersigned Acting Justice of the Supreme Court.

BACKGROUND

The parties in this contentious matrimonial action were married on November 23, 1997 and have two (2) children, to wit: J.R, born July 25, 1998

(who is now emancipated); and J.R., born August 4, 2000. The instant proceeding was commenced on August 17, 2017 and the Preliminary Conference in this matter was held on October 23, 2017.

By Decision and Order dated May 10, 2018 (Quinn, J.), the Court determined the Defendant/Husband's income to be \$300,000.00 through his employment of [REDACTED]¹ and the Plaintiff/Wife's income to be \$0.00 as she has not worked outside of the home since 1999. See Exhibit E, to Plaintiff's moving papers.

The parties have been physically separated since in or around August 2016. The Wife still resides in the marital residence located at [REDACTED]. The Husband and the children moved out of the marital residence into a home located at [REDACTED] which has since been sold.

From the unnecessarily voluminous motion papers submitted to this Court, the ownership of the [REDACTED], and the relevant discovery issues related thereto, remains the main issue of this proceeding and all other issues should be resolved pursuant to the terms of the parties' Antenuptial Agreement dated November 21, 1997. See Exhibit G to Plaintiff's moving papers.

Currently before the Court is the Wife's application for interim counsel fees. The Husband opposes the Wife's application in its entirety.

COUNSEL FEES

In Branch a) of the Wife's application, she has requested an award of \$50,000.00 in interim counsel fees. The Husband opposes the application and argues, *inter alia*, that the Wife's application should be denied because she has not provided this Court with an updated Statement of Net Worth.

The Court may direct a party to pay counsel fees "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." See Dom. Rel. Law §237(a).

It is well settled that an award of interim counsel fees is within the sound discretion of the court. The issue of counsel fees is also controlled by the equities and circumstances of each case. See Nicodemus v. Nicodemus, 98 A.D.3d 604

¹ The Husband's alleged ownership of this business is the primary issue in this proceeding.

(2d Dept. 2012). Additionally, an award of interim counsel fees is warranted where there is a significant disparity in the financial circumstances of the parties. See Prichep v. Prichep, 52 A.D.3d 61 (2d Dept. 2008). However, with requests for "an interim award of counsel fees, as opposed to a final award, no such detailed inquiry is warranted." Id. at 64-66. Interim fees will ensure that the non-monied spouse will be able to litigate on equal footing with the monied spouse to prohibit the monied spouse "from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation." Id.

22 N.Y.C.R.R. § 202.16(k)(2) requires a party seeking counsel fees to include, *inter alia*, a Statement of Net Worth. A failure to submit an updated Statement of Net Worth renders a counsel fee application defective. Bertone v. Bertone, 15 A.D.3d 326 (2d Dept. 2005); see also Prochilo v. Prochilo, 165 A.D.3d 1304, 1305 (2d Dept. 2018) (the court denied the plaintiff's counsel fee request for her failure to provide updated financial information, including an updated Statement of Net Worth; the plaintiff's Statement of Net Worth submitted to the lower court was three years old).

Here, Exhibit F annexed to the Wife's initial moving papers is her 2-year-old Statement of Net Worth sworn to on August 21, 2017². An updated Statement of Net Worth is required and should have been included in the Wife's application; failure to annex an updated Statement of Net Worth renders Plaintiff's application defective. The Court also notes that the Husband failed to annex his updated Statement of Net Worth or retainer agreement and failed to disclose the total amount he has paid to his current and prior attorneys to date. See 22 N.Y.C.R.R. § 202.16(k); see also Hinden v. Hinden, 122 Misc.2d 552, 558-59 (Nas. Cty. Sup. Ct. 1983). Therefore, this Court would have drawn an inference favorable to the Wife when determining her counsel fee application. See 22 N.Y.C.R.R. § 202.16(k)(5)(i).

The Court must also advise the parties that an interim counsel fee application is not the proper forum to litigate the entirety of this case. It is also unnecessary to annex 86 exhibits (76 of which were annexed by the Plaintiff) to their respective papers, which are wrought with needless, abhorrent allegations against each other.

For the reasons set forth herein, the Plaintiff's application for counsel fees is denied without prejudice and the Plaintiff is granted permission to renew such request upon submission of proper papers.

Accordingly, it is hereby

² Notably, the Wife indicates on the face of her Statement of Net Worth that it reflects income, assets, debts, etc. as of August 28, 2017 but is sworn to on a date a week prior thereto.

ORDERED that Plaintiff's application for counsel fees is denied without prejudice and the Plaintiff is granted permission to renew such request upon submission of proper papers; and it is further

ORDERED that all relief requested not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 19, 2019
Central Islip, New York

HON. CHERYL A. JOSEPH, A.J.S.C.

FINAL COUNSEL
FEE SUBMISSION
DECISION

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

P R E S E N T :

HON. CHERYL A. JOSEPH

Acting Justice of the Supreme Court

INDEX NO.:

Counsel Fee Submission

-----X

[REDACTED],

Plaintiff,

- against -

[REDACTED],

Defendant.

-----X

DECISION & ORDER

Plaintiff's Attorney

Defendant's Attorney

Upon the following papers read, to wit:

1. Plaintiff's Affirmation in Support of Counsel Fees and Plaintiff's Memorandum of Law in Support of her Application for an Award of Counsel and Expert Fees¹; and
2. Defendant's Affirmation in Opposition to Plaintiff's Request for Attorney's Fees and Defendant's Memorandum of Law in Opposition of Plaintiff's Application for an Award of Counsel and Expert Fees.

The Plaintiff Wife's application seeks \$139,281.07 representing \$134,843.75 in counsel fees, \$932.82 in disbursements and \$3,504.50 in expert fees. The Defendant Husband opposes the application in its entirety.

¹ The Court notes the Plaintiff's Affirmation in Reply was disregarded by the Court as this Court does not accept replies for counsel fee submissions.

BACKGROUND

The parties were married on September 29, 2007 and the instant matrimonial proceeding was commenced on or about February 11, 2018. The Plaintiff ("Wife") is 45 years old and the Defendant ("Husband") is 43 years old; both parties are in good health. The parties also have two (2) children, to wit: A.B, born March 30, 2005; and G.B., born May 15, 2008.

Both parties ran their own businesses during the marriage. The parties' retained Dieters & Associates, LLC (n/k/a Empire Valuation Consultants) to value both their business and income streams.

The Wife is a Registered Dietician, Certified Dietetic Nutritionist and Certified Intuitive Eating Specialist. The Wife's business is [REDACTED] which provides one on one nutritional consulting and also provides transformational life coaching sessions. The Wife's business accepts payments both privately and from medical insurance companies. The value of the Wife's business was found to be \$0.00 and her income was found to be \$67,600.00 per year. See Exhibit I to Plaintiff's moving papers.

The Husband's business is [REDACTED] which specializes in finding, purchasing and reselling, through its supply chain, electronic components. The Husband's business also services original equipment manufacturers and contract manufacturers worldwide who face long lead times when searching for obsolescent or hard to find parts. The fair market value of the Husband's business was found to be \$355,000.00 and his income was found to be \$334,000.00. See Exhibit E to Plaintiff's moving papers.

The Wife blames the Husband for the length of time this case took to settle and posits that the Husband failed to cooperate with the litigation process "at almost every step". Specifically, the Wife argues that the Husband did not cooperate with the discovery process and failed to produce responsive documents in a timely fashion. The Wife claims that due to the Husband's failure to timely cooperate with the discovery process, she was forced to serve at least 10 subpoenas to various banks and financial institutions.

The Wife further argues that the Husband failed to engage in meaningful settlement negotiations relating to *pendente lite* issues, custody and the ultimate resolution of this matter. The Wife argues that the matter was not settled until the eve of trial and her attorneys were forced to spend numerous hours preparing for same.

The Wife's current counsel is the second law firm on the case, and it was not disclosed what was paid to her first attorneys. The Wife retained her current attorneys on or about August 1, 2018 and paid a retainer of \$9,500.00. A total of

\$134,843.00 in legal fees and \$932.82 in disbursements was billed by her current attorney and a total of \$55,482.58 has been paid toward those services to date. Therefore, a total of \$80,293.24 is due and owing. The Husband's retainer agreement details that an initial retainer of \$7,500.00 was paid to his attorneys. A total of \$91,522.25 was incurred by the Husband and \$45,000.00 was paid to date. Therefore, a total of \$46,522.25 is due and owing.

The Husband categorically denies the Wife's allegations and claims that the only legal action taken by the Wife's counsel was serving discovery demands. The Husband argues that he responded to the demands as quickly as was practical. The Husband further argues that the Wife caused the subpoenas to be served *after* he provided his discovery responses. Importantly, the Husband argues that negotiations were not had until the eve of trial because the Wife failed to enter negotiations with him and when negotiations were eventually had, the case quickly settled.

Additionally, the Husband argues that the Wife will have approximately \$600,000.00 from equitable distribution in this matter to pay her own legal fees. Notably, the Wife failed to annex the Stipulation of Settlement to her moving papers or detail to the Court what either party is receiving in equitable distribution and/or support. Further, the Husband argues that most of the legal fees incurred by the Plaintiff were a result of "hand holding" and there was no litigation (i.e. motions, depositions, etc.) in this case.

The Court notes that the Preliminary Conference in this matter was held on August 9, 2018 and the trial was scheduled for September 13, 2019 but was adjourned until September 24, 2019. The parties ultimately settled all issues, except for counsel fees, on September 23, 2019 by way of Stipulation of Settlement. The Stipulation of Settlement is annexed to the Defendant's opposition papers as Exhibit A.

EXPERT FEES

The Wife's application seeks an award of expert fees in the amount of \$3,504.50 related to the valuation of the parties' businesses and properties.

An award of expert witness fees in a matrimonial action is left to the discretion of the court. Avello v. Avello, 72 A.D.3d 850, 852 (2d Dept. 2010). Importantly, absent an affidavit from the expert, this Court lacks sufficient basis to grant a motion for the award of such fees. Id.

Here, the Wife failed to provide an affidavit from the experts. More importantly, the Wife failed to note that the expert fees were previously apportioned between the parties with the Wife paying 20% and the Husband

paying 80% of same. Therefore, even if expert affidavits were provided, the Court finds no basis to disturb the previous allocation of expert fees.

Accordingly, the Wife's application for expert fees is denied

COUNSEL FEES

The Wife relies on Domestic Relations Law § 237 (a) and the long-standing case law in our jurisdiction in support of her counsel fee submission.

Domestic Relations Law § 237(a) states in pertinent part:

"In any action or proceeding brought...for a divorce...the court may direct either spouse...to pay counsel fees...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...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."

It is well settled that an award of counsel fees is within the sound discretion of the court. The issue of counsel fees is controlled by the equities and circumstances of each case. See Nicodemus v. Nicodemus, 98 A.D.3d 604 (2d Dept. 2012); see also DeCabrera v. DeCabrera-Rosete, 70 N.Y.2d 879 (1982). The Court shall also consider the relative financial circumstances of the parties, including distributive awards; the nature and extent of the services rendered and the relative merits of the parties' positions. Nadası v. Nadel-Nadası, 153 A.D.3d 1346 (2d Dept. 2017) (internal citations omitted). Finally, Courts have also considered the following factors in fixing and determining counsel fees:

- (a) the actual time spent;
- (b) the necessity for the services;
- (c) the nature of the issues involved;

- (d) the professional standing of counsel, including his/her background and expertise;
- (e) the results achieved; and
- (f) the parties' obstructionist and wasteful tactics.

See Penavic v. Penavic, 60 A.D.3d 1026 (2d Dept. 2009); Prichep v. Prichep, 52 A.D.3d 61 (2d Dept. 2008); Franco v. Franco, 97 A.D.3d 785 (2d Dept. 2012); Vitale v. Vitale, 112 A.D.3d 614 (2d Dept. 2013); Brantly v. Brantly, 89 A.D.3d 881 (2d Dept. 2011); Siskind v. Siskind, 89 A.D.3d 832 (2d Dept. 2011); Rubenstein v. Rubenstein, 137 A.D.2d 514 (2d Dept. 1988); and Ahern v. Ahern, 94 A.D.2d 53 (2d Dept. 1983).

Both parties' Statements of Net Worth are not in the form prescribed by 22 N.Y.C.R.R. § 202.16 as they fail to include a copy of the most recently filed tax return. Additionally, the Wife's Statement of Net Worth is as of August 2019 and an updated Statement of Net Worth was required to reflect her correct income and assets. The Husband's Statement of Net Worth was also required to be updated as it is over a year old and does not reflect his current income or assets. Accordingly, the Court is inclined to draw a negative inference against both parties. See 22 N.Y.C.R.R. § 202.16(k); see also Bertone v. Bertone, 15 A.D.3d 326, 326-327 (2d Dept. 2005); see also Cohen v. Cohen, 160 A.D.3d 804, 806 - 807 (2d Dept. 2018). The Wife's retainer agreement also does not contain a Statement of Client's Rights and Responsibilities in accordance with 22 N.Y.C.R.R. § 1400.2.

Here, both parties were represented by experienced, well respected matrimonial attorneys who zealously advocated on behalf of their clients and were able to settle this matter without the need for a trial. There is no question, that the Husband is the monied spouse. There is a question, however, as to the amount of attorney's fees expended in this matter given the fact that there was no motion practice, depositions or a trial. Upon review of the Wife's billing records, the first notation regarding a settlement proposal being sent to opposing counsel was not until August 2019 and the first proposed Stipulation of Settlement was not drafted until September 11, 2019; the first entry regarding settlement on the Husband's billing records was from August 2018. See Exhibit B to Plaintiff's moving papers and C to Defendant's moving papers.

Further, the Wife will receive a substantial amount of money in equitable distribution as per the parties' settlement. The Court also recognizes that the Husband previously paid \$7,500.00 toward the Wife's counsel fees which the Wife did not include her in moving papers.

With respect to the Wife's request for counsel fees in the amount of \$134,834.00, the Court finds that while the Husband is the monied spouse, in view of, *inter alia*, the relative financial circumstances of the parties (including

the approximate \$600,000.00 the Wife will receive in equitable distribution), the negative inference drawn against both parties, the \$7,500.00 previously paid by the Husband and the nature and extent of the services rendered, an award of \$10,000.00 to the Wife is warranted.

Accordingly, it is hereby

ORDERED that the Defendant shall pay directly to the Plaintiff's counsel, [REDACTED] the sum of \$10,000.00 as and for counsel fees within forty-five (45) days from the date of this Order; and it is further

ORDERED that upon serving a certified copy of this Decision and Order pursuant to C.P.L.R. §8019(c) on the Suffolk County Clerk along with the filing of an Affirmation of non-compliance, the Clerk of the County of Suffolk is hereby directed to enter and docket a money judgment in favor of [REDACTED] and against the Defendant, [REDACTED], in the sum of the outstanding balance owed and [REDACTED] shall have execution therefor; and it is further

ORDERED that all other relief requested is denied for the reasons set forth herein.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 31, 2020
Central Islip, New York

HON. CHERYL A. JOSEPH, A.J.S.C.

Post Judgment - counsel fee
Denied

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

PRESENT:

HON. CHERYL A. JOSEPH

Acting Justice of the Supreme Court

INDEX NO.: [REDACTED]

ORDER TO SHOW CAUSE

Submission Date:

January 11, 2019

Motion: 1 - PD-MDEC

-----X

J [REDACTED] C [REDACTED]

Plaintiff,

- against -

E [REDACTED] C [REDACTED]

Defendant.

-----X

DECISION & ORDER

Plaintiff's Attorney

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Defendant's Attorney

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Upon the following papers read on the motions, to wit:

1. Order to Show Cause for Money Judgment;
2. Affirmation in Opposition; and
3. Affirmation in Reply,

The parties were married on D [REDACTED] 19 [REDACTED]. After 34 years of marriage, the parties decided to divorce and they settled their marital difficulties by way of Stipulation of Settlement dated July 25, 2003, which was incorporated but did not merged into the Judgment of Divorce by the Fifth Court of Civil and Commercial Chamber of the First Instance Court of the National District of Santo Domingo in the Dominican Republic on August 6, 2003.

Currently before the Court is Plaintiff's post judgment Order to Show Cause, which seeks, a money judgment in the amount of \$210,000.00; an income deduction order in the form of a Domestic Relations Order and counsel fees.

The Defendant opposes the Plaintiff's application in its entirety and argues that the Plaintiff's application is jurisdictionally defective because the Plaintiff failed to domesticate the foreign divorce decree. The Plaintiff, in her reply, argues that this Court has already recognized the parties' Judgment of Divorce. This Court agrees with the Plaintiff. Specifically, this Court obtained jurisdiction over these parties and their divorce when it granted a Domestic Relations Order on October 27, 2004 ([REDACTED] J.). A copy of the Domestic Relations Order is annexed to Plaintiff's moving papers as Exhibit C and to her reply papers as Exhibit A.

Money Judgement

Pursuant to Domestic Relations Law § 244:

"Where a spouse in an action for divorce...defaults in paying any sum of money as required by the judgment or order directing the payment thereof...Upon application the court...shall make an order directing the entry of judgment for the amount of arrears...unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears..."

Additionally, this Court does not have the discretion to refuse to enter a judgment for support arrears when the amount is shown to be due and unpaid. Felton v. Felton, 175 A.D.2d 794 (2d Dept. 1991).

Here, pursuant to the parties' Stipulation of Settlement, the Defendant was to pay the Plaintiff spousal maintenance in the amount of \$6,000.00 per month. See Stipulation of Settlement dated July 25, 2003 at pages 16 – 17. The Plaintiff states that Defendant has not paid spousal maintenance since July 2015 and the arrears due and owing to her are \$210,000.00 and she requests a money judgment for said amount. The Defendant does not dispute the arrears due to the Plaintiff.

The Court finds that there are no factual issues in dispute which prevents this Court from awarding a money judgment. See Felton, 175 A.D.2d at 795. Accordingly, the application for a money judgment in favor of the Plaintiff and

against the Defendant in the amount of \$210,000.00 is granted and the Suffolk County Clerk is directed to enter and docket same.

Domestic Relations Order

The Plaintiff also requests an Income Deduction Order pursuant to CPLR § 5242 in the form of a Domestic Relations Order against Defendant's pension benefits in order to satisfy his maintenance obligation and arrearages.

Pursuant to CPLR § 5242(b):

"Upon application of a creditor, for good cause shown, the court may enter an income deduction order for support enforcement...Proof of default establishes a prima facie case...which can be overcome only by proof of the debtor's inability to make the payments. Unless the prima facie case is overcome, the court shall enter an income deduction order for support enforcement..."

Here, the Plaintiff requests that she be permitted to submit a Domestic Relations Order as a vehicle for income deduction for support based upon the fact that Defendant has failed to make any spousal maintenance payments. The Defendant does not oppose this request and does not provide any proof of his inability to make payments.

Accordingly, the Plaintiff is awarded an income deduction order against the Defendant's pension benefits in the form of a Domestic Relations Order as and for his spousal maintenance obligations. The Plaintiff does not specify which of the Defendant's two pensions she wishes to submit the Qualified Domestic Relations Order against. Therefore, the Plaintiff shall submit the Domestic Relations Order against the Defendant's New York State and Local Retirement System pension plan. If that plan does not cover the entirety of the Defendant's spousal obligation, upon application to the Court and on notice to the Defendant, the Plaintiff shall be permitted to request a second Domestic Relations Order against the Defendant's National Center for Disability Services for the remaining amount due and owing to the Plaintiff. The Plaintiff shall be one hundred percent responsible for the cost of the preparation of the Domestic Relations Order(s), including any attorney's fees incurred in connection therewith.

Counsel Fees

The Plaintiff requests an award of counsel fees in the sum of \$7,500.00 pursuant to Article 19 of the parties' Stipulation of Settlement.

Pursuant to 22 N.Y.C.R.R. 202.16 (k)(3), "[n]o motion for counsel fees shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant..." The Plaintiff's moving papers do not indicate the amount of money paid. Additionally, the Plaintiff did not annex a statement of net worth to her moving papers or supplemental papers.¹

Accordingly, the Plaintiff's application for counsel fees is denied without prejudice and the Plaintiff is granted permission to renew such request upon submission of proper papers.

Accordingly, it is hereby

ORDERED that the Plaintiff is awarded a money judgment in favor of the Plaintiff and against the Defendant in the amount of \$210,000.00 and the Suffolk County Clerk is directed to enter and docket same; and it is further

ORDERED that the Plaintiff is granted an Income Deduction Order in the form of Domestic Relations Order as more fully described in this Decision and Order; and it is further

ORDERED that Plaintiff's application for counsel fees is denied without prejudice and the Plaintiff is granted permission to renew such request upon submission of proper papers; and it is further

ORDERED that all relief requested not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 5, 2019
Central Islip, New York

HON. CHERYL A. JOSEPH, A.J.S.C.

¹ 22 N.Y.C.R.R. § 202.16 (k)(2) states that no motion for counsel fees shall be heard unless the moving papers include a statement of net worth. The Court notes that the Plaintiff was not required to submit a statement of net worth if the counsel fee application was made pursuant to Domestic Relation Law §§ 237(c) or § 238, but same was required in support of her application for fees pursuant to Article 19 of their agreement.

Counsel Fee Enforcement

At an IAS Term, Part _____ of the
Supreme Court of the State of New York,
held at the Courthouse, 400 Carleton
Avenue, Central Islip, New York on the
_____ day of _____, 2020.

PRESENT: _____
J.S.C.

-----X
ANONYMOUS,

Plaintiff,

ORDER TO SHOW CAUSE

-against -

ANONYMOUS,

Defendant.

Index No. 20__ - ____

-----X
UPON reading and filing the annexed Affirmation of _____, ESQ.,
affirmed the ____ day of _____, 2020, together with the exhibits annexed thereto, and upon
all the pleadings and proceedings heretofore had herein,

LET the Plaintiff, _____, or an attorney on her behalf, show
cause before this court at Part _____, thereof to be held in and for the County of Suffolk at the
Supreme Court Building, located at 400 Carleton Avenue, Central Islip, New York 11722 on the
_____ day of _____, 2020, at 9:30 o'clock in the forenoon of that day, or as soon
thereafter as counsel can be heard, why an order should not be made and entered:

- a. For an Order permitting the withdrawal of [ATTORNEY] as attorney of record for Plaintiff, [ANONYMOUS], in the above-entitled matter; and
- b. For an Order, upon the withdrawal of [ATTORNEY] as attorney of record for Plaintiff, if such leave is granted by this Court, directing that the Defendant, or any other person acting on or for his behalf be stayed, restrained, prohibited, prevented, and/or restricted for at least thirty (30) days from the entry of such decision from proceeding in any fashion in connection with the above-entitled matter; and

- c. For an Order granting [ATTORNEY] a money judgment against the Plaintiff in the instant action in the amount of \$ _____; and
- d. For an Order granting [ATTORNEY] a charging lien in the instant action in the amount of \$ _____ against the Plaintiff; and
- e. For an Order granting such other, further and different relief as this Court may deem just, proper and equitable.

SUFFICIENT CAUSE APPEARING THEREFORE, IT IS HEREBY:

ORDERED, that, pending the determination of the instant Order to Show Cause, the Defendant is hereby stayed, restrained, prohibited, prevented, and/or restricted from proceeding in any fashion in connection with the above-entitled matter; and it is further

ORDERED, that service of a copy of this order, together with papers upon which it is based by service upon the Plaintiff by personal service pursuant to CPLR § 308 on or before the _____ day of _____, 2020; and service upon the Defendant's Attorney, _____, **of the Order to Show Cause, but not supporting papers**, by first class mail on or before the _____ day of _____, 2020; and service upon the attorney for the child, _____, **of the Order to Show Cause, but not supporting papers**, by first class mail on or before the _____ day of _____, 2020 be deemed good and sufficient service thereof.

ENTER :

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
ANONYMOUS,

Index No.: ____ - ____

Plaintiff,
-against -

AFFIRMATION IN SUPPORT

ANONYMOUS,

Defendant.

-----X

[ATTORNEY], an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following under the penalty of perjury:

I. I am the attorney of record for the Plaintiff, [ANONYMOUS], and as such I am fully familiar with the facts and circumstances set forth herein. I make this Affirmation in Support of the annexed Order to Show Cause, which seeks an order granting the following relief:

- a. For an Order permitting the withdrawal of [ATTORNEY] as attorney of record for Plaintiff, [ANONYMOUS], in the above-entitled matter; and
- b. For an Order, upon the withdrawal of [ATTORNEY] as attorney of record for Plaintiff, if such leave is granted by this Court, directing that the Defendant, or any other person acting on or for his behalf be stayed, restrained, prohibited, prevented, and/or restricted for at least thirty (30) days from the entry of such decision from proceeding in any fashion in connection with the above-entitled matter; and
- c. For an Order granting [ATTORNEY] a money judgment against the Plaintiff in the instant action in the amount of \$ _____; and
- d. For an Order granting [ATTORNEY] a charging lien in the instant action in the amount of \$ _____ against the Plaintiff; and
- e. For an Order granting such other, further and different relief as this Court may deem just, proper and equitable.

**THIS COURT SHOULD PERMIT THE WITHDRAWAL OF [ATTORNEY] AS
ATTORNEYS OF RECORD FOR THE PLAINTIFF DUE TO A BREAKDOWN IN THE
ATTORNEY/CLIENT RELATINSHIP**

2. It is unfortunate that I am constrained to request an Order to be relieved as counsel for [Mr./Ms. ANONYMOUS] as this office's primary concern has always been [Mr./Ms. ANONYMOUS]'s best interests. However, due to [Mr./Ms. ANONYMOUS]'s actions and her utter refusal to abide by our legal advice, [he/she] has made our representation unreasonably difficult, if not impossible.

3. [Mr./Ms. ANONYMOUS] has been placed on advance notice that an irretrievable breakdown in communications would result in the instant application. Annexed hereto as **Exhibit "A"** is a copy of [Mr./Ms. ANONYMOUS]'s retainer agreement with this firm as well as a Statement of Client's Rights. Our Retainer Agreement provides [Mr./Ms. ANONYMOUS] advance notice that an application may have to be made to be relieved as counsel. Our retainer provides that:

You are advised that if, in the judgment of the Law Firm, we decide that there has been an irretrievable breakdown in the attorney-client relationship, or a material breach of the terms of this Retainer Agreement, including a failure to pay in accordance with this Retainer, we may decide to make application to the court in which your action is pending to be relieved as your attorneys. In such event, you will be provided with notice of the application and an opportunity to be heard.

See Exhibit "A" at page 2.

4. [Mr./Ms. ANONYMOUS]'s specific refusal to cooperate or accept the legal advice of this firm is as follows:

- a. [insert examples of conduct that demonstrates a breakdown in the attorney/client relationship such as failing to return telephone calls, appear

for scheduled office meetings, refusal to accept legal advice. However, you should be careful to not divulge more information than required and to not breach confidentiality].

5. The New York Rules of Professional Conduct (as adopted in April, 2009 and amended through June 1, 2018), and more particularly Rule 1.16(c)(7), provides in pertinent part: "...a lawyer may withdraw from representing a client when... the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively..." Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16(c)(5). [Mr./Ms. ANONYMOUS] has made it unreasonably difficult, if not impossible to carry out our firm's employment effectively.

6. In view of the foregoing, I am constrained to move this Court for an order allowing [ATTORNEY] to withdraw as the attorneys of record for Plaintiff since it is unreasonably difficult, if not impossible to continue representation of the Plaintiff.

**THIS COURT SHOULD GRANT [ATTORNEY]
A MONEY JUDGMENT AND CHARGING LIEN AGAINST THE
PLAINTIFF IN THE AMOUNT OF \$[]**

7. It is respectfully submitted that this Court should grant [ATTORNEY] a money judgment, as well as a charging lien, against the Plaintiff as and for [his/her] outstanding attorney's fees.

8. Annexed hereto as **Exhibit "B"** is the billing history of this firm in this matter. As set forth in the billing history, thus far, this firm has expended \$_____ in legal fees and expenses and has only been paid \$_____, leaving a balance of \$_____ outstanding.

9. Pursuant to Part 137 of the Rules of the Chief Administrator, this office has sent the Plaintiff a Notice of Client's Right to Arbitrate a Dispute Over Attorney's Fees on _____, 2020. Annexed hereto as **Exhibit "C"** is a true copy of the Notice of Client's Right to Arbitrate a Dispute Over Attorney's Fees along with a true copy of the certified mailing. However, the Plaintiff has not availed [himself/herself] of the arbitration process.

10. It is respectfully submitted that the fees charged herein are reasonable. My qualifications and standing are as follows: [State background and experience of attorney].

11. Based upon the within, I submit that the rates charged herein, as reflected in the retainer annexed hereto as **Exhibit "A,"** are commensurate with other practitioners in the field with the same level of skill and experience. Plaintiff signed a Retainer Agreement and Statement of Clients Rights with [ATTORNEY] on _____ for the amount of \$_____, which Plaintiff paid by [credit card]. Annexed hereto as **Exhibit "A"** is a true copy of the Retainer Agreement and Statement of Clients Rights and Responsibilities. Plaintiff has received regular billing invoices from [ATTORNEY] in intervals of no less than every sixty (60) days and, as shown in the billing statements, she is now \$_____ in arrears of her legal bills with my office. Annexed hereto as **Exhibit "B"** is a true copy of the billing history and most recent billing history.

12. As set forth in the Retainer agreement, Plaintiff agreed to pays \$[_____] per hour for your affiant's time and \$[_____] per hour for paralegal's time. Thus far, Plaintiff has been billed a total of \$[_____] for legal services and fees rendered and she has only paid \$[_____].

13. It is therefore respectfully submitted that this Court should grant [] a money judgment in the amount of \$_____ against the Plaintiff, and grant [ATTORNEY] a charging lien against the Plaintiff in this matter.

14. Notice was given of this office's intent to file the instant application, which also seeks temporary relief. Annexed hereto as **Exhibit "D"** is a true copy of the e-mail sent to the Plaintiff. Also annexed as part of **Exhibit "D"** is proof of advanced notice to all counsel.

15. No previous application for the relief requested herein has been made.

WHEREFORE, I respectfully request that the within application be granted in its entirety, together with such other and further relief as this Court may deem just, proper and equitable.

Dated: _____, 2020
_____, New York

[ATTORNEY]

NOTICE OF RIGHT TO ARBITRATE FEE DISPUTE
PURSUANT TO PART 137 OF THE
RULES OF THE CHIEF ADMINISTRATOR

The amount of \$_____ is due and owing for the provision of legal services in the case of _____. If you dispute that you owe this amount, you have the right to elect to resolve this fee dispute by binding arbitration. To do so, you must file a Request For Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions.

If you do not file this request to arbitrate within those 30 days, you will not be permitted to resolve this dispute by arbitration under Part 137, unless our retainer or letter of engagement provides otherwise, and I will be free to bring a lawsuit in court to seek to obtain payment of my fee.

Dated: _____, New York

ATTORNEY'S NAME
Office and P.O. Address
Attorney's Address

Attorney's Telephone Number

STANDARD INSTRUCTIONS TO CLIENTS FOR ARBITRATION OF FEE DISPUTES
IN THE COUNTY OF SUFFOLK PURSUANT TO RULE 137

Part 137 of the Rules of the Chief Administrator, Title 22, provides a procedure for the arbitration of fee disputes for amounts between \$1,000.00 and \$50,000.00, between attorneys and clients in civil cases. A copy of Part 137 will be made available upon request. Your attorney may not bring an action in court to obtain payment of a fee, unless he or she first has notified you of your right to elect to resolve the dispute by arbitration or the written agreement between you and your attorney provides for arbitration which will be binding on both you and your attorney and cannot be appealed except in certain limited circumstances.

If the amount in dispute is under \$10,000.00, but more than \$1,000.00, the arbitration will be heard by one attorney arbitrator. If the amount in dispute is \$10,000.00 or more, but less than \$50,000.00 (unless by agreement of the parties), the arbitration will be heard by a panel of three arbitrators, consisting of two attorneys and one layperson, who shall be selected at random from a pool of arbitrators comprised of laypersons. All arbitrators will be selected by the appropriate Dispute Resolution Committee of the Suffolk County Bar Association.

Arbitration is available only if you dispute the amount of the fee paid or owed. In order to elect to resolve this dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the Suffolk County Bar Association within 30 days from the receipt of this Notice with the appropriate fee of \$150.00, unless other arrangements are made to obtain a waiver of fee. The Suffolk County Bar Association is located at 560 Wheeler Road, Hauppauge, New York 11788-4357, (631) 234-5511; filing of the Request for Arbitration must be made with the Suffolk County Bar Association, who has jurisdiction over the attorneys in the county in which the civil action was brought or would have been brought. If you do not file the Request for Arbitration within those 30 days, you will not be permitted to elect to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee, or may elect arbitration if specifically provided for in their retainer agreement or letter of engagement.

Once you or the attorney timely files the Request for Arbitration, the arbitration hearing will be held as expeditiously as possible, and a decision will be made within 30 days of the date of the hearing. You will receive notice of the decision by mail. You are not required to be represented by an attorney at the hearing, although you may appear with an attorney, if you wish. You may also participate by submission of a notarized written statement served on all named parties.

A stenographic or other recording may be taken of the hearing and a copy to be provided to the panel, upon request by the panel.

NOTICE OF CLIENT'S RIGHT TO ARBITRATE
A DISPUTE OVER ATTORNEYS FEES

The amount of \$ _____ is due and owing for the provision of legal services with respect to:

If you dispute that you owe this amount, you have the right to elect to resolve this dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions. If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137, and your attorney will be free to bring a lawsuit in court to seek payment of the fee.

Dated: _____

(Attorney's Signature)
[print Attorney's name, address and telephone number below]



STANDARD WRITTEN INSTRUCTIONS AND PROCEDURES
TO CLIENTS FOR THE RESOLUTION OF FEE DISPUTES PURSUANT
TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

Part 137 of the Rules of the Chief Administrator of the Courts provides a procedure for the arbitration (and in some cases mediation) of fee disputes between attorneys and clients in civil matters. Your attorney can provide you with a copy of Part 137 upon request or you can download a copy at www.nycourts.gov/admin/feedispute. Fee disputes may involve both fees that you have already paid to your attorney and fees that your attorney claims are owed by you. If you elect to resolve your dispute by arbitration, your attorney is required to participate. Furthermore, the arbitration will be final and binding on both your attorney and you, unless either of you seeks a trial *de novo* within 30 days, which means either of you reject the arbitrator's decision by commencing an action on the merits of the fee dispute in a court of law within 30 days after the arbitrator's decision has been mailed. Fees disputes which may not be resolved under this procedure are described in Part 137.1 of the Rules of Chief Administrator of the Courts: representation in criminal matters; amounts in dispute involving a sum of less than \$1,000 or more than \$50,000 unless the parties consent; and claims involving substantial legal questions, including professional malpractice or misconduct. Please consult Part 137.1 for additional exclusions.

Your attorney may not bring an action in court to obtain payment of a fee unless he or she first has provided written notice to you of your right to elect to resolve the dispute by arbitration under Part 137. If your attorney provides you with this notice, he or she must provide you with a copy of the written instructions and procedures of the approved local bar association-sponsored fee dispute resolution program ("Local Program") having jurisdiction over your dispute. Your attorney must also provide you with the "Request for Fee Arbitration" form and advise that you must file the Request for Fee Arbitration with the local program within 30 days of the receipt of the notice. If you do not file the Request within those 30 days, you will not be permitted to compel your attorney to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee.

In order to elect to resolve a fee dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the approved local program. An updated list of local programs is available at www.nycourts.gov/admin/feedispute or by calling toll-free 1-(877)-FEES-137 (1-877-333-7137). Filing of the Request for Fee Arbitration must be made

with the appropriate local program for the county in which the majority of legal services were performed. Once you file the Request for Fee Arbitration, the local program will mail a copy of the request to your attorney, who must provide a response within 15 days of the mailing. You will receive at least 15 days' notice in writing of the time and place of the hearing and of the identity of the arbitrator(s). The arbitrator(s) decision will be issued no later than 30 days after the date of the hearing. You may represent yourself at the hearing, or you may appear with an attorney if you wish.

Some local programs may offer mediation services in addition to arbitration. Mediation is a process by which those who have a fee dispute meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for your attorney and you to discuss your concerns without relinquishing control over the outcome and of achieving a result satisfactory to both of you. Participation in mediation is voluntary for your attorney and you, and it does not waive any of your rights to arbitration under these rules. If you wish to attempt to resolve your dispute through mediation, you may indicate your wish on the Request for Fee Arbitration form.

More information, including an updated list of local programs, is available at

<http://www.nycourts.gov/admin/feedispute>

or by calling 1-(877)-FEES-137 (1-877-333-7137).

Suffolk County Bar Association

Dispute Resolution Program Rules

Suffolk County Bar Association
560 Wheeler Road
Hauppauge, New York 11788-4357
(631) 234-5511

Section 1 Establishment of Program

This program is established pursuant to part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York and the Standards and Guidelines approved as of October 3rd, 2001.

Section 2 Definitions

The following definitions will apply throughout these rules, except as otherwise provided:

- "Program" means the Suffolk County Bar Association Dispute Resolution Program established pursuant to Part 137 of the Rules of the Chief Administrator
- A. "Client" means a person or entity receiving legal services or advice from a lawyer on a fee basis in the lawyer's professional capacity
- B. "Administrator" means the person primarily responsible for administration of the Program as designated by the Suffolk County Bar Association
- C. "SCBA" means the Suffolk County Bar Association
- D. "Arbitrator" means a person who serves as an arbitrator under the Program
- E. "Case" means any case or controversy cognizable under the Program where the amount in dispute is at least in the sum of \$1,000.00
- F. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator
- G. "Fee Dispute" means the committee appointed by the Suffolk County Bar Association Board of Directors which oversees the Dispute Resolution Program and make decisions concerning administration of the Program.
- H.

Section 3 Application

These rules apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the Bar of the State of New York who undertake to represent a client in a civil matter, where the majority of legal services are performed in Suffolk County or where the attorney maintains an office for the practice of law in Suffolk County.

These rules shall not apply to any of the following:

1. representation in criminal matters;
2. amounts in dispute involving a sum of less than \$1,000.00 or more than \$50,000.00, except that an arbitral body may hear disputes involving other amounts if the parties have consented in writing;
3. claims involving substantial legal questions, including professional malpractice or misconduct;
4. claims against an attorney for damages or affirmative relief other than adjustment of the fee;
5. disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
6. disputes where no attorney's services have been rendered for more than two years;
7. disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York; and
8. disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

Section 4 Arbitrators

Applicants for membership as an Attorney Arbitrator must meet or exceed the following requirements:

- A. Minimum of five (5) years of admission to the Bar
- B. Member in good standing of the Suffolk County Bar Association or other recognized bar groups
- C. Ability to evaluate and apply legal principles
- D. Ability to manage the hearing process
- E. Minimum of six (6) hours of fee dispute resolution training or comparable training and experience in arbitration and/or other forms of dispute resolution
- F. Other relevant experience or accomplishments
- G. Freedom from bias and prejudice
- H. Thorough and impartial evaluation of testimony and other evidence
- I. Willingness to devote time and effort when selected to serve
- J. Willingness to successfully complete training under the guidelines of the Program

Applicants for membership as a Non-Attorney Arbitrator must meet or exceed requirements E through J above.

All training of arbitrators will be provided by the New York State Office of Court Administration at its sole cost and expense, or by the Suffolk County

Bar Association, or other recognized dispute resolution programs approved by the board.

Arbitrators will serve on a voluntary basis, without financial compensation.

Section 5 Initiating the Arbitration

The Submission Process

Client:

A client with a fee dispute starts the process by filing a request for dispute resolution with the Administrator of the Program together with the required filing fee of \$150.00 *see Financial Hardship Policy. Forms can be obtained by calling the Administrator at 631/234-5511, extension 222, by obtaining the form in person at the Suffolk County Bar Association, located at 560 Wheeler Road, Hauppauge, New York 11788-4357 or by requesting said form by facsimile transmission to the administrator (631/234-5899) or by e-mail to the administrator at fee@scba.org between the hours of 9:00 a.m. and 5:00 p.m., Monday to Friday, or you may download forms on the SCBA website at [www.scba.org/fee dispute/fee overview.html](http://www.scba.org/fee%20dispute/fee%20overview.html)

Attorney:

An attorney starts the process by sending a Notice of Right to Arbitrate and required forms to the client. If there is a prior written agreement to arbitrate, the initiating party shall submit a copy to the Administrator with their request to arbitrate. If the client fails to then file a request to arbitrate within 30 days, the attorney who's written agreement provides for such dispute resolution may file the request to arbitrate. An attorney is required to send by certified mail or by personal service, the notice of right to arbitrate with appropriate forms upon initiation of any dispute involving fees between client and attorney, and/or prior to commencement of any civil action for collection of fees.

A party may make application to the Administrator to have the filing fee waived, based upon limited financial resources which make the filing fee a financial burden or would prevent said client from utilizing this resolution program. The request must be made in writing to the Administrator who will have the discretion to grant or deny the request. Should the arbitration result in a finding in favor of the client for whom the fee was waived, the waived filing fee will be deducted from such award, and paid directly by the attorney to the Association, after deduction from said award.

The request for arbitration must contain the name and address of the parties along with the telephone numbers of the parties to be contacted, and a brief description of the claim and the amount involved.

Upon receipt of the request for arbitration, the Administrator will mail a copy of the request for arbitration to the named attorney, together with an attorney fee response, to be completed by the attorney and returned

to the Administrator within 15 days of mailing. The attorney will include with the attorney fee response, a copy of retainer or letter of engagement, if any, and an affidavit that a copy of the response was served on the client.

Upon receipt of the attorney fee response, or if no response is received within 15 days of mailing of the attorney fee response form to the attorney, the Administrator will endeavor to appoint an arbitrator or arbitrators to the case with experience in the subject matter of the representation. Arbitrators will be assigned from a panel of neutrals who have qualified to act as arbitrators in fee dispute matters. Disputes involving a sum of less than \$10,000.00, but more than \$1,000.00, will be submitted to one attorney arbitrator. Disputes involving a sum of \$10,000.00 or more, but less than \$50,000.00 (unless by agreement of the parties), will be submitted to a panel of three arbitrators, which will include one non-lawyer, unless otherwise provided for in writing.

When a party and attorney are notified of the appointment of the arbitrator(s), any conflict of interest shall promptly be disclosed in writing but not less than five (5) days prior to the scheduled hearing.

Upon receipt of a case, the Administrator will notify the parties of a date, time, and place for the hearing, which notice will be at least fifteen (15) days prior to the scheduled date, with the identity of the arbitrator or arbitrators. All arbitrations will be held at the offices of one of the arbitrators or at the Suffolk County Bar Association.

Section 6 Powers of arbitrator and conduct of the hearing

An arbitrator has the following powers:

- A. Issue subpoenas and administer oaths
- B. Take and hear evidence pertaining to the proceeding
- C. Rules of Evidence need not be observed at the hearing and either party, at his or her expense, may be represented by counsel. Representation by counsel must be disclosed on filing form or response
Arbitrator(s) may adjourn or postpone the hearing
- D.

The burden will be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client must present his or her account of the service rendered and time expended. Witnesses may be called by the parties. Participation may be by written statement sworn to under penalties of perjury. The client will have the right of final reply.

Any party may provide for stenographic or other record at the party's expense, providing that the panel is given duplicate copy at time of hearing upon request by the panel. Any other party to the arbitration will be entitled to a copy of said record, upon written request and payment of the expense for such record.

The arbitration awards will be issued to the parties no later than thirty (30) days after the completion of the hearing. Arbitration awards will be in writing and specify the basis for the determination. Except as set forth herein, all arbitration awards will be final and binding, unless a *trial de novo* is commenced under the Rules within the time set forth therein.

Neither the Associations, nor the Committee, its Chair or members, Administrator, Arbitrator and staff person acting under these Rules, shall be a necessary party in any judicial proceeding relating to any arbitration conducted in accordance with these Rules. None of the parties listed in the preceding sentence shall be liable for any act or omission relating to any dispute in connection with any arbitration conducted under these Rules. Without limiting the scope of the preceding two sentences, it is intended that the Committee, its Chair and its members, and any Arbitrator acting under these Rules have the same immunity as a judicial officer of body would have in a court proceeding. The parties to any arbitration held under these Rules will be deemed to have conferred the immunity described above.

The hearing will be conducted by either the sole or all of the arbitrators in case of a controversy in excess of \$10,000.00, but a majority may determine any question and render an award.

Section 7 Trial de novo

A party aggrieved by the arbitration award may, unless there is a written agreement to the contrary, commence an action on the merits of its fee dispute (a *trial de novo*) in a court with jurisdiction over the amount in dispute, within thirty (30) days after the arbitration award has been mailed. If no action is commenced within thirty (30) days of the mailing of the arbitration award, the award shall become final and binding. Upon filing of a demand for *trial de novo*, the aggrieved party shall also mail a copy of the demands to the Administrator and other side.

Any party who does not participate in the arbitration hearing will not be entitled to a *trial de novo* absent good cause for such failure to participate.

Arbitrators shall not be called as witnesses nor shall the arbitration award or record of the proceedings be admitted in evidence at the *trial de novo*.

Section 8 Communication with arbitrators

No party and no one acting on behalf of any party will communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator will be sent to the other party.

Section 9 Enforcement of arbitration awards

Any award that has become final and binding may be entered as a judgment upon moving to confirm said decision in a court of competent jurisdiction, by appropriate notice, pursuant to the CPLR Article 75.

Section 10 Vacancies

If, after an arbitrator is assigned to the case, the arbitrator is unable to perform his or her duties, they will promptly notify the Administrator, who will appoint a substitute arbitrator.

In the event that one arbitrator on a panel of arbitrators is unable to attend the hearing or continue, the remaining arbitrators may continue with the hearing to the determination of the controversy, unless one party objects. Upon receipt of an objection, the arbitration will be deemed terminated and the matter will be reassigned by the Administrator, who will appoint a substitute arbitrator to take the place of the arbitrator who was unable to begin or conclude the arbitration hearing.

Section 11 Attendance at hearings

The arbitrators will maintain the privacy of the hearings unless the rules or the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend the hearing. All attorneys are required to participate in the arbitration program. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It will be discretionary with the arbitrators to determine the propriety of the attendance of any other person, other than a party and its legal representatives.

Section 12 Arbitration in the absence of a party or representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to participate or fails to obtain a postponement. An award will not be made solely on the default of a party. The arbitrator will require the party who is present to submit such evidence as the arbitrator may require to support the participant's position.

Section 13 Waiver of rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state an objection at the time of said arbitration or prior thereto, will be deemed to have waived the right to object.

Section 14 Majority decision

When the panel consists of more than one arbitrator, unless required by law or by these rules, the majority of the arbitrators (or the remaining arbitrators in the case of a vacancy under Section 10) must make all decisions.

Section 15 Interpretation and application of rules

The arbitrators will interpret and apply these rules in so far as they relate to the arbitrator's powers and duties. When there is more than one arbitrator, and a difference arises among them concerning the meaning or application of these rules, it will be decided by a majority vote. In the event that the Administrator or an arbitrator(s) is unable to resolve any issue concerning the arbitrator(s) duties or administration of this Program, said question will be referred to the Fee Dispute Resolution Committee for a final decision.

Section 16 Time of award

Unless otherwise agreed by the parties, the award shall be issued not later than thirty (30) days from the date of the completion of the hearing. The Administrator will, upon receipt of the award from the arbitrator or chair of the panel, mail the same to the parties at the address given by the parties for that purpose. The decision will be accompanied by a letter advising the parties of their rights regarding the decision.

Section 17 Record Keeping

- A. The Administrator will maintain a separate folder for each "Request for Arbitration" form received. The records are to be kept at the Suffolk County Bar Association for two (2) years. At the end of the two years, they may be disposed of as the Administrator sees fit.

- B. With the exception of the award itself, all records, documents, files, proceedings, and hearing pertaining to the arbitration of a dispute under these rules, in which both parties have consented to be bound by the results, may not be open to the public or any person not involved in the dispute, and shall be confidential except to the extent necessary to take ancillary legal action with respect to this fee matter.
- C. The Association will maintain the names, addresses, telephone numbers, and summary of credentials of the arbitrators and will update the same from time to time.

Section 18 Financial Hardship Policy

The program's standard policy is to make the program accessible to all who choose to use it. Toward that end, the program maintains a reasonable fee schedule that considers the financial exigencies of the non-lawyer participants, provides extended payment plans, and/or grants full or partial fee waivers under circumstances of extreme financial hardship. Every attempt will be made to keep the names of the individuals who seek hardship assistance and the information disclosed confidential.

Section 19 Amendment of Rules

These rules may be amended from time to time, upon majority vote of the Board of Directors of the Suffolk County Bar Association, the Board of Governors, and the Presiding Justice of the Appellate Division, 2nd Department.

(For Office Use Only)

Case No. _____

Date Received: _____

REQUEST FOR FEE DISPUTE RESOLUTION
(Civil Cases)

1. Name, address and telephone number of client is:
 Name: _____
 Address: _____
 Telephone No.: _____

2. The name, address and telephone number of the lawyer or law firm is:
 Name: _____
 Address: _____
 Telephone No.: _____

3. Type of case involved (check all that are applicable):

<input type="checkbox"/> Landlord-Tenant	<input type="checkbox"/> Negligence/PI	<input type="checkbox"/> Real Estate
<input type="checkbox"/> General Civil Litigation	<input type="checkbox"/> Corporate	<input type="checkbox"/> Traffic
<input type="checkbox"/> Malpractice/Medical	<input type="checkbox"/> Family Court/Custody	<input type="checkbox"/> Other _____
<input type="checkbox"/> Family Court/Support	<input type="checkbox"/> Judicial Appointment/FC	_____
<input type="checkbox"/> Wills/Trusts/Estates	<input type="checkbox"/> Appellate	_____
<input type="checkbox"/> Commercial	<input type="checkbox"/> Matrimonial	_____

4. Court in which the civil action was commenced, if applicable (include county): _____ Court _____ County

5. Set forth the date when the lawyer first agreed to handle case:

6. Attach a copy of the written retainer agreement or letter of engagement between lawyer and client. Attach copies of any other letters or papers that discuss the fee agreement.

7. Describe briefly what was the fee arrangement:

8. State all amounts paid to the lawyer; provide dates of payment and what the payment was to cover, if applicable:

9. State the total amount of moneys in dispute, including any amount the lawyer says you still owe and any amount you already paid but believe should be refunded (attach a copy of the lawyer's bill, if available):

10. Have you received a "Notice of Client's Right to Arbitrate" from your attorney: _____ (enter "yes" or "no" in space). If yes, please attach a copy.

11. Briefly explain why you disagree with the amount of money for legal services billed, paid, or demanded (use additional sheets, if necessary):

I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the Suffolk County Bar Association, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both the lawyer and client, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial *de novo*) in a court of law within 30 days after the arbitrator's decision has been mailed.

Dated: _____

Signed: _____

(Print name below signature)

☐ Will be represented by legal counsel

Name _____

Telephone Number _____

Important: Request for Fee Arbitration must be filed with the Suffolk County Bar Association, if the attorney is physically present in Suffolk County (has office in Suffolk) or if the majority of the legal services have been performed in Suffolk County. The Request must be filed within 30 days of the receipt from the lawyer of notice of the client's right to request arbitration. If the client does not file the Request for Fee Arbitration within those 30 days, the client will not be permitted to elect to resolve the fee dispute by arbitration pursuant to Part 137, unless the attorney elects to resolve this matter by arbitration and the written agreement provides for the same. The lawyer is required to provide the client with the address of the Suffolk County Bar Association upon request. A filing fee of \$150.00 is required.

Method of Payment:

☐ Filing Fee of \$150.00 paid by check is enclosed.*

I Elect to make payment by credit card.

☐ Visa ☐ Master Card ☐ American Express ☐ Discover

Name on Credit Card: _____

Account #: _____

Expiration: ____ / ____

I hereby authorize the Suffolk County Bar Association in assessing a \$150.00 charge to the above credit card account.

X _____

☐ Request payment plan.

☐ I request a waiver of fee due to hardship (I understand that I must supply written verification of same).

* the filing fee of \$150.00 should be remitted with this form unless a waiver is requested. Please Make check payable to "Suffolk County Bar Association".

Please remit this form with payment to: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357, Attention: Fee Dispute Resolution Coordinator.



SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

**Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend
resources. All calls are private and confidentiality is protected under
Judiciary Law Section 499. (Lawyer Assistance Committee)**

Feel Free to Join Us at Our Weekly Recovery Meeting

*The Lawyers Helping Lawyers Committee
Recovery Meeting
Open to anyone in the legal profession who has a desire to stop
drinking or using other substances.*

*Every Wednesday at 6PM
United Methodist Church of Hauppauge
473 Townline Road, Hauppauge, NY*