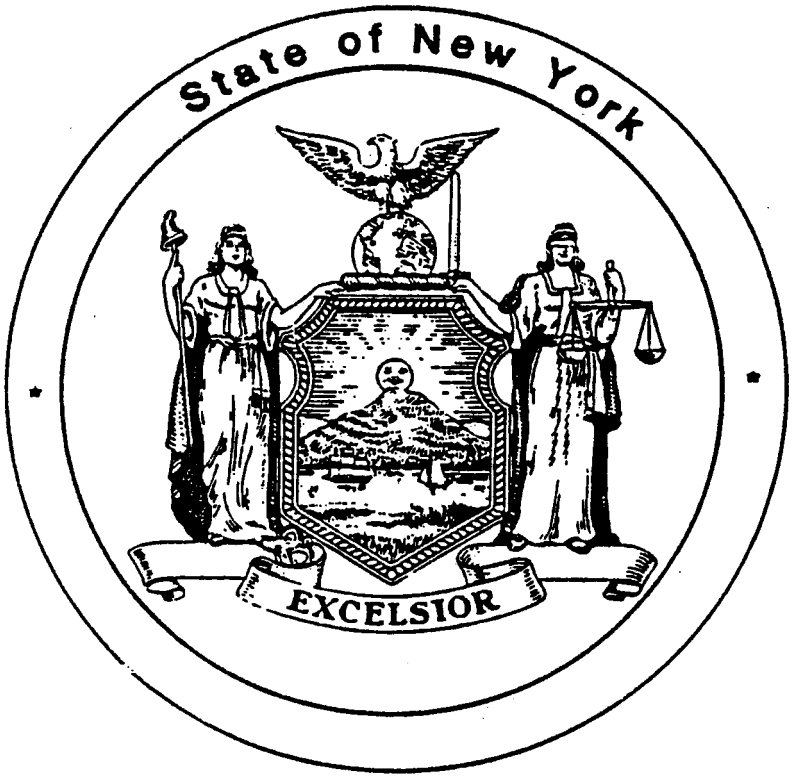
COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS

REPORT



MAY 4, 1993

Committee to Examine Lawyer Conduct
in Matrimonial Actions
27 Madison Avenue
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May 4, 1993

Honorable Judith S. Kaye
Chief Judge of the State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: Committee to Examine Lawyer Conduct
In Matrimonial Actions

Dear Chief Judge Kaye:

The Committe to Examine Lawyer Conduct In Matrimonial Actions respectfully submits its report for your consideration. We are pleased to note that we are unanimous in our recommendations.

As the work of our Committee progressed over a nine month period, it became abundantly clear that there is a compelling need for prompt reform. We, therefore, concentrated our efforts on making recommendations which can be implemented without delay by court rule.

We are hopeful that the adoption of our recommendations will significantly improve the client-attorney relationship and the handling of matrimonial and custody matters by the courts.

I know that the members of the Committee found the work to be both important and challenging. We are grateful for being given this gratifying task.

Sincerely,

E. Leo Milonas

COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS

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COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS

EXECUTIVE SUMMARY

The dismantling of a marital relationship, the loss of love and intimacy, the bitter struggle over children, the marital home, and finances, cause intense and conflicting feelings of anger, rejection, guilt and vulnerability. Litigants report that they experience a state of despair and isolation equalled only upon the death of a loved one.

We have all experienced the sorrow resulting from the breakup of a marriage and family. Whether we have lived through the destructive process ourselves, or have observed the experiences of close friends or family members, we know the consequences are enduring. The emotional scars remain long after the lawyers and judges have left the scene.

It is charged that a legal system which should operate to alleviate people's grief, protect their children and preserve resources in fact exacerbates the problems attendant to divorce. Litigants describe the courts as being unsympathetic, unresponsive, impotent and overwhelmed by delay, and claim that the main concern of lawyers is not to serve their clients' best interests but their own. A number of attorneys assert that the criticism of the courts and the wholesale indictment of matrimonial lawyers is unfair and is the result of litigants' unrealistic expectations. They allege that matrimonial clients are at the lowest emotional ebb of their lives, and that their judgment is clouded by hostility and insecurity. Lawyers also claim that the vast majority of matrimonial disputes are quietly resolved by agreement, out of the courts, and at a reasonable cost.

It is in this troubling atmosphere that the Committee sought to identify legitimate complaints and to respond with reasonable recommendations for reform and improvement, especially those which may be adopted without delay and at minimal cost.

The Committee to Examine Lawyer Conduct in Matrimonial Actions was created in July of 1992, largely in reaction to the report, "Women in Divorce: Lawyers, Ethics, Fees and Fairness," issued by Commissioner Mark Green of the New York City Department of Consumer Affairs in March of that year (the *Green Report*). The mandate of the Committee, which is required to report to Chief Judge Judith S. Kaye and the Administrative Board, was to study the role of attorneys in matrimonial actions in order to "lead to recommendations that will have a significant

impact on the ultimate ability of the court system to improve the providing of a fair and effective tribunal for the hearing of matrimonial actions without undue burden on the participants."[1]

The Committee was comprised of attorneys from various parts of the State, four Justices of the Appellate Divisions, one representing each department, and Judge Judith S. Kaye of the Court of Appeals, who is no longer on the Committee due to her appointment as Chief Judge.

The Committee initially met privately and with attorneys and experts in the field of matrimonial law, Commissioner Green and Karen Winner (the author of the *Green Report*), various judges from New York and New Jersey, bar leaders, law professors and scholars.[2] Meetings were held on October 2, 1992, November 13, 1992, December 2, 1992, March 23, 1993, March 31, 1993, and April 16, 1993. The Committee has reviewed many reports, law review articles, and *Bounds of Advocacy,* which sets forth the "Standards of Conduct in Family Law Litigation" of the American Academy of Matrimonial Lawyers. In addition, many written recommendations have been submitted from private citizens, attorneys, public interest groups and major bar associations throughout the State. The Committee also has examined the procedures and rules relating to matrimonial actions in other states.

The investigative process culminated in three days of public hearings held in New York City and Albany, during which more than 50 individuals shared their experiences and insights with the Committee.[3] In addition, approximately 25 individuals who are currently engaged in the litigation of matrimonial cases were interviewed by the Committee staff; synopses of these interviews, from which all identifying information had been redacted, were reviewed by the Committee. Many of these individuals, who offered valuable insights, were referred by the Westchester-based Coalition for Family Justice.[4]

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[1]*See,* Appendix A, letter of Former Chief Judge Sol Wachtler, dated July 16, 1992; *see* Appendix B for Committee members' biographies.

[2]*See,* Appendix C for a list of those who met with the Committee privately.

[3]*See,* Appendix D for a list of the speakers at the public hearings. References to testimony at the hearings will be indicated as follows: "Public Hearing I" for the New York City Public Hearing, January 26, 1993; "Public Hearing II" for the Albany Public Hearing, February 8, 1993; and "Public Hearing III" for the New York City Public Hearing, February 23, 1993.

[4]Monica Getz, co-founder and chair of the Coalition, explained that the organization's "main mission is to help make the legal and court system user-friendly to family members." Public Hearing I at 283.

The most extraordinary feature of this intensive investigation is the remarkable consensus for specific reforms which has emerged from representatives of a multitude of different constituencies. The organized bar, litigants, consumer and citizen groups, legal scholars, leading matrimonial practitioners and judges, in great measure, agree with the recommendations which this Committee is proposing.

The Committee is grateful to the many lawyers, scholars and judges who gave this Committee the benefit of their experience and wisdom and especially to the many litigants who offered an invaluable insight into how the public perceives the quality of services rendered by courts and the legal profession, and presented many pragmatic and significant recommendations.

In view of the mandate of the Committee, the recommendations made in this report relate to matrimonial practice, with the exception of the recommendation to open disciplinary proceedings. However, the Committee recommends that, where possible, the suggestions made should have broader application.

The Committee was impressed with the scope and urgency of the problems it encountered and urges the prompt implementation of its recommendations. After careful consideration and deliberation, the Committee respectfully makes the following recommendations:

1. STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES	A prospective client must be provided with a "Statement of Client's Rights and Responsibilities" prior to signing a written retainer agreement. The attorney shall obtain a signed acknowledgment of receipt from the client.
2. RETAINER AGREEMENTS	There shall be a written retainer agreement between attorney and client setting forth in plain language the nature of the relationship and the details of the fee arrangement. This agreement shall be filed with the court and a copy given to the client.
3. NONREFUNDABLE RETAINER	A nonrefundable retainer fee is prohibited.
4. SECURITY INTERESTS	No attorney shall take a security interest, obtain a confession of judgment or otherwise obtain a lien from a client, without prior notice to the client in a signed retainer agreement and approval from the court after notice to the adversary. Mortgages placed on the marital residence shall be nonforeclosable against the spouse consenting to the mortgage.

5. RETAINING AND CHARGING LIENS	Within 30 days after an attorney has been discharged or withdraws from a case, the attorney shall forward the case file to the client.
6. FEE ARBITRATION	At the client's election, fee disputes between attorney and client must be determined by an arbitration panel consisting of two lay persons and one attorney.
7. SEXUAL RELATIONSHIP BETWEEN ATTORNEY AND CLIENT	A sexual relationship with a client during the course of representation is prohibited.
8. ATTORNEY DISCIPLINE	The public should have access to disciplinary proceedings once formal charges have been filed against an attorney by the Departmental Disciplinary Committee.
9. CASE MANAGEMENT	The Committee proposes improved procedures in case management which include: the imposition of sanctions for abusive motion practices, noncompliance with discovery, and all other forms of improper conduct; prompt enforcement of court orders; early court intervention; early identification of critical issues, including custody; prompt resolution of *pendente lite* applications; frequent and ample awards of legal fees; early resolution of custody or visitation issues; the use of court-appointed experts where possible; prioritization of matrimonial cases for un-interrupted trials; and an expedited process for interlocutory appeals.

Almost all of the recommendations made in this report can be promptly promulgated by the use of the rule-making authority already vested in the courts and the exercise of the courts' inherent power to regulate the practice of law. The New York State Constitution empowers the Chief Judge to

> establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals. Article VI, §28(c).

In an exercise of this broad authority, most of the Committee's proposals may be incorporated into the "Rules of the Chief Judge" (22 NYCRR Parts 1-40), as an additional part pertaining to matrimonial practice, or delegated to the "Rules of the Chief Administrator" (22 NYCRR Parts 100-135), or to the Uniform Rules for the New York State Trial Courts (22 NYCRR Parts 200-216).

The Committee's recommendations may also be implemented by rules of the four Appellate Divisions in the exercise of their power to discipline lawyers and regulate the practice of law, so long as the proposed regulation or rule does not conflict with an existing statute. 22 N.Y.C.R.R. §80.3(c). The ban on a sexual relationship between attorney and client more properly belongs in the Disciplinary Rules (22 N.Y.C.R.R. §1200) which were jointly promulgated by the four Appellate Divisions. The recommendation to open disciplinary proceedings to the public requires legislative action. Judiciary Law §90.

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

A prospective client must be provided with a "Statement of Client's Rights and Responsibilities" prior to signing a written retainer agreement. The attorney shall obtain a signed acknowledgment of receipt from the client.

For many consumers, the first time they seek legal representation occurs when they retain a matrimonial attorney. Despite the fact that the divorce will significantly alter the lives of the parties and their children, it is likely that the act of obtaining counsel will be less informed than the decision to make an ordinary household purchase, according to Stephen Gillers, Professor of Ethics at New York University School of Law.[5] When an individual embarks upon this relationship without fully understanding the rights and responsibilities entailed, the attorney-client relationship begins with an inherent imbalance that may become exacerbated as the action progresses. A consumer who is "in the dark" at the outset of the representation is likely to be unprepared for the financial consequences and, ultimately, dissatisfied with the services rendered by his or her lawyer.

In both the written materials submitted to the Committee and the statements made at the public hearings, widespread support has been expressed by consumers, lawyers, and members of the judiciary for a statement of client's rights and responsibilities. This statement should be provided to a prospective client at the initial conference and prior to the signing of a retainer agreement. In order to avoid future uncertainty as to the delivery of such a statement, the attorney should obtain a signed acknowledgment of its receipt.

Several bar associations submitted proposed drafts of such a document to the Committee, all of which are included as appendices to this report.[6] Until the matrimonial bar is required to provide such a document to prospective clients, the Department of Consumer Affairs intends to distribute its own version, entitled "Consumer Bill of Rights for Divorce Clients."[7] In addition, the Committee reviewed Florida's "Statement of Client's Rights," which must be signed by attorney and client in most contingency fee matters.[8]

The Committee recommends that, at a minimum, the following standard statement of rights and responsibilities be adopted:

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[5]Public Hearing I at 100-101.

[6]These include the New York Chapter of the American Academy of Matrimonial Lawyers, provided by Irvin Rosenthal, Esq., Co-chair of the Matrimonial Law Section of the New York County Lawyers' Association; and the Family Law Section of the New York State Bar Association, provided by Stephen Gassman, Esq., Chair. A bill of rights contained in a book published by the New York Bar Foundation, entitled *Understanding the Law: A Practical Guide for New York Residents* (Charles Evans Hughes Press, New York 1990), was provided by Angelo Cometa, Esq., past President of the New York State Bar Association (Appendices E-G).

[7]*See*, Appendix H.

[8]*See*, Appendix I.

Statement of Client's Rights and Responsibilities

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and your attorney please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, don't hesitate to ask your attorney. He or she should be readily available to represent your best interests and keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences, secrets or statements which are revealed in the course of the relationship.

You are entitled to a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any terms contained therein, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract.

Your attorney may not request a retainer fee which is nonrefundable. That is, should you discharge your attorney, or should your attorney withdraw from the case, before the retainer is used up, he or she is entitled to be paid for the time spent on your case and any expenses, and must return the balance of the retainer to you.

You are entitled to refuse to enter into any fee arrangement which you find unsatisfactory, including an arrangement which gives your attorney an additional fee such as a "bonus" or a fee which otherwise may be described as based on "results obtained," "results achieved," or on "the complexity of the case."

You are entitled to know how many attorneys and other legal staff members will be working on your case at any given time and what you will be charged for their services.

You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.

At your request, you are entitled to be given an estimate of approximate future costs of your case.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent by counsel, and to raise any objections or errors in a timely manner. Time spent in discussion or explanation of bills will not be charged to you.

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

You are entitled to be kept informed of the status of your case, and to be provided with copies of documents prepared on your behalf or received from the court or your adversary.

You have the right to be present at court conferences unless a judge orders otherwise.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. Should your attorney seek to do so, or should you discharge your attorney for any reason, you have the right to obtain the release of your file. If an action is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of your judgment. If no action is pending, and your withdrawing attorney retains possession of the file, the attorney must return it within 30 days of your written request, but may then commence proceedings against you to recover any unpaid fee.[9]

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to cover legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence shall be non-foreclosable against you.

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[9]This provision is particularly important, since many consumers reported problems obtaining their files when they sought or were forced, to change attorneys. Presumably, the recurrence of this problem will be significantly reduced by the introduction of mandatory fee arbitration, as recommended by this report.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If at any time you believe that your attorney has engaged in unethical conduct, you have the right to report the matter to the disciplinary or grievance committee that oversees lawyer misconduct. Your attorney must append to this document the name and address of the grievance committee which oversees his or her conduct.

In the event of a fee dispute, you have the right to seek arbitration, the results of which are binding. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Such a statement of rights will encourage discussion of how the attorney intends to proceed, the billing procedure, and how the client will be kept apprised of the status of the case. The client, despite his or her inexperience in the legal arena and the highly emotional climate involved in a matrimonial action, will become familiar with the realities of litigation. An informed consumer will participate more knowledgeably and efficiently in the process and have more realistic expectations of counsel.

Some consumers suggested that there was a need to provide more substantive information to the prospective client than that contained in a statement of rights and responsibilities. Janet Pierson, a consumer who spoke at the January 26, 1993 public hearing, recommended that the relevant sections of the Domestic Relations Law concerning divorce and equitable distribution be annexed to the statement of rights.[10] Other consumers, who were ignorant of the process at the outset, said that they were never enlightened by their attorneys about the law or legal procedure and recommended publication of a pamphlet defining common terminology and containing general information about applicable law and procedure, including the appellate process.[11] Such a thorough and comprehensible explanation of the various stages of the divorce process would be a major step in educating the public.[12]

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[10]Public Hearing I at 223.

[11]Several consumers complained of being deprived of the appellate process by counsel's failure to either apprise them of its availability, or notify them of the order within the time to file a notice of appeal.

[12]A recent issue of the *Family Advocate*, published by the Family Law Section of the American Bar Association, entitled "Your Divorce, A Guide Through the Legal Process," provides a glossary of terms, discusses each step of the process, and lists the documents and type of information that a client is expected to provide to counsel. This publication should be made available to the public through the efforts of the Office of Court Administration and of the various bar associations.

One member of the judiciary was concerned that presenting a statement of rights and responsibilities to a prospective client sets an unnecessarily "adversarial" tone to the attorney-client relationship, encouraging distrust and apprehension before the representation has even begun. The Committee members believe, however, that the goal of informing the public is paramount and that the adoption of a client's statement of rights and responsibilities will have a markedly positive effect on the attorney-client relationship.

RETAINER AGREEMENTS

There shall be a written retainer agreement between attorney and client setting forth in plain language the nature of the relationship and the details of the fee arrangement. This agreement shall be filed with the court and a copy given to the client.

Consumers repeatedly voiced dissatisfaction with the manner in which they were charged for legal services and the lack of information from counsel as to the status of their case. Clients found themselves completely unprepared for the protracted duration and spiraling cost of the action. Sharp criticism focused on such matters as the nature of the services for which fees were charged, the manner and timing of demands for payment, and the circumstances under which security interests were demanded.

The complexity of litigating equitable distribution has undeniably raised the cost of divorce.[13] However, consumers complained not only of the total cost of their divorce, but of attorneys' hourly fees and questionable billing practices. The author of the *Green Report* challenged the practice of hourly billing, claiming it encourages overcharging, and suggested instead that there be flat rates for certain work.[14] Judith Reichler, Esq., of the National Center on Women and Family Law, and past Director of the New York State Commission on Child Support, agreed that hourly billing was flawed because all services are not equal.[15] According to Barbara Handschu, Esq., a Buffalo practitioner and Vice-President of the New York Chapter of the American Academy of Matrimonial Lawyers, "value billing" is under consideration by the Academy of Matrimonial Lawyers as an alternative to hourly billing.[16]

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[13]Public Hearing I at 45-46 (testimony of Timothy M. Tippins, Esq., President, New York Chapter of the American Academy of Matrimonial Lawyers); 88-89 (testimony of Janet Pierson); 121 (testimony of Commissioner Green); 258 (testimony of Justice William Rigler, Supreme Court, Kings County); Public Hearing II at 54 (testimony of Raymond Pauley, Esq.); Public Hearing III at 53 (testimony of Adria S. Hillman, Esq., Co-chair, Coalition on Women's Legal Issues). For a brief overview of the impact of the equitable distribution law, *see*, "The Longer View," *infra*.

[14]Written statement of Karen Winner, November 5, 1992. Commissioner Green also suggested that hourly billing was inappropriate in matrimonial cases. Public Hearing I at 125-26.

[15]Written statement submitted at Public Hearing II.

[16]Written statement submitted at Public Hearing II.

In addition to criticism of the method of computing fees, consumers claimed overbilling resulted from a general overstatement of work actually performed.[17] Deirdre Akerson of the Coalition for Family Justice pointed out that, even if an attorney submits a detailed bill to the client, there is simply no way to verify that the work was actually done.[18] One consumer reported that she successfully challenged a fee only by producing documentary proof that she was in another state at the time that her attorney claimed they had a conference.[19]

In order to better and more accurately advise a prospective client of the realities of the representation to be undertaken, as well as to fully disclose the financial arrangement between counsel and client, the Committee recommends that a written retainer agreement be required in all matrimonial cases. The use of a written agreement is endorsed by matrimonial attorneys and consumer advocates alike.[20] Several speakers, however, minimized the significance of a written agreement. It was their view that the written agreement protects only the attorney and that stronger measures are needed to correct the abuses suffered by consumers at the hands of unscrupulous, or simply inattentive, attorneys.[21]

A written agreement may not prevent all abuses that can conceivably occur. However, it will foster communication between counsel and client, educate the client, and prepare him or her for the anticipated developments, delays, and costs of the action. Both counsel and client will benefit from a reduction in the friction generated during a time-consuming contested action.

Many attorneys currently use written retainer agreements.[22] Some agreements state no more than the fact that the attorney has been retained and the amount of the advance retainer. While several consumers reported that they signed such a document, often simultaneously supplemented by an oral agreement relating to future legal fees, they charged that they were frequently cavalierly assured that legal fees would be secured from the spouse and told "not to worry about it." Yet, these consumers unhappily discovered that the oral understanding was unenforceable or, worse, that the attorney denied its existence.[23]

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[17]Public Hearing I at 66-67 (testimony of Lillian Kozak, Chair, Domestic Relations Law Task Force for N.O.W. New York State).

[18]Public Hearing I at 249-50, 254-55.

[19]This happened to Barbara Seaman, who spoke at the February 23, 1993 hearing, and was cited in the *Green Report* at 17.

[20]*Bounds of Advocacy*, Standard 2.1 (American Academy of Matrimonial Lawyers); the *Green Report* at 51. The American Bar Association also recommends that a written fee agreement be used in all contingent fee and domestic relations cases. Report of the Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century*, Comment, Recommendation 17.

[21]Public Hearing I at 68, 80-82 (testimony of Gloria Jacobs, Esq.); 278-80 (testimony of Monica Getz, Coalition for Family Justice); 247, 249-50 (testimony of Deirdre Akerson, Coalition for Family Justice).

[22]Some consumers reported that, despite their request, attorneys refused to furnish them with a written retainer agreement, even where a substantial amount of money had been requested. Public Hearing III at 223 (testimony of Dorothy Allen, Associate Director, Legal Awareness of Westchester, Inc.).

[23]This issue was also mentioned by Janet Pierson and Deirdre Akerson at Public Hearing I at 225, 247-48.

Other retainer agreements include numerous provisions consisting of oblique and, to the client, incomprehensible phrases. These include provisions that the final fee may entail additional amounts based on "results obtained" or "achieved" or upon the "complexity" of the case. To the uninitiated consumer, it is not readily apparent that these phrases may signify hidden and possibly considerable costs. Such terms also fail to explain when these clauses come into effect and how the additional fees are calculated. Legal Awareness of Westchester, Inc. (L.A.W.), a group which serves as a clearing house for legal and consumer information dealing with all aspects of family law, cautions consumers about the use of these unexplained phrases, which they compare to a "blank-check agreement."[24]

One consumer sent the Committee a copy of her attorney's retainer agreement stating that his fees would be based not only on the amount of time spent but on "the degree of labor required," "the circumstances under which the services are performed," "the novelty and the degree of difficulty of the issues involved" and the "skill required to perform the legal services properly." Such language effectively left the client without a clue as to the possible cost of the action and imposed no fee restrictions on the attorney. Ultimately, the client received substantial bills with no explanation of the charges. As this example demonstrates, it is critical that every material aspect of the financial arrangement between attorney and client be reduced to writing in terms the client understands, and that the client be accorded the opportunity to study the agreement before signing it.[25]

The Committee does not propose that a particular form for such an agreement be adopted.[26] However, at a minimum, the agreement should explain the following:

1. the amount of the retainer to be paid in advance; whether, and under what circumstances, the attorney will seek an additional retainer or lump sum payment in the course of the action;

2. what services and costs the retainer will cover;

3. the circumstances under which any portion of the retainer might be refunded or retained;

4. the client's right to cancel the agreement within three days of signing it, and obligation to pay only expenses already reasonably incurred by the attorney;

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[24]*See*, Appendix J for L.A.W.'s guidelines and sample retainer agreement.

[25]Dorothy Allen, Associate Director of L.A.W., noted that some attorneys do not allow their clients to take home and review the retainer agreement before signing it. Public Hearing III at 223-24.

[26]In the best of circumstances, as recommended by Susan Bender, Esq., President, New York State Women's Bar Association, the retainer should be a negotiated contract. Public Hearing I at 166-67. In response to this comment, Deirdre Akerson questioned who would be expected to negotiate on behalf of the client. Public Hearing I at 247. (*See*, Appendix K for Akerson's sample retainer agreement submitted to the Committee.) However, L.A.W. specifically advises consumers to "consider carefully" hiring an attorney who refuses to delete any provision or condition to which the client objects. (*See*, Appendix J.)

5. the client's right to discharge the attorney at any time and, in such event, how the fees and costs will be determined and paid;

6. how counsel is to be paid after the retainer is depleted;

7. how counsel will be paid when the case is concluded;

8. where there is a bonus fee clause such as "results obtained" or a clause in the agreement providing that there may be additional fees based on the "complexity of the case," the agreement must define these terms in plain language and set forth the circumstances under which such additional fees may be incurred and how they will be calculated;

9. the frequency with which the client will receive an itemized bill, detailing all fees and expenses. Bills must be sent at least every 60 days. Upon receipt, the client will review such bills and promptly make any objections, and there will be no charge for time spent discussing the client's bills;

10. the nature of the services to be rendered;

11. the client's right to be kept apprised of the status of the case and court appearances;

12. the hourly fee to be charged by counsel, as well as that of anyone in the firm who might render services to the client;

13. counsel's rates may not be unilaterally increased;[27]

14. the client will reimburse counsel for out-of-pocket expenses, which include copying costs, travel expenses, long distance telephone calls, court fees, and transcripts; the bill shall include the breakdown for such charges and specify when they will be due and payable;

15. whether, and under what circumstances, counsel might seek a specific security interest from the client, which can only be obtained with court approval and on notice to the adversary;

16. under what circumstances counsel might seek to withdraw from the case. This provision must include the prohibition against retaining liens and the possibility that the attorney might obtain a charging lien;

17. in the event of a fee dispute, the client has the right to seek arbitration, which is binding upon both attorney and client. The attorney must provide information regarding arbitration in the event of a fee dispute or upon the client's request.

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[27]One consumer wrote to the Committee that, in the course of two years, her attorney raised his fees four times without prior notification or agreement.

Other matters to be covered in such agreements include whether, and under what circumstances, experts may be retained and at whose expense; whether other attorneys in the firm may be consulted and at what cost; whether the client's prior consent to such consultation is required; whether the client will automatically be provided with copies of all documents and correspondence in the action and at what cost; and whether the client will be furnished with an estimate of the cost of each step to be undertaken as the case progresses.

The Committee does not, at this time, propose that such agreements must be filed with the Office of Court Administration.[28] Such a requirement would place an undue burden on all concerned. However, the Committee does recognize the value of a record-keeping system that would enable the courts and scholars to obtain statistics in the matrimonial field which are not currently available due to the confidentiality accorded domestic relations cases. The absence of the availability of such statistics was noted in the *Green Report*, which itself has drawn criticism from some members of the matrimonial bar precisely for its reliance on "anecdotal" rather than statistical evidence.

The Committee recommends that the signed written retainer agreement, as well as any additions or amendments to it, must be filed with the court in which the action is pending. The Committee also recommends that a closing statement must be filed with the court at the conclusion of the case. The interests of justice are better served in any type of action by full disclosure. In matrimonial actions, the amount of money paid to each spouse's attorney is particularly relevant because there is often a marked discrepancy between the spouses' ability to secure and pay for adequate representation. At present, courts may request the submission of the parties' retainer agreements (frequently, in connection with a *pendente lite* application) but practitioners on the Committee noted that some attorneys conveniently fail to comply. Accordingly, the Committee proposes that filing of the agreement should be required.[29]

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[28]The filing of such agreements was recommended in the *Green Report*, at 51.

[29]Where no action is pending at the time the retainer agreement is signed, the agreement should be filed at the time of the preliminary conference.

NONREFUNDABLE RETAINER

A nonrefundable retainer fee is prohibited.

Perhaps the most controversial aspect of a retainer agreement is a demand for a nonrefundable fee, which appears to be either payment for services not actually rendered or a penalty for discharging an attorney. The lawyers' rationale supporting the nonrefundable fee is that counsel should be compensated not simply for their time but for their reputation or expertise, and that the attorney has allocated time for the case and consequently declined other work.

Recently, the Second Department held that a nonrefundable retainer agreement violates Disciplinary Rule 2-110(a)(3), which provides that an attorney is obligated to "refund promptly any part of a fee paid in advance that has not been earned." *Matter of Cooperman*, 187 A.D.2d 56 (2d Dept. 1993). The Court sustained the charge that such an arrangement creates an "impermissibly chilling effect on the client's inherent right, upon public policy grounds, to discharge an attorney at any time with or without cause." This reasoning is particularly applicable in a matrimonial case, where a client's inability to recover the fee often renders him or her unable to afford new counsel. This impasse, and the attendant delay, can irreparably damage the client's ability to maintain or defend the action.

The New York State Bar Association Professional Ethics Committee, in Ethics Opinion 599 (3/16/89), found such an agreement invalid only if the fee was excessive and the client did not fully understand the arrangement. However, the Ethics Opinion repeatedly noted that such fees are a "source of continuing controversy, especially in matrimonial matters", that they are "subject to potential abuse, especially in matrimonial matters" and that the attorney must be particularly careful to avoid taking advantage of the circumstances of the client in such matters. In view of these admonitions, the better course appears to be to eliminate, rather than attempt to regulate, such fees in matrimonial actions.

A member of the judiciary who presides in a matrimonial part advocated this solution on the ground that an attorney simply does not have a right to keep money that has not been earned.[30] One lawyer with a substantial matrimonial practice stated that such fees should be "outlawed."[31] Professor Gillers, however, was reluctant to recommend a flat prohibition of nonrefundable retainer agreements, observing that they originated in the still valid need to ensure the availability of counsel. Commissioner Green agreed that an attorney's rejection of other work is a

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[30]Public Hearing I at 262 (testimony of Justice William Rigler).

[31]Written statement of Angelo Cometa, Esq., submited at the November 13, 1992, Committee meeting. Other attorneys agreed that a nonrefundable retainer fee should be prohibited. Public Hearing I at 87 (testimony of Gloria Jacobs, Esq.); Public Hearing III at 11-12 (testimony of Jeffrey Sander Sunshine, Chair, Family Law Section, Brooklyn Bar Association).

valid consideration in determining what portion of the retainer an attorney might keep when his or her services are terminated prior to the retainer being used up, but pointed out that it does not justify keeping the entire fee.[32]

Other attorneys supported the imposition of restrictions on the use of nonrefundable retainer fees, but would allow them where the fee is "reasonable" and the client has notice of the arrangement.[33] It was suggested that reasonableness could be measured by whether the amount is a "reasonable multiple" of the attorney's hourly rate, with the presumption that more than five times is "unconscionable."[34] Another proposal was that only an "unconditional" nonrefundable retainer should be prohibited and that the unused portion of such a fee be returned.[35] This is not currently the practice, as illustrated by one woman's experience with a prominent attorney, who demanded a retainer in the sum of $10,000 which "constitute[s] a minimum fee and is nonrefundable, whether your matter is resolved by reconciliation, compromise or litigation." This fee did not even include disbursements or court costs.[36] Another attorney's retainer agreement provided that the retainer was nonrefundable even if the parties reconciled, the matter was discontinued or counsel was discharged.

A nonrefundable retainer agreement should not be confused with a minimum fee agreement. A minimum fee is a specific amount the client agrees to pay counsel if the latter is able to obtain a settlement in substantial accord with specified terms within a particular time period. The Committee determined that an attorney may enter into a minimum fee arrangement with a client as long as the terms are explicit and are incorporated into the written retainer agreement. For obvious strategic reasons, the precise terms of settlement need not appear in the agreement, which will be filed with the court in accordance with the Committee's recommendation on written retainer agreements.

A minimum fee arrangement, which is usually triggered when a case is settled in a relatively short period of time, is therefore readily distinguishable from the situation in which the client discharges counsel before the amount of the nonrefundable retainer is exceeded, and long before the action is concluded. In such circumstances, the lawyer, particularly in matrimonial actions, not only gets to keep

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[32]Public Hearing I at 111-12 (testimony of Stephen Gillers, Esq.); 124 (testimony of Commissioner Green).

[33]Public Hearing I at 54-56 (testimony of Timothy M. Tippins, Esq.); Public Hearing II at 123 (testimony of Marshall Goldman, Esq.); Public Hearing III (written statement submitted by Stephen Gassman, Esq.).

[34]Public Hearing I at 103-104 (testimony of Stephen Gillers, Esq.).

[35]Public Hearing III (written statement submitted by Stephen Gassman, Esq.).

[36]The attorney was discharged shortly after filing a perfunctory answer to the husband's complaint, and the client's subsequent attorney ultimately succeeded in having a substantial portion of the $10,000 retainer refunded to the client.

an unearned fee, but the client frequently lacks the funds to retain another attorney. As a result of such penalty, a client may forfeit the only money available for legal fees. Thus, a nonrefundable retainer, often a substantial amount, only further complicates the already difficult issue of counsel fees. Because the retained fee has no relationship to the value of the services rendered, and in order to preserve the client's unqualified right to discharge counsel, even without cause, the use of the nonrefundable retainer should be prohibited as being repugnant to public policy.[37] The Second Department's recent decision, and the Ethics Committee's acknowledgment that such arrangements are especially susceptible to abuse in matrimonial cases, demonstrate that the prohibition of such agreements is the appropriate solution.

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[37]"Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law," Lester Brickman and Lawrence A. Cunningham, *Fordham Law Review*, Vol. 57, 1988, p. 149, 189.

SECURITY INTERESTS

No attorney shall take a security interest, obtain a confession of judgment or otherwise obtain a lien from a client, without prior notice to the client in a signed retainer agreement and approval from the court after notice to the adversary. Mortgages placed on the marital residence shall be nonforeclosable against the spouse consenting to the mortgage.

A major complaint heard from litigants concerned the demand for payment of legal fees at a critical stage of the litigation, such as occurs on the eve of a custody dispute or trial. According to many litigants and practitioners, the client, usually the nonmonied wife, is often forced to accede to the levy of a security interest upon a marital asset in order to ensure that not only will the litigation continue but that counsel will not abandon her.[38] Frequently, clients reported, they felt coerced into taking such action and were not adequately advised of the consequences.

Some litigants recounted the experience of losing the only marital asset, their home, to an attorney who demanded that the client execute a mortgage in favor of counsel. At the conclusion of the lawsuit, the lawyer foreclosed on the mortgage. From the testimony offered by other litigants, it appears that some attorneys enter signed confessions of judgment culminating in the client's loss of assets received from the marital estate.[39]

Representatives from the matrimonial bar contended that confessions of judgment, liens, mortgages and promissory notes are often the only instruments upon which an attorney can rely to ensure that he or she will not be victimized by clients who are unwilling to pay the fee for services duly and competently rendered. This position was further buttressed by reference to two New York State Bar Association ethical opinions which endorse the use of security interests.[40]

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[38]Public Hearing II at 64 (testimony of Judith Reichler, Esq.); 136-37 (testimony of Marilyn Faust, Esq.).

[39]Public Hearing I at 253 (testimony of Dierdre Akerson); 226-27 (testimony of Janet Pierson); Public Hearing II at 64 (testimony of Judith Reichler, Esq.).

[40]Written statement of Timothy M. Tippins, Esq., November 13, 1992; Public Hearing II (written statement submitted by Marshall S. Goldman, Esq.); letter of Norman S. Heller, Esq., Co-chair, Matrimonial Law Section, New York County Lawyers' Association, February 23, 1993; New York State Bar Association, *Family Law Review*, Vol. 24 no. 4. Opinion No. 474 (10/4/77), Confession of judgment to secure attorney's fee; Opinion No. 550 (4/15/83), Mortgage or deed as security for payment of lawyer's fee.

New York State has long recognized the right of an attorney to a fee. Consumers themselves do not dispute the right of an attorney to be paid for services rendered. It is the method of such payment, or the means to guarantee eventual payment, that gives rise to a particularly sensitive problem in matrimonial cases. For example, if the manner of collecting the fee requires the acquisition of a lien upon the marital residence, it conflicts with the disciplinary rules and ethical considerations set forth in Canon 5 of The Lawyer's Code of Professional Responsibility. Ethical Consideration 5-7 and Disciplinary Rules 5-103(A) and 5-104(A) proscribe conduct leading to the acquisition by an attorney of a proprietary interest in the litigation. As noted by Professor Gillers, an attorney may not have a comparable proprietary interest in the *res* of a commercial litigation.[41] Although the Code makes a specific exception for the procurement of a lien to secure payment of a fee, the exception ignores the significant conflict of interest which arises between attorney and client in a matrimonial case when the security interest attaches to the marital home.[42] It is indefensible that an attorney may seize a client's home to satisfy an unpaid fee in a matrimonial case.

In order to better balance the interests of attorney and client, the Committee recommends that a court rule be adopted requiring that, in a matrimonial case, a confession of judgment or any security interest may be obtained only when (1) the client is specifically advised in the retainer agreement that such a levy is possible; (2) the opposing party receives notice of the application; (3) the justice handling the underlying matter gives approval; and (4) there is no other means of securing payment of the fee. Security interests of any kind should be granted by the court as a last resort, where there is no other means of securing payment of the attorney's fee, and after application has been made for counsel fees. Only where the court has carefully reviewed the respective finances of the parties following full disclosure, and considered an application for legal fees, should the court entertain an application for a security interest.

The Committee first considered an outright prohibition of any lien on the marital residence. However, the Committee is aware that, for many nonmonied spouses, the marital residence is the only asset or potential source of payment that can be offered from the outset of the representation. Therefore, such a prohibition might make it exceedingly difficult for such individuals to obtain representation.[43] Instead, the Committee resolved that a lien on the marital residence may be obtained under the circumstances enumerated above, but that, in addition, any such lien must be nonforeclosable against the spouse consenting to the mortgage. Only upon the spouse's sale of the house would funds be available from which to pay the fees.[44]

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[41]Public Hearing I at 102 (testimony of Stephen Gillers, Esq.).

[42]Letter of Gloria Jacobs, Esq., January 27, 1993.

[43]Public Hearing II at 24-25 (testimony of Sanford S. Dranoff, Esq., past President, American Academy of Matrimonial Lawyers);. 123 (testimony of Marshall Goldman, Esq.);Public Hearing III at 151-55 (testimony of Stephen Gassman, Esq.).

[44]The attorneys who opposed prohibiting a lawyer from obtaining a security interest from a client had no objection to this limitation. The imposition of some restrictions, if not an "outright ban," on security interests, was advocated by the Committee on Professional Responsibility of the Association of the Bar of the City of New York. Public Hearing III at 243 (testimony of Daniel Capra, Esq., Chair).

The Committee urges that reasonable interim attorney's fees be regularly awarded during the litigation of a matrimonial case so that the attorney need not resort to obtaining a confession of judgment or lien upon the client's proceeds of the marital estate. In this way, the nonmonied spouse is assured of uninterrupted, adequate representation without losing the proceeds of the eventual divorce settlement.

RETAINING AND CHARGING LIENS

Within 30 days after an attorney has been discharged or withdraws from a case, the attorney shall forward the case file to the client.

Counsel's withdrawal from representation during the pendency of a matrimonial action creates a situation fraught with stress and uncertainty for the now unrepresented client. The situation is further exacerbated if the lawyer refuses to release the case file until final payment of the fee is tendered. This is particularly true where the client has paid a portion of the fee and has not received a copy of any documents prepared by the attorney.

Case law has long recognized a lawyer's right to retain materials comprising a case file until an outstanding fee is paid.[45] Moreover, pursuant to Judiciary Law §475, once an action is commenced, the attorney acquires a charging lien upon the client's cause of action which attaches to the judgment. Upon petition by attorney or client, the court may determine and enforce such lien.

In formulating its recommendations on this issue, the Committee focused on preventing prejudice to the client caused by the attorney's retention of the case file. Such prejudice inevitably occurs where the attorney has withdrawn at a critical stage of the proceeding, and, as previously noted, the client has not been provided with copies of relevant papers during the course of the representation. Worse, instances have been reported of an attorney's refusal to relinquish not only papers generated during the action, but also personal documents placed in his or her keeping, such as deeds, *etc.* Some attorneys have been known to retain a client's passport to ensure payment of their fees.[46] Other lawyers, reportedly, even have refused to comply with a court order directing return of the file. The consequence of such conduct is to bring the action to a standstill as the client is unable to proceed without the file even if new counsel has been retained. The client may be irreparably harmed by the inability to continue the litigation, whereas the attorney has other means to ensure eventual payment.[47] In balancing the interests of attorney and client at this juncture of the proceeding, the attorney's right to be paid cannot take precedence over the client's right to the case file.

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[45]*Matter of Heinsheimer*, 214 N.Y. 361, 364 (1915); New York State Bar Association, Committee on Professional Ethics, Opinion 567: Lien, lawyers' retaining; Fee for legal services, dispute over; statement of Angelo Cometa, Esq., at the Committee meeting November 13, 1992; Public Hearing III (written statements submitted by Stephen Gassman, Esq., and Norman Heller, Esq.).

[46]This abuse was cited by Hal Lieberman, Chief Counsel, Departmental Disciplinary Committee, First Judicial Department, in the *Green Report*, at 30.

[47]The simple answer, of course, is that any outstanding bill should be paid, but often the client is without funds, or wishes to dispute the bill presented. Typically, such a client may be coerced into waiving any right to contest the charges in exchange for the case file.

In order to prevent this unjust result, the Committee endorses the adoption of a rule requiring that, regardless of the circumstances of the attorney's withdrawal or discharge, the attorney must turn over the case file within 30 days. A Massachusetts rule which addresses an attorney's withdrawal from employment requires, *inter alia*, that counsel return, upon request, materials supplied by the client; documents received from the court or served by another party; investigatory or discovery documents for which the client has paid; and, where there is no contingent fee agreement, a copy of the attorney's work product.[48] Although the rule seems to allow the attorney to keep certain work product, it prohibits the retention of any material which would result in prejudice to the client. This caveat suggests that the client might be compelled to make a showing of such prejudice and, therefore, that additional litigation might be generated. To avoid this complication, and to ensure that no unnecessary delay occur, the Committee concluded that it would be preferable to simply require the release of the file in all matrimonial actions. Furthermore, rather than the "reasonable time" framework specified in the Massachusetts rule, the Committee proposes a 30 day period for the lawyer to deliver the file. This is the time usually set by the court for new counsel to obtain the file from the former attorney.

Adoption of this measure will provide welcome relief to consumers.[49] At the same time, attorneys will not be deprived of their right to recover their fees; they have the option of participating in arbitration to expeditiously fix their fee, filing a judgment, or, where appropriate, moving for a charging lien.[50] Such remedies are sufficient even in the small class of cases described to the Committee where counsel has been deliberately discharged to avoid payment after a settlement has been reached and the services of the "family lawyer" are obtained to enter judgment. In such instances, the fee dispute should be resolved promptly by arbitration or by asking the court to set a charging lien.

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[48]*See*, Appendix L for the text of the Massachusetts rule.

[49]To a certain extent, the problem created when counsel retains the file may be alleviated by the Committee's recommendation that a client be furnished with documents when they are prepared by counsel (*see, Statement of Client's Rights and Responsibilities*).

[50]For the most part, attorneys have no objection to the elimination of retaining liens because of their statutory entitlement to a charging lien. Public Hearing II at 22 (testimony of Sanford S. Dranoff, Esq.); Public Hearing III at 157-58 (testimony of Stephen Gassman, Esq.).

FEE ARBITRATION

Fee disputes between attorney and client, at the client's election, must be determined by an arbitration panel consisting of two laypersons and one attorney. The determination of the panel shall be binding on both attorney and client.

Despite the best intentions, *bona fide* fee disputes may arise between attorney and client. During the course of its investigation, the Committee examined several fee arbitration programs, most notably in California, New Jersey and Erie County, New York. Attorneys who successfully participate in mandatory fee arbitration have established a practice of frequent billing, detailed fee statements and better communication with their client.[51] The fee arbitration process results in the expeditious and cost-effective resolution of a potentially protracted dispute, and is, therefore, generally favored by litigants and attorneys.

The Committee recommends the establishment of an arbitration program, which incorporates both the New Jersey and Erie County experiences. The following model is suggested for consideration:

The local bar association in each county shall operate the program under the auspices of the bar association's president. Both attorney and layperson panel members shall be appointed by the bar association president to serve four year terms. The layperson members shall be drawn from the ranks of the local business community. Disputes involving $1500 or less shall be determined by one attorney arbitrator. All other disputes shall be resolved by a panel consisting of one attorney and two laypersons. Panels may sit as permanent teams assigned to disputes on a rotating basis, or, in the alternative, panels may be constituted for each fee dispute submitted for resolution. The attorney member shall serve as the panel chair.

In addition to the panel members, the president shall appoint a member of the bar association as secretary to the program. It is the secretary's responsibility to track the paperwork for each dispute and attempt an informal resolution prior to the submission of a dispute to a panel.

Biennially, the panel members shall elect from their ranks five attorneys and five laypersons to serve as a policy committee, which shall act as consultant to the president on policy matters and appointments. Members shall serve staggered four year terms.

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[51]These factors were cited by Barry I. Croland, Esq., and Gary N. Skoloff, Esq., two New Jersey practitioners who spoke about the New Jersey program at the Committee meeting December 2, 1992. The New Jersey program was also discussed by Judge Stephen J. Schaeffer, Presiding Judge, Family Division, Superior Court, Hudson County, New Jersey. Public Hearing I at 199-200.

When a client and attorney cannot agree as to the fee, it shall be the attorney's responsibility to send a letter to the client, advising the client that he or she has 21 days to elect to resolve the dispute by arbitration, which is binding upon both attorney and client. If the client does not file a petition seeking arbitration within the specified time period, the attorney is free to commence an action to recover the fee.

The letter sent to the client must include instructions regarding the method for requesting arbitration and the standard petition form seeking arbitration. A client interested in pursuing arbitration must file the written petition with the county bar association located in the county where he or she resides. Included with the petition shall be a form whereby the client waives his or her right to pursue a claim through legal process and agrees to be bound by the arbitration panel's decision. Clients who choose to participate in the program have 30 days to withdraw from the process following the filing of a petition seeking arbitration. Attorneys who refuse to submit to the arbitration process shall be referred to the local grievance committee for disciplinary action.

Once the application for arbitration is made, the bar association shall notify the attorney and request the filing of an answer and the production of all documentation supporting the fee claim. The secretary to the arbitration program shall assemble the case documentation and attempt to effect a settlement between the parties. If no settlement is possible, the matter shall proceed to an arbitration hearing.

Prior to the hearing, each panelist shall receive instructions regarding the hearing procedures. No discovery is to be held prior to the hearing. All proceedings shall be confidential, and no stenographic transcripts shall be made. The lawyer shall open the hearing with the presentation of the documentation of work performed, the billing history and other information relevant to establish the fee requested. The client shall follow, presenting his or her account of the work performed and time expended. Witnesses may appear on the client's behalf. The lawyer shall be given an opportunity to respond, and the client has the right of final reply. The hearing panelists shall conclude the hearing with remarks regarding the relevance of the materials presented during the hearing. A letter decision shall issue from the panel within thirty days of the hearing, and there is no right of appeal. Within thirty days of the date of the letter decision, the lawyer must refund whatever monies are found due to the client. Similarly, the client shall be required to pay the attorney any monies owing within the same time frame. By court rule, judgment shall be automatically entered in the event the monies are not duly paid.

The procedure in New Jersey provides that all decisions of arbitration panels are kept on file at the local grievance committee, and members of this Committee recommend that the same procedure be followed in New York. Both the Bar and the public benefit from the direct referral by the arbitrators of any apparent attorney misconduct to a disciplinary office and the establishment of a record of an attorney's fee collection history for disciplinary purposes.

ATTORNEY DISCIPLINE

The public should have access to disciplinary proceedings once formal charges have been filed against an attorney by the Departmental Disciplinary Committee.

A recurring theme in the response received by the Committee from the public was frustration with the attorney disciplinary process. Although the Committee's mandate was to examine lawyer conduct in matrimonial actions, reform of the existing disciplinary scheme must extend beyond the matrimonial bar.[52] Typically, at the end of a case, a client who files a complaint about excessive fees, neglect, or other misconduct, discovers that review of the attorney's behavior is conducted primarily by other lawyers and in secrecy; that the matter may be declined without adequate explanation;[53] and that, even when the complaint is ultimately dismissed, resolution is often delayed. At the other end of the spectrum, consumers discover that when they consider hiring an attorney, they have no way of knowing whether and what complaints have been filed previously against that attorney. Some consumers confronted a "Catch-22" if they questioned their attorney's conduct in the midst of an action since they were informed that their complaint could not be accepted because of the ongoing representation. Understandably, consumers have concluded that attorney discipline is something of a fiction and that lawyers are interested only in protecting themselves. Not surprisingly, public opinion of the legal profession in general is at a particularly low point. Reform of the disciplinary process is essential not only to curb the abuses cited in this report, but also to restore public confidence in the profession.

Current disciplinary procedure in New York State is governed by Judiciary Law §90, which provides in subdivision 10 that all matters concerning a "complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential." Consumers who spoke and wrote to the Committee could not understand why New York State persists in maintaining this extraordinary degree of secrecy in disciplinary matters when other states have open processes. According to the experience reported in Oregon, which for fifteen years has permitted public access once a complaint has been filed, the detrimental effect to an attorney's reputation,

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[52]Commissioner Green, in his written remarks submitted at Public Hearing I, suggested that a grievance committee be established for matrimonial and family law related matters. Dorothy Allen, Associate Director of L.A.W., suggested that perhaps a special panel, whose members were experienced in matrimonial practice, should hear complaints in such cases. Public Hearing III at 229.

[53]One letter of declination from a Disciplinary Committee explained that the consumer had not "described any conduct on the part of this attorney which violates a specific provision of the Lawyer's Code of Professional Responsibility," and therefore the Committee declined to investigate the matter.

feared by those who oppose opening the process, has not been realized.[54] In the majority of states, confidentiality is lifted once formal charges are made.[55] Even those involved in the administration of the current system acknowledge that New York is "behind the times" on this issue.[56]

Some critics of the present New York procedure advocate a disciplinary system admininistered solely by laypersons, assisted by a "legal advisor."[57] Others support a completely open disciplinary system, which would make available all information from the moment a complaint is filed.[58] This recommendation was urged in 1992 by the American Bar Association's Commission on Evaluation of Disciplinary Enforcement (known as the McKay Commission) but was rejected by the Association's governing body, which recommended instead that the process be open once formal charges are filed. As early as 1981, the Committee on Professional Discipline of the Association of the Bar of the City of New York recommended that confidentiality end with the filing of formal charges. Again, in a 1992 report on the confidentiality of disciplinary proceedings, the City Bar Association endorsed this alternative.[59] However, where an attorney is "privately disciplined" without the filing of formal charges, such action would presumably remain confidential. In misconduct proceedings against a doctor, the practice of "maintaining confidentiality while complaints are investigated, but conducting open proceedings once complaints are substantiated and charges are served is rational and in accord with the strong public policy of this state of assuring public access to administrative proceedings (citation omitted)." *John Doe, M.D. v. The Office of Professional Medical Conduct of the New York State Department of Health,* ___A.D.2d ___, 591 N.Y.S.2d 26 (1st Dept. 1992). The Fourth Department, however, recently reached the opposite conclusion. *Matter of Dr. J.P. v. Chassin,* ___ A.D.2d ___, 1993 N.Y. App.Div. Lexis 2973 (decided March 12, 1993).

Members of this Committee agreed that the disciplinary process should be accessible to the public after the filing of formal charges, although one member urged that, like Oregon, the process be open from the time that a complaint is received. Legislation is required to implement this change, and such an amendment to Judiciary Law §90 has been previously submitted to the Legislature for consideration, without success.[60] Although the City Bar Association, as noted, has

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[54] 1992 Report on "Confidentiality of Disciplinary Proceedings," Committee on Professional Discipline, Association of the Bar of the City of New York.

[55] At least twenty-eight states now permit public access in disciplinary matters once formal charges have been filed. States such as Florida and West Virginia provide public access even to those complaints dismissed prior to the filing of any formal charges.

[56] Public Hearing III at 218-19 (testimony of Haliburton Fales, 2d, Esq., Chair, Departmental Disciplinary Committee, First Judicial Department); 220 (testimony of Hal Lieberman, Esq., Chief Counsel, Departmental Disciplinary Committee, First Judicial Department).

[57] Public Hearing III at 107, 110 (testimony of Veronica Ferret). The same system would oversee fee disputes as well as grievances.

[58] The Coalition for Family Justice supports an independent body of both attorneys and laypersons, which would function in the open, and Commissioner Green advocated an open process as well. Public Hearing I at 124-25.

[59] *See,* 1992 Report, *supra,* at note 54.

[60] *See,* Appendix M.

long supported such a measure, the New York State Bar Association's House of Delegates overwhelmingly rejected such a proposal as recently as June, 1992.[61]

In addition to the importance of making the process accessible to the public, the Committee recognizes that other areas of the disciplinary process merit further study and improvement. The lack of adequate funding and staff was cited by Haliburton Fales, 2d, Esq., Chair of the Departmental Disciplinary Committee in the First Judicial Department, as a primary impediment to speedy and comprehensive review of all complaints received in that Department.[62] In particular, complaints alleging attorney neglect were cited as too difficult and time-consuming to pursue under current budget and staff constraints.[63] Yet, according to Mr. Fales, approximately fifty percent of the complaints received in the First Department concern allegations of neglect.[64] Although the 1991 Annual Report of the Disciplinary Committee in the First Judicial Department cited recently adopted administrative changes which have reduced its backlog of "serious complaints," the number of complaints received throughout the state is rising.

Another problem mentioned by some consumers was that in small communities, attorneys are loathe to pursue disciplinary action against one another. Some consumers in metropolitan areas encounter the same reluctance to "take on" another, perhaps prominent, attorney, either in the disciplinary context or in a malpractice action.[65] At the same time, these consumers have been privately assured that they had a valid complaint.[66] In view of the public's perception that their complaints are not taken seriously and are rarely pursued, and lawyers' reluctance to report one another, it is particularly troubling that judges infrequently report misconduct to the disciplinary committees.[67] One consumer interviewed by Committee staff was mystified that his complaint was declined, without adequate

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[61]"Bar Opposes Disclosing Misconduct Complaints," *New York Law Journal*, June 30, 1992, p. 1.

[62]Public Hearing III at 219. The rising caseload across the state makes this a problem in every Department. *See*, "The State of Discipline in New York State," New York State Bar Association, Committee on Professional Discipline, Annual Report for the Year 1991; "Rise in Caseload Burdens Lawyer Discipline System," *New York Law Journal*, November 30, 1992, p. 1.

[63]Statement of Hal Lieberman, Esq., at the Committee meeting November 13, 1992.

[64]Public Hearing III at 221.

[65] Public Hearing II at 111-12 (testimony of Monica Strand, Co-Chair, Greater Rochester N.O.W. Task Force to Protect the Civil Rights of Primary Caretakers and Their Children).

[66]A statewide disciplinary system could go far in relieving this problem, as well as ensure a measure of consistency in the discipline meted out in the state. Such a system has been proposed previously in several quarters, but generally rejected by the bar. *See*, "Report on a Unified Statewide Disciplinary System," Committee on Professional Discipline, Association of the Bar of the City of New York, 1985.

[67]"Holding Lawyers to the Letter of the Law," interview with Hal Lieberman, Esq., *New York Newsday*, January 28, 1993, p. 97.

explanation, despite the fact that the judge handling his divorce action had given attorney misconduct as grounds for rejecting the proposed settlement between the spouses. [68]

In light of the persistent criticism of the existing system, and the conflict within the bar itself as to appropriate remedies, the Committee believes both the bar and the public would benefit from a full-scale review of the system in order to improve its accessibility and accountability to the public. The public must have confidence that not only allegations of the most egregious professional misconduct will receive attention, but that the bar is willing to recognize and actively discourage the many commonly practiced types of abuse.

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[68]The Committee received letters from both the husband and wife in this action, and both spouses were interviewed by staff. There were numerous instances of alleged attorney misconduct reportedly committed by several attorneys during the litigation and, after eleven years, there is still no divorce judgment.

SEXUAL RELATIONSHIP BETWEEN ATTORNEY AND CLIENT

A sexual relationship with a client during the course of representation is prohibited.

According to Stephen Gillers, Professor of Ethics at New York University School of Law, discussion about the propriety of an intimate personal relationship between attorney and client focuses almost exclusively on matrimonial practice, and complaints of such conduct generally involve female clients and male attorneys.[69] The Standing Committee on Ethics and Professional Responsibility of the American Bar Association recently issued a formal opinion that the existence of a sexual relationship between attorney and client in any type of representation "so greatly jeopardizes" the attorney's ability to represent the client effectively that an attorney should refrain from such a relationship.[70] This opinion urges caution and restraint but does not actually prohibit the relationship.

No state has implemented a rule that expressly prohibits a sexual relationship between attorney and client. Even Rule 3-120, recently adopted in the California Rules of Professional Conduct, does not flatly forbid an intimate relationship, but rather prohibits sexual exploitation in the course of the representation.[71] Pursuant to the rule, an attorney cannot demand sexual favors as a condition of representation or otherwise coerce a client into engaging in a sexual relationship. The rule also prohibits counsel from representing any individual with whom he or she has a sexual relationship if that relationship causes the attorney to render his or her services "incompetently." Such demands, coercion, or incompetence, are surely unacceptable practice in any state. The California rule, then, simply states in more explicit terms what is already prohibited by the Code of Professional Responsibility, Canon 6.

The Committee believes that the potential risks to both parties can be effectively eliminated only by forbidding a sexual relationship between client and counsel during the pendency of the action. Indeed, as noted by Professor Gillers, and Hal Lieberman, Chief Counsel, Departmental Disciplinary Committee, First Judicial Department, the relationship between attorney and client in a matrimonial action is in some respects analogous to the relationship which exists between a therapist and patient. Pursuant to the Principles of Medical Ethics, §2, a sexual relationship between doctor and patient is categorically unethical.[72] Despite the fact that the

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[69]Written statement submitted at Public Hearing I.

[70]*See,* Appendix O.

[71]*See,* Appendix N.

[72]*See,* Appendix P. Professor Gillers would go so far as to preclude an attorney from representing an individual with whom he or she has an existing intimate relationship, prior to the commencement of representation, to avoid the risk that the same questions of competence and objectivity would arise.

relationship may be entirely consensual, ultimately the attorney's objectivity and judgment may be affected or called into question. Furthermore, a sexual relationship between attorney and client may jeopardize the client's position in the case, particularly with respect to issues of fault and custody.

In recognition of the vulnerable state of most divorce clients and the high degree of ethical conduct to which an attorney should be held, the *Bounds of Advocacy*, Standard 2.16, promulgated by the American Academy of Matrimonial Lawyers, expressly prohibits a sexual relationship between attorney and client.[73] Such a relationship is perceived, quite simply, as creating a potential conflict of interest. Of course, such conflicts of interest are already indirectly addressed in several provisions of the Code of Professional Responsibility. Disciplinary Rule 5-101(A) provides that an attorney cannot accept employment where his or her professional judgment may be influenced by, among other things, the attorney's own "personal interests." Canon 5 provides that "a lawyer should exercise independent professional judgment on behalf of a client." Disciplinary Rule 9-101 provides that an attorney must avoid even the appearance of impropriety. These rules, however, are inadequate to address the more subtle aspects necessarily involved where an intimate relationship exists between attorney and client, and a rule should be adopted which expressly prohibits such a relationship.[74]

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[73]The Standard also specifies that no sexual relationship should exist with opposing counsel during the course of representation, and this proscription should logically extend to any individual in the proceeding.

[74]Business relationships and proprietary interests between attorney and client are already subject to limitation (DR 5-104).

IMPROVED CASE MANAGEMENT

The single most critical ingredient in the resolution of a matrimonial case is the role of the individual judge.

Virtually every person who addressed the Committee criticized judges for:

- failing to enforce their own court orders;
- routinely deferring requests for counsel fees to the trial court or until the conclusion of the case;
- failing to make timely rulings on *pendente lite* applications;
- tolerating motion "churning," "stonewalling," or similar attempts to impede discovery;
- failing to impose sanctions for the deliberate obstruction of discovery or other misconduct.

Litigants were also frustrated by their exclusion from meaningful contact with the court. Their experience with the court process often consisted of hurried conferences with counsel in courthouse hallways, after which the attorneys consulted privately with the judge in chambers. Moreover, a significant factor increasing attorneys' fees was the time wasted by attorneys waiting in court, whether it was for a motion, conference, or trial.[75]

While some litigants and attorneys did complain of misconduct on the part of a judge or hearing officer, more often they reported instances of abuse committed by the other spouse or opposing counsel, which was tolerated by the court. The judges' failure to prevent the dissipation of assets or to insist on compliance with discovery requirements and the general lack of enforcement of court orders, all of which harm the nonmonied spouse and children, previously have been outlined in the *1986 Report of the Task Force on Women in the Courts* (*Task Force Report*)[76] According to attorneys, litigants, and many judges, these practices persist.[77] To cite just a few examples, no sanctions were imposed, nor were other appropriate measures

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[75]Public Hearing I at 164 (testimony of Susan Bender, Esq.); Public Hearing II at 126 (testimony of Marshall Goldman, Esq.); 129 (testimony of Marilyn Faust, Esq.); Public Hearing III at 17-18 (testimony of Jeffrey Sander Sunshine, Esq.).

[76]*Task Force Report*, at 79, 91-92.

[77]One prior litigant graphically described her struggle to support herself and her two children when her ex-husband stopped paying support. To this day, according to her testimony, he still owes arrears from 1990. Public Hearing III at 95-98 (testimony of Diana Harding).

taken where a party admitted under oath that he had lied on two prior statements of net worth; where an attorney filed numerous, unncessary motions in order to harass a spouse who was ill; where one spouse refused to pay court-ordered maintenance and mortgage payments for several years, exposing the other spouse to the risk of losing her home; where a husband's refusal to pay arrears left his former spouse and child without basic services such as water and electricity; or where one spouse wilfully refused to turn over a deed or related documents despite a court order. In each instance, a clear message was sent to the offending spouse: there is absolutely no incentive to "play by the rules" or adhere to the court's orders because there are no consequences for noncompliance.[78]

The judges' failure to prevent abuse of the court process not only causes delay, which unnecessarily increases the cost of the litigation, but also significantly adds to the emotional price paid by the parties. Wilful noncompliance may be the result of hostility and high emotions. Often it is also part of a calculated effort to "wear down" the other spouse. The latter, already exhausted and exasperated by the financial consequences of the delay, eventually becomes unable or unwilling to continue the fight. He or she ultimately capitulates to the other spouse's settlement demands or abandons a rightful claim altogether. Thus, a war of attrition has been successfully waged with the court's tacit acceptance.[79]

Without aggressive commitment to management practices on the part of the judiciary, the recommendations made in this report will prove to be of little value to participants in the court process.[80] Sufficient measures are presently at the judges' disposal to adequately respond to many of the problems brought to the Committee's attention. However, the Committee found that in practice, these measures are rarely invoked. Accordingly, the Committee recommends that the following procedures be applied in connection with the judicial management of matrimonial cases:[81]

A. Early Court Intervention

Pursuant to newly enacted rules of procedure effective January 1, 1993, an action is commenced by filing the summons and complaint, or summons with notice, with the Clerk of the Court in the county in which the action is brought. Within 120 days after the date of filing the summons and complaint or summons with notice,

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[78]*Task Force Report*, at 94; Public Hearing I at 72-73 (testimony of Gloria Jacobs, Esq.); 74-76 (testimony of Lillian Kozak); Public Hearing II at 131-32 (testimony of Marilyn Faust, Esq.).

[79]An example of this scenario was described by Marilyn Faust, Esq. Public Hearing II at 131-35; *see also* 120 (testimony of Marshall Goldman, Esq.).

[80]Justice Anthony Cardona, Administrative Judge, Third Judicial District, in his remarks to the Committee, stressed the significance of the judge's role in managing a matrimonial case. Public Hearing II at 34-46, 51-52.

[81]Many of these procedures are also addressed in the Report of the Matrimonial Subcommittee of the Ninth Judicial District Gender Fairness Committee, January 14, 1993.

proof of service must be filed with the Clerk of the Court in which the action is brought (CPLR 304, 306-b). In order to ensure early court intervention and monitoring of a matrimonial case, the Committee recommends requiring that plaintiff's attorney file a request for judicial intervention (RJI), pursuant to §202.6 of the Uniform Rules for the Supreme Court (22 NYCRR §202.6), within 45 days of actual service, unless counsel for both parties file a "notice of no necessity" that is signed by both spouses. Such notice would enable those cases in which settlement negotiations are proceeding smoothly to avoid unnecessarily clogging the court calendar.[82] In any event, in order to protect the public and to ensure that settlement attempts are *bona fide*, an RJI must be filed within 120 days of service of the summons and complaint or notice.

B. Preliminary Conference

Within 30 days of the filing of the RJI, a preliminary conference must be held, which both parties must attend.[83] Where feasible, a motion for *pendente lite* relief should be made at this time. To the extent possible, a statement of net worth should be provided no later than 10 days prior to the preliminary conference. At the conference, counsel must certify whether *bona fide* issues exist as to fault, custody and finance, and each issue must be specifically described.[84] If issues pertaining to fault, custody or finances are not certified, or if they are resolved in whole or in part at this conference, counsel must enter into a "so-ordered" written stipulation which effectively forecloses the issue in question. Foreclosed issues or parts thereof may be reopened only upon a showing of good cause. Where it appears that immediate settlement is not possible, the court must set a discovery schedule for the unresolved issues, and for the filing of a note of issue and statement of readiness. The court must also select a date for a compliance conference, to ensure that the parties adhere to the discovery schedule and any other court directives.

Fault

If fault is in issue, the judge may direct an immediate trial so that this aspect of the case may be resolved as quickly as possible. Judges and attorneys who spoke with the Committee noted that the parties frequently settled once this matter was determined.

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[82]Judges who spoke with the Committee noted that many cases proceed to settlement without court intervention, and that it was inadvisable to mandate an early conference in every case.

[83]The importance of the clients' presence at court appearances was emphasized by the judges who met with the Committee, and was also noted by many speakers. Public Hearing I at 165 (testimony of Susan Bender, Esq.); Public Hearing III at 79 (testimony of Justice Kathryn McDonald, Chair New York Judicial Committee on Women in the Courts); 56-57 (testimony of Harriet Cohen, Esq.); 67-68 (testimony of Adria Hillman, Esq.).

[84]As noted by several attorneys, the complexity of financial issues does not depend on the amount of the assets, but rather their sources.

Appointment of Experts

Where it appears that the services of an expert will be required in connection with matters of financial evaluation or custody, the parties shall submit to the court, within 20 days of the conference, a list of experts from which the court may appoint one.

Custody and Visitation

In addition to the appointment of a forensic expert on custody matters, the court may either *sua sponte* appoint a law guardian at the time of the conference or request that the parties submit, within 20 days, a list of suitable law guardians from which the court may choose one for appointment.[85] A trial date may also be set at this time for determination of the custody issue, thereby avoiding protracted litigation of this aspect of the case. Where possible, the court should also resolve the issue of temporary visitation.[86]

During the preliminary conference, the parties should be advised of education programs such as Parent Education and Custody Effectiveness (P.E.A.C.E.) or similar efforts, which foster communication between the parents on matters relating to the children.[87] Some women's advocates registered strong disapproval of the P.E.A.C.E. program, on the grounds that P.E.A.C.E. is no more than an attempt to compel mediation.[88] However, the Committee believes any effort to study and evaluate programs which may promote better communication for the well-being of the children caught in the midst of the divorce should be encouraged and supported.

At the conclusion of the preliminary conference, the judge should be able to ascertain the complexity of the case based upon the financial issues involved, custody matters raised, length of the marriage and the tone set by the parties themselves. Those cases which appear to be noncomplex should be scheduled for early trial, not later than six months from the date of the conference. One of the continuing themes heard by the Committee was that the animosity generated is often exacerbated by the length of time that it takes to resolve the case.

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[85]For a further discussion of custody, *see* "Custody and Visitation," *infra* at p. 40.
[86]Compulsory mediation to resolve visitation issues was advocated by Julia Perles, Esq. Public Hearing I at 89-90, 91-93.
[87]The P.E.A.C.E. Program was developed by the Hofstra University School of Law and School of Education's Marriage and Family Counseling, and co-sponsored by the Interdisciplinary Forum of Mental Health and Family Law. Its stated purpose is to educate parents about the divorce process, and its goal is to enable divorcing parents to develop methods of effective communication and to assume responsibility for decisions regarding their children. In a letter dated March 3, 1993, Bernard Rothman, Esq., and Rona J. Shays, Esq., co-chairs of the Interdisciplinary Forum, stated that any expansion of the program is premature. Andrew Schepard, Esq., Professor of Law, Hofstra University School of Law, also noted that the program, which is relatively new, is not ready to expand. Public Hearing I at 204.
[88]Letter, dated March 3, 1993, from the Coalition on Women's Legal Issues, the National Organization for Women (N.O.W. - New York State) and the Coalition for Family Justice. In recent weeks, the Committee has received numerous letters from individuals stating their support for the position expressed in this letter.

The Committee also supports the recommendation in the September 1992 Report of the Review Committee on the Individual Assignment System (the *IAS Report*), submitted to the Chief Judge last fall, concerning the scheduling of preliminary conferences in block periods of time, so as to eliminate wasted and costly waiting time for counsel and clients.[89]

C. *Pendente Lite* Relief; Awards of Interim Counsel Fees

As previously noted, an application for *pendente lite* relief may be made at the preliminary conference, if not earlier. The Committee favors the proposal that the application raise "all [the] issues that will require judicial direction during the course of the litigation."[90] Where careful attention is paid to the provisions of *pendente lite* relief, additional motion practice seeking modification is avoided. If the motion is all-inclusive, the court's order should prove to be a workable document upon which an eventual settlement may be predicated. Additionally, where a *pendente lite* order is sufficiently specific, telephone conferences may suffice to resolve the insubstantial questions that subsequently arise; motions or court appearances, which incur further expense to both parties, will be avoided. Judges and attorneys favored the use of forms for *pendente lite* relief wherever possible in order to simplify the paperwork and reduce the cost to the client.

With respect to payment of the nonmonied spouse's legal fees, Domestic Relations Law §237(a) presently authorizes the courts to award such fees to the nonmonied spouse during the course of the action. However, consumers and attorneys reported that courts infrequently granted any interim legal fees on a *pendente lite* application.[91] The practice of many judges to defer such applications to the trial court essentially delays the awarding of fees until the final settlement or judgment, and often compromises the nonmonied spouse's ability to adequately litigate the case. Inevitably, his or her share of the equitable distribution award is invaded to pay counsel's fee.[92] This problem is particularly acute, given the acknowledged increased cost of divorce today.[93] When an application for legal fees is

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[89]*IAS Report* at 38.

[90]"Reflections on Matrimonial Lawyers, Judges and Practice," by Justice David B. Saxe, Part I, *New York Law Journal*, January 8, 1993, p. 2; Part II, *New York Law Journal*, January 11, 1993, p. 2. Justice Saxe sits in a matrimonial part in Supreme Court, New York County.

[91]In a letter dated February 26, 1993, Archibald F. Murray, Esq., and Joseph S. Genova, Esq., co-chairs of the New York State Bar Association's President's Committee on Access to Justice, cited the tremendous demand for free legal services in matrimonial cases. They urged that prompt and adequate *pendente lite* awards be granted to reduce this growing demand, a significant portion of which "comes from poor potential clients whose spouse has assets sufficient to pay for an attorney but, as the current system operates, the poor spouse client has no practical access to these assets."

[92]Public Hearing III at 73, 75 (testimony of Justice Kathryn McDonald). As noted by Adria Hillman, Esq., and Harriet Cohen, Esq., fees should be paid from income where possible, rather than come out of the ultimate settlement. Public Hearing III at 63, 68-69.

[93]Public Hearing I at 142 (testimony of Justice Jacqueline W. Silbermann); 69-70 (testimony of Gloria Jacobs, Esq.); Public Hearing III at 73-74 (testimony of Justice Kathryn McDonald).

denied or even deferred, the attorney for the nonmonied spouse is left not only without payment for services rendered but without reasonable expectation as to how or whether payment will be made. Considering the protracted nature of divorce actions, both client and attorney are left in limbo for an indefinite period of time, a circumstance which can drive a wedge between attorney and client.

Where interim fees have been denied or deferred, attorneys have demanded some type of security interest in lieu of immediate payment, according to litigants. If this was not forthcoming, they threatened to abandon the client, often at a critical stage in the proceedings. Consumers also charged that they were confronted on the eve of trial, some on the steps of the courthouse, with a threat to foreclose on a lien or demands to sign a confession of judgment, hand over an engagement ring, or take out a life insurance policy for the attorney's benefit. The coercive aspect of this tactic is unacceptable. Ample and regular awards of legal fees during the course of the action will certainly reduce such conflict between attorney and client.

The Committee heard considerable testimony about the creation of a marital "pot" of funds, to be set aside early in the litigation for use by the nonmonied spouse for legal fees in order to "level the playing field."[94] Judges stated that on occasion they have set aside such funds in appropriate matters. The Committee recognizes the difficulties cited in the management of such funds, *e.g.*, who will hold the money in escrow and what the criteria are for release of funds.[95] Again, the better practice is for judges to award adequate *pendente lite* counsel fees early in the action, and to make appropriate adjustments when necessary. 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.[96]

Although judges are supposed to render a decision on a *pendente lite* application within 30 days, it is common for decisions on these motions to take 90 days or longer to be issued (*cf.*, 22 NYCRR §4.1[a][2]). The harm suffered by the parties awaiting the decision requires that the courts direct the resources necessary to decide these motions within the time frame prescribed.

E. Experts

The Committee recommends that all experts be required to submit written reports. At the court's discretion, these reports will substitute for direct testimony at the time of trial.[97] This practice will save the parties money and further expedite the trial process. Written reports will enable counsel to better prepare for trial and may

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[94]Public Hearing I at 142-44, 145 (testimony of Justice Jacqueline W. Silbermann); 305-308 (testimony of Justice Elliott Wilk). Justice Wilk suggested that both spouses could have access to such a "pot" to fund the litigation. Public Hearing III at 165 (testimony of Stephen Gassman, Esq.).

[95]Public Hearing I at 227-28 (testimony of Janet Pierson); 252 (testimony of Dierdre Akerson; Public Hearing III at 165 (testimony of Stephen Gassman, Esq.).

[96]Public Hearing II at 141 (testimony of Marilyn Faust, Esq.).

[97]Public Hearing I at 96-97 (testimony of Julia Perles, Esq.).

foster settlement. Failure to provide opposing counsel with the expert's written report 60 days prior to trial will result, at the judge's discretion, in the preclusion of the evidence. At least 30 days before trial, the parties must exchange any additional reports which respond or reply to their adversary's report. In addition, the offering party may not introduce on his or her direct case any evidence which is not contained in the report.

F. Motions

As previously mentioned, judges should adhere to the rule requiring that motions be decided within 30 days. Oral argument should occur only when directed by the court, in order to eliminate unnecessary expense to the client. When argument is required by the court, it should be scheduled in a manner designed to minimize costly waiting time. Also, courts may rely on telephone conferences to facilitate scheduling, save time and reduce costs.

G. Forms

As previously noted, several practitioners and judges recommended that uniform forms be developed for the submission of *pendente lite* and other motions to the court. Forms will reduce the time it takes an attorney to prepare the motion and conserve judicial resources, since the information necessary to decide the motion will be easier to identify and evaluate. Clients, who will pay less for the preparation of a motion made on forms, also benefit. Accordingly, the Committee recommends that the Office of Court Administration develop forms for statewide use similar to those currently employed by the Family Courts.

H. Discovery

The court must demand compliance with the established discovery schedule. Where possible, an abbreviated timetable and procedure should be adopted.[98] As previously noted, the statement of net worth should be provided no later than ten days prior to the preliminary conference.

The Committee further proposes that attorneys be required to certify to their clients' statement of net worth and all other submissions to the court, similar to Rule 11 of the Federal Rules of Procedure.[99] While this subject generated much discussion among Committee members as well as among the speakers, the Committee concluded that it would further the interests of justice and the equitable resolution of the action to require that counsel certify that he or she has no knowledge or reason to believe that the substance of the submission is inaccurate.[100] Further, the Committee believes that if clients are properly advised of the necessity for truthfulness and if judges assess sanctions for any violation, clients will submit more accurate statements. The financial disclosure form signed by the client shall contain a warning in bold type as to the penalties for making false and perjurious statements.[101]

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[98]This may be particularly applicable in marriages of brief duration, as noted by Justice Saxe in his articles. *See,* footnote 90.

[99]*See,* Appendix Q; Public Hearing I at 17-18, 21, 26-30 (testimony of Whitney North Seymour,Jr., Esq.).

[100]In fact, this is no more than is presently required by the Canons of Ethics. *See, The Lawyer's Code of Professional Responsibility,* Canon 7, EC 7-25, 7-26, 7-27.

[101]*See,* "Sanctions," *infra,* for failure to comply with discovery orders.

Parties should be present at the compliance conference to facilitate meaningful settlement discussions in light of the discovery accomplished.

I. Sanctions and Enforcement of Court Orders

Courts must consistently impose sanctions for frivolous and dilatory motion practices, for noncompliance with their orders, for incomplete or inaccurate net worth statements, and for all other improper litigation practices. Sanctions should extend to both the party and counsel and include spot perjury prosecutions. Intentional failure to disclose an asset should result in forfeiture of that asset. The Committee also endorses a recommendation of the Chief Administrator's CPLR Advisory Committee to amend the Civil Practice Law and Rules to provide for automatic preclusion when a party fails to comply with a demand for discovery.[102]

Other sanctions which judges may employ include striking pleadings, denying requested relief to a party who is in noncompliance with a prior order of the court, issuing orders resolving the matter against the party in noncompliance, and issuing mandatory income deduction orders for support or maintenance.[103]

Contempt sanctions should be used, in particular, with regard to the violation of support orders. Several judges recommended instituting self-executing support orders and permitting the entry of judgment upon proof of nonpayment so as to eliminate the additional time and costs entailed in reducing arrears to a judgment.[104]

The persistent violation of support orders was one of the most serious problems reported to the Committee, and several practitioners noted that some judges refer to its consequences as the "instant poverty syndrome." As noted in the 1986 *Task Force Report*, when a wife seeks enforcement of a support order, the husband inevitably brings a motion for modification, which effectively derails any enforcement mechanism. The wife is directed to answer the motion; the application is sent to a referee and then scheduled for a hearing sometime in the distant future. By the time any resolution is reached, the court often declines to assess costs or add interest, and, frequently, forgives the arrears.[105] As noted at the outset of this section, the spouse who violates a support order believes, with good reason, that he or she may do so with impunity. The climate which has produced this attitude, and the devastating consequences to the family members deprived of court-ordered support for extended periods of time, must be changed. Judges must make it "unprofitable" for a spouse to bring a modification motion for the sole purpose of thwarting the enforcement of the original support order.[106] The judge whose order has been

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[102]*See, IAS Report* at 93. In West Virginia, there are criminal sanctions, for both client and counsel, for the submission of false statements. *See*, Appendix R.

[103]Jeffrey Sander Sunshine, Esq., sugested that a motion include a "statement of compliance" with the court's prior orders. Public Hearing III at 16-17.

[104]Public Hearing I at 265-67 (testimony of Justice William Rigler). *IAS Report* at 86.

[105]1986 *Task Force Report*, at 85-88, 91-96. When one mother who wrote to the Committee, attempted to collect a significant amount of arrears in child support, the court "excused" the arrears in order to give the parties a "fresh start."

[106]Family Court Act §460(1) now provides that where a party fails to pay court-ordered support, the court shall enter a judgment for the arrears plus costs and disbursements, unless the defaulting party shows good cause for failing to make a motion for modification *prior to* the accrual of the arrears.

violated should keep the subsequent motions for enforcement or modification, rather than send them out to a referee. In addition to imposing costs, the court should also impose heavy sanctions.

Finally, where appropriate, offending attorneys should be referred for disciplinary proceedings.

J. Custody and Visitation

As previously discussed, attorneys will be required to certify to the existence of a *bona fide* custody issue, and the court must promptly appoint the relevant experts and consider the appointment of a law guardian. The Committee also recommends that a separate cause of action be pleaded for custody. This recommendation requires legislative implementation. It should be noted, however, that some attorneys opposed isolating the custody issue or expediting resolution of this matter. They argued that often the claim is false, and eventually disappears when not forced to the forefront; in such cases, postponing the matter avoids unnecessary trauma to the child.[107] However, the majority of speakers expressed the view that early identification and resolution of the matter benefits all the parties, particularly the children, who otherwise suffer from protracted uncertainty.[108]

Some speakers advocated the appointment of law guardians in all custody cases, arguing that attorneys and parents may not be in the best position to advocate what is truly in the best interests of the child.[109] However, the Committee believes that it is preferable to leave the appointment of a law guardian to the discretion of the court.

Many attorneys favored discovery in custody cases, already permitted in the Third and Fourth Departments by case law, on the ground that the prospect of being "put to the proof" quickly eliminates false custody claims. Those opposing this suggestion cited its potential use as a device for harassment and intimidation of the custodial spouse. In this area as well, the Committee recommends that, rather than attempting to formulate a new rule, discovery should be left to the court's discretion and permitted where appropriate and in the child's best interests.

K. Jurisdiction

There was unanimous support for the use of dedicated matrimonial parts, although Committee members recognized that in smaller upstate communities, this

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[107]Public Hearing III at 48-49, 57-58, 60-62 (testimony of Adria Hillman, Esq., and Harriet Cohen, Esq.).

[108]Public Hearing II at 29-30 (testimony of Barbara Handschu, Esq.); Public Hearing III at 115-16 (testimony of Meryl Kovit, Esq.).

[109]Public Hearing II at 122, 127, 133, 139 (testimony of Meryl Kovit, Esq.). Adria Hillman and Harriet Cohen argued that the law guardian was an "unnecessary" party who became just one more adversary within the family unit, and that such an appointment would also involve the child, to his or her detriment, at an early stage of the litigation. Public Hearing III at 61-62.

recommendation might not be practicable.[110] One legislator, G. Oliver Koppell, Esq., Chair of the New York State Assembly Judiciary Committee, proposed expanding the jurisdiction of the Family Court to award divorces.[111] Expansion of the Family Court's jurisdiction requires constitutional amendment.

Some practitioners and litigants were of the opinion that matrimonial actions should remain within the Supreme Court and that all pending litigation in the Family Court should be consolidated with the Supreme Court action. It is an unfair burden for the parties to litigate in two courts, and consumers and attorneys reported that some actions were instituted in the second court merely to delay the ongoing action. This view is consistent with caseload statistics, which demonstrate that Family Courts statewide would be hard-pressed to absorb additional cases.[112]

L. Trials

A primary goal of the reform of matrimonial case management must be to eliminate the fragmented trials to which parties are routinely subjected. Attorneys reported that even on sensitive issues such as custody, trials commonly are continued on nonconsecutive days and might extend over a period of weeks or months.[113] The delay in obtaining an outcome severely harms the family. Moreover, attorneys are forced to repeatedly prepare the case, unnecessarily increasing the cost to the clients, which itself adds to the emotional strain felt by the parties.

The IAS court's sizable motion calendar, as well as its need to be available for the frequent emergency relief sought in matrimonial cases, has made it exceedingly difficult to try any case without interruption. The Committee proposes that although the IAS judge should remain the trial judge wherever possible, the judge should have the discretion to send a case out for trial. No motions would be entertained in the trial part, and both simple and complex cases could be sent to a "backup" part. Even those judges who strongly favored a "pure" IAS system for its continuity agreed that the system would benefit by affording judges the option to rely upon backup parts. It was suggested that jury cases might be "bumped" to give priority to a nonjury matrimonial case. In fact, there is already a statutory preference for matrimonial cases.[114] Certainly the trial of custody cases should be given priority. Judges must also be required to issue their findings promptly. Attorneys reported that, as with *pendente lite* decisions, judges often did not render their decisions for many months following a trial.

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[110]Public Hearing I at 20 (testimony of Whitney North Seymour, Jr., Esq.); 48 (testimony of Karen Winner); 136-37 (testimony of Justice Jacqueline W. Silbermann); 165 (testimony of Susan Bender, Esq.). In a letter dated February 4, 1993, Edward Alderman, Esq., a Syracuse practitioner, suggested that in less populated counties, a centrally located matrimonial court might be designated. Justice Silbermann suggested that in areas where a part cannot be dedicated to only matrimonial cases, all such cases could be assigned to one judge. Public Hearing I at 137-39.

[111]Public Hearing II at 79-81 (testimony of G. Oliver Koppell, Esq.).

[112]*See*, Appendix T.

[113]Public Hearing I at 266 (testimony of Justice William Rigler); 303-305 (testimony of Justice Elliott Wilk); 163-64, 169-70 (testimony of Susan Bender, Esq.); Public Hearing III at 31-32, 41-42 (testimony of Barbara Handschu, Esq.).

[114]*See*, Domestic Relations Law §249 and CPLR §3403(a)(3).

M. Appellate Review

Because of the undue delay which characterizes many matrimonial actions, one recommendation made to the Committee was to eliminate all interlocutory appeals in matrimonial matters.[115] However, as Barbara Handschu, Esq., pointed out, such a prohibition might have grave consequences (*e.g.*, where a parent has been permitted to take a child out of state). Instead, the Committee recommends that an expedited process be available in such cases.[116] The Appellate Divisions should fast-track the appeal by establishing an abbreviated briefing schedule and by setting the argument for a date certain.

N. Mediation

The courts, overwhelmed by expanding caseloads, have increasingly welcomed mediation as a reasonable method of diverting and resolving disputes in order to conserve court resources.[117] Other jurisdictions have crafted mediation programs to intervene in matrimonial disputes. Westchester County at one time utilized *amicus* settlement panels to mediate matrimonial actions, with some degree of success. The Committee recommends that the Office of Court Administration study the feasibility and cost of implementing a program similar to the early settlement program used in New Jersey, and consider instituting a pilot program in both an urban and rural area. The New Jersey program, as explained to the Committee by two practitioners and one judge, is well received by the public and the bar, and, significantly, resolves approximately fifty percent of the cases sent to mediation.[118]

Briefly, the New Jersey program is conducted by county-wide panels of experienced matrimonial attorneys. Each panel consists of two attorneys who sit informally in the courthouse, for one half-day session each month. Usually, the panel first intervenes in a case towards the end of the discovery process. The panel confers with the parties and their attorneys, and may occasionally confer privately with each party. The panel then attempts to arrive at a settlement package. A major reason for the program's effectiveness, as explained to the Committee, is that the panel affords each side ample opportunity to present their case, and, realistically, is able to devote more time to each case than a judge. In addition, the frank discussions that take place help to dispel false expectations on the part of both spouses. Even where settlement is not achieved by the panel, the parties may be more reasonably disposed towards settlement when they appear before the court. In a particularly complex case, a "blue ribbon" panel may be assigned to mediate.

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[115]Public Hearing I at 18, 23-25 (testimony of Whitney North Seymour, Jr., Esq.).

[116]This concept was recommended or endorsed by a number of speakers. Public Hearing III at 9 (testimony of Jeffrey Sander Sunshine, Esq.); 36 (testimony of Barbara Handschu, Esq.).

[117]Mediation is also favored by those who find the adversarial system unsuitable for the resolution of family-related matters. Public Hearing II at 90, 97 (testimony of Deborah Murnion, Executive Director, Youth Bureau, Orange County).

[118]Barry I. Croland, Esq. and Gary N. Skoloff, Esq., spoke about the early settlement panels in New Jersey at the December 2, 1992 Committee meeting. Judge Stephen J. Schaeffer spoke about the panel at the November 13, 1992 Committee meeting, as well as at the first public hearing. Public Hearing I at 186-93.

Where custody is identified as a genuine issue at the outset of a case, some New Jersey counties divert the custody matter for immediate mediation in order to attempt to resolve the matter and eliminate it from the case at the earliest possible stage.

As noted elsewhere in this report, opposition to mediation has been expressed by advocates representing, for the most part, the nonmonied wife.[119] These advocates believe that the financially superior spouse prevails in mediation and therefore the nonmonied wife, the weaker of the two partners, cannot possibly benefit from the process. The Committee reiterates its belief, however, that any process which may foster communication and reduce the hostility between the parties is to be encouraged.

O. Judges' Training

In order for matrimonial parts to function effectively, the judges, hearing officers and examiners must be properly trained on an ongoing basis.[120] Several speakers noted that some judges display a marked antipathy for matrimonial matters, and some judges even refuse to accept matrimonial cases. Rather than focus its best resources on family related matters, the court system seems to accord the highest priority to matters of commercial litigation.[121] The attention of the courts must be redirected, to correctly reflect the premium society should place on family matters.

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[119]These advocates strongly oppose what they perceive to be an effort to "push the women and the children" out of the courts, and particularly oppose mediation of custody issues. They view mediation as a compromise at the expense of the wife and children. Public Hearing III at 47-49, 58, 61-62 (testimony of Adria Hillman, Esq. and Harriet Cohen, Esq.).

[120]Public Hearing I at 136-37 (testimony of Justice Jacqueline W. Silbermann); 19-20 (testimony of Whitney North Seymour,Jr., Esq.); 36 (testimony of Karen Winner); 292 (testimony of Monica Getz); Public Hearing II at 11 (testimony of John Johnson); 69 (testimony of Judith Reichler, Esq.); Public Hearing III at 159 (testimony of Stephen Gassman, Esq.). In particular, judges were urged to treat orders of protection more seriously, rather than view them as impediments to achieving a settlement in a case. Public Hearing III at 43-44 (testimony of Barbara Seaman); 52-53 (testimony of Adria Hillman, Esq.).

[121]Public Hearing I at 53-54 (testimony of Timothy M. Tippins, Esq.); Public Hearing II at 119, 121, 124 (testimony of Marshall Goldman, Esq.); 129, 135 (testimony of Marilyn Faust, Esq.). At the outset of his testimony, Stephen Gassman, Esq., stressed that any attempt to improve court procedure required recognition of the importance of matrimonial cases. Yet, he stated, in some courts, assignment to a matrimonial part is viewed as "akin to judicial Siberia." (Public Hearing III at 142-43).

Such a reallocation of judicial resources would be enthusiastically received by consumer groups, who often perceive the courts as remote and unresponsive to the realities of divorce today and to the feelings of the public.[122]

P. Public Education

The Office of Court Administration, together with local bar associations and citizens groups, should undertake programs to educate the public on family law matters. The publication by the Family Law Section of the American Bar Association, entitled "Your Divorce: A Guide Through the Legal Process," is an example of an excellent source of information for consumers, and this booklet should be made available to the public. As is already being done in some areas, the bar associations also should establish programs for educating the public not only as to their rights in family law matters but to the realities of litigation.

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[122]Public Hearing I at 275 (testimony of Monica Getz).

ADDENDUM - THE LONGER VIEW

During the course of its work, the Committee encountered several areas of matrimonial law and practice which, by virtue of their complexity are not amenable to short term resolution . For example: is the Equitable Distribution Law fulfilling its purpose? Are the best interests of children being served by the way we presently handle custody disputes? Should mediation and education programs such as P.E.A.C.E., have a place in the divorce process? How can the courts deliver effective justice in the face of current caseloads? Each of these areas requires empirical research and study and the imput of the public, attorneys, judges and legislators.

Equitable Distribution

A number of litigants who offered their experiences to the Committee questioned whether the 1980 Equitable Distribution Law has achieved the goals intended by the drafters. Their inquiries echo sentiments expressed as long ago as 1986 in the *Task Force Report.* It is the view of most, though not all, Committee members that the equitable distribution law and its application by judges be re-examined if only because the law has resulted in a divorce process that is more costly, complex and inconsistently applied than its predecessor statute. Much of what was reported to the Committee by judges, attorneys, and litigants, confirmed the findings of a 1991 law review article by Brooklyn Law School Professor Marsha Garrison, who quantified and discussed the effects of equitable distribution on property distribution and the awarding of alimony.[1]

With the introduction of the new law in 1980, marital property, not alimony, was awarded as the wife's predominant economic entitlement. Maintenance was awarded as a temporary measure to enable the wife to become self-supporting. The intent of equitable distribution was to afford judges flexibility to ensure that wives received a fairer share of the marital estate.

Following a detailed analysis of divorce data drawn from New York, Westchester and Onondaga Counties, Professor Garrison concluded that, in contrast to its intended purpose, equitable distribution has not resulted in the awarding of a share of the marital estate to wives based upon their economic need and contribution to the marriage. Furthermore, the law was found to be flawed in that judicial discretion has lead to awards which are unpredictable and inconsistent.

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[1]"Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes", *Brooklyn Law Review*, Fall 1991, Vol. 57, No. 3. Professor Garrison's study is noted with the caveat that its most recent data, which dates from 1984, somewhat limits its reliability as an indicator of present day divorce awards.

In part, the failure of equitable distribution to fairly divide the marital estate can be attributed to the misconception that husbands generally hold title to valuable marital property which can be awarded to the wife in lieu of alimony. Professor Garrison demonstrated that, to the contrary, the value of marital property is small and is far exceeded by marital income. Also, most marital assets in Professor Garrison's sample of contested matrimonial cases are not liquid.[2]

Both before and after the introduction of equitable distribution, wives received approximately one-half of the marital property . However, after 1980 this award was substantially offset by the wives' more frequent assumption of an increased share of the marital debt.[3] Awards were further offset by the fact that women were directed to pay their own attorney's fees in 72% of the cases where the court addressed the fee issue.[4]

At the same time that net property awards fell, wives suffered disproportionate reductions in maintenance. It was the intent of the 1980 law to award maintenance not as a permanent entitlement, but to "award the recipient spouse an opportunity to achieve independence."[5] As a consequence, between 1978 and 1984 the proportion of cases in which alimony or maintenance was awarded fell 43%.[6] Professor Garrison found that the alimony reductions most heavily impacted the women whom the statute was intended to most assist, *i.e.*, those whose marriages were of long duration and those whose individual incomes was substantially less than that of their spouse. In 1978, 71% of wives who were described as homemakers received alimony as opposed to only 59% in 1984.[7]

Similarly, women who earned a small percentage of the family income suffered substantial losses in awards made pursuant to equitable distribution in 1984 contested matrimonial cases.[8] The data further show that, in 1978 and 1984, a woman's post-divorce income was approximately 30% less than her pre-divorce income. By comparison, the husband's post-divorce income rose 82%.

Professor Garrison's findings, the experiences reported to this Committee, and the findings of the *Task Force Report*, all suggest that more study is necessary to ensure the fairer distribution of the marital estate.

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[2]*Ibid*, p. 662-666. *See*, Appendix S, Figure 1.
[3]*Ibid*, p. 677.
[4]*Ibid* p. 715, n. 274.
[5]*Ibid* p. 640, *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585 (1985).
[6]*Ibid* p. 697.
[7]*Ibid* p. 702. *See*, Appendix S, Table 1.
[8]*Ibid* p. 705-708. *See*, Appendix S, Tables 2 and 3.

Custody

Discussions regarding custody issues sparked emotions which only topics related to the well-being of children can evoke. A marked diversity of opinion emerged regarding early resolution of custody and visitation questions; the manner in which child support orders should be enforced; the appointment of law guardians; whether discovery should be conducted in custody matters; and the presumption that custody should be awarded to the spouse providing primary care.[9] Exploration of these matters should continue so that children, who are often the pawn of one parent or the other in bitter divorce disputes, are afforded protections which minimize the trauma of a disintegrating family.

Mediation and Education Programs

Related topics which generated spirited, and polarized debate were mediation and education programs such as P.E.A.C.E.[10] Each concept was endorsed by the Committee as a vehicle to foster communication between the parties during the divorce process. Moreover, P.E.A.C.E. was praised by its founders as assisting the parties to develop tools for the amicable resolution of post-divorce custody questions. However, both mediation programs and P.E.A.C.E. drew sharp criticism from respected advocacy groups which focused on the disparity of the negotiating positions between the spouses. These disparities may be caused by physical or emotional abuse, the coercion implicit in a spouse's refusal to pay support, or the general imbalance of power between a monied husband and a nonmonied wife. These concerns must be addressed in order for these programs to have efficacious results.

Courts

The Committee's recommendations regarding improved case management consist of remedies aimed at reducing the length of cases and minimizing the tactics which enable one spouse to damage the ability of the other spouse to obtain a just result. An aspect of case management not addressed is the number of cases handled each year by the Unified Court System, particularly, the overwhelming caseload carried by individual judges. As the following statistics and well publicized accounts of appalling working conditions demonstrate, judges adjudicate the most complex and sensitive matters under daunting circumstances.

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[9] *See,* the discussion of Custody, *supra*, p. 40.

[10] *See,* the discussion of Mediation and P.E.A.C.E., *supra*, at p.42 and p.35, respectively.

In 1992, requests for judicial intervention were filed in 172,347 cases statewide; of these, approximately 80,000 were filed in New York City and 92,000 were filed upstate. Contested matrimonials constituted 4% of the New York City filings and 12% of the upstate filings.[11] More telling is the fact that in 1992 contested matrimonials comprised a disproportionate 15% of cases in which notes of issue were filed.

Erie County Supreme Court handled 1,745 contested and 1,670 uncontested matrimonial cases, in 1992, by dividing them among three parts which handle matrimonial cases. Similarly, 685 contested and 14,249 uncontested matrimonial cases were divided among four to five dedicated parts in New York County Supreme Court.[12]

The case activity reports of two judges who sit in designated matrimonial parts, one upstate and one in New York City reflect very different approaches to case management. Nonetheless, each caseload provides graphic testimony of the judicial effort expended to resolve matrimonial cases.[13]

Improvement in case management through the implementation of the recommendations set forth herein will only partially ameliorate the systemic deficiencies attributable to the judiciary. Problems endemic to the courts, related to the overwhelming caseloads, must be addressed by the Legislature in a long term substantive manner.

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[11]Upstate figures include Nassau and Suffolk Counties. *See,* Appendix U for statistics provided by Chester H. Mount, Jr., Manager, Data Services, Office of Court Administration.

[12]Letter from Peter J. Ryan, Executive Assistant to Deputy Chief Administrative Judge Joseph J. Traficanti, Jr., November 25, 1992. *See,* Appendix U for Supreme Court statistics.

[13]*See,* Appendix V for 1992 Case Activity Reports.

APPENDICES

APPENDIX A

Letter of Appointment from the Chief Judge

The Chief Judge of the State of New York

Sol Wachtler

July 16, 1992

On behalf of the Administrative Board of the Courts, I want to thank you for agreeing to serve on the committee formed by the Board to examine the role of attorneys in matrimonial actions in the New York courts. This is an extremely important endeavor, as the treatment of litigants in divorce actions, both with respect to the law and with respect to the system itself, has been under increasing attack. It is my hope that this committee's studying of the role of attorneys in this process will lead to recommendations that will have a significant impact on the ultimate ability of the court system to improve the providing of a fair and effective tribunal for the hearing of matrimonial actions without undue burden on the participants.

I have asked each of the four Presiding Justices of the Appellate Divisions to appoint one Justice from their respective courts to serve on the committee, and I have joined with them in selecting six distinguished members of the bar to serve as well. I am also pleased to note that Judge Judith S. Kaye of the Court of Appeals has agreed to join the committee. Justice E. Leo Milonas of the Appellate Division, First Department, has consented to serve as the Chair, and he will be contacting you shortly to begin the committee's work. A copy of the names and addresses of all of the committee members is attached.

I and the other members of the Administrative Board look forward to seeing the results of this most important study.

Very truly yours,

Sol Wachtler

APPENDIX B

COMMITTEE MEMBERS'

BIOGRAPHIES

HON. E. LEO MILONAS., Chair. Associate Justice, Appellate Division, Supreme Court, First Judicial Department; Deputy Chief Administrative Judge, New York City Courts, (1979-1982); Bar Association of the City of New York, Encourage Judicial Service (Chair), Council on Judicial Administration, Municipal Affairs; Member, Task Force on the Workload in the Appellate Divisions, Committee to Examine the Effectiveness of the Fiduciary Appointment Rule; Board Member: Judges & Lawyers Breast Cancer Alert, New York Urban League, National Center for State Courts, National Conference of Metropolitan Judges, St. Michael's Home for the Aged, The Constitutional Rights Foundation; Other Service: Mayor's Criminal Justice Coordinating Council (Executive Commitee); American Bar Association, Committee on Implementation of Standards for the Administration of Criminal Justice, Law Enforcement Assistance Administration Oversight Committee, Annual Meeting Program Committee (Chair), Membership Committee for New York State (Co-Chair); Williamsburg II Conference.

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RONNA D. BROWN, Esq. Deputy Bureau Chief of the Consumer Frauds and Protection Bureau of the New York Attorney General's office. Ms. Brown supervises the Attorney General's consumer protection program, including the Bureau's litigation, mediation and education programs. Ms. Brown joined the Attorney General's office in 1988 as the Regional Coordinator, overseeing consumer litigation in 13 regional offices statewide. She became a Litigation Section Chief later that year and the Deputy Bureau Chief in 1992. Prior to working in the Attorney General's office, from 1984 to 1987, Ms. Brown was an associate at Colton, Hartnick, Yamin & Sheresky, specializing in matrimonial litigation. From 1981 to 1984, Ms. Brown was a staff attorney at the Criminal Appeals Bureau in the Legal Aid Society. She received her law degree from New York University in 1981 and her bachelor's degree from the University of California at Berkeley in 1978.

HON. D. BRUCE CREW. Graduated from Albany Law School in 1962 and was appointed Confidential Clerk to Supreme Court Justice Harold E. Simpson. In 1964 he began private practice in Elmira, New York, and was a partner in the firm of Donovan, Granor, Davidson & Burns where he engaged in personal injury litigation. In 1973, he was elected Chemung County District Attorney and served in that position until 1983, when he was elected a Supreme Court Justice. In 1987 he was designated Administrative Judge for the Sixth Judicial District and in 1990 he was appointed an Associate Justice of the Appellate Division for the Third Judicial Department.

HON. LEO J. FALLON. Associate Justice of the Appellate Division, New York State Supreme Court; Elected to Supreme Court in 1986. Trial Lawyer 1953-1986; Former Assistant United States Attorney and Graduate Cornell University Law School with distinction in 1953.

GREGORY X. HESTERBERG, Esq. Partner, Hesterberg & Keller, Brooklyn, New York; Georgetown University, 1968-1972, Bachelor of Arts Degree; Brooklyn Law School, 1972-1975, Juris Doctorate, admitted 1976 to the Bar of the State of New York; Member of: Brooklyn Bar Association, Co-Chairman; Surrogate's Court Committee Member, Board of Trustees; New York State Bar Association, American Bar Association; Catholic Lawyers' Guild of Kings County. Community Activities: Flatbush Boys' Club; Emerald Association of Long Island; Kiwanis Club of Garden City; Georgetown University Alumni Admissions Committee.

HON. SONDRA MILLER. In 1982, Justice Miller was named as Westchester Woman of the Year. She has served as Vice President of Legal Awareness of Westchester; Director of the Cancer Support Team; Director of the Westchester Lighthouse, and was a founding member of the Westchester Women's Bar Association. She also served as Vice President of the Women's Bar Association of the State of New York, is an active member of several other bar associations, and is a popular lecturer. A proud mother and grandmother, Justice Miller is a successful proponent of balancing the demands of career and family.

PATRICK C. O'REILLY, Esq. Admitted to practice in the State of New York in 1981. He is a senior partner in the law firm of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, with offices located in Buffalo and New York City, New York. Mr. O'Reilly's associations, positions and appointments include: Fellowship in the American Academy of Matrimonial Lawyers, serving as a member of the New York State Chapter, Board of Managers. He is the current Chairman of the Erie County Bar Association Matrimonial and Family Law Committee, and a Member of the Executive Committee of the Family Law Section of the New York State Bar Association, serving as Delegate at Large. Mr. O'Reilly has also served as a panelist and speaker upon issues of Matrimonial & Family Law in numerous seminars, workshops and symposiums sponsored by the Erie County Bar Association, the New York State Bar Association, American Academy of Matrimonial Lawyers, the People's Law School, and the Psychological Associates of Western New York (PAWNY).

LAWRENCE W. POLLACK, Esq. Partner, Migdal, Pollack, Rosenkrantz & Sherman, New York, N.Y., Admitted New York Bar 1957. B.S. Economics, Wharton School, University of Pennsylvania (1953); LLB - New York University School of Law (1956); LLM - University of Michigan School of Law (1957); Fellow, American Academy of Matrimonial Lawyers; Member Committee on Equitable Distribution, New York State Bar Association, Family Law Section; Lecturer; Pro Bono Battered Women's Program, Women's Bar Association.

STANLEY A. ROSEN, Esq. Senior Partner, McNamee, Lochner, Titus & Williams, P.C., Albany, New York. Chair, Matrimonial and Family Law Department. Albany Law School of Union University, J.D., 1968. Admitted to Bar, 1968. Assistant District Attorney, Albany County, 1969-1973. Member, New York State Bar Association, Family Law Section, Executive Committee, 1982 - present. Fellow, American Academy of Matrimonial Lawyers, 1985 - present. Listed, *Best Lawyers In America,* all editions. Assistant Editor, *Family Law Review,* 1979 - present. Co-author *Family Law Practice - A Systems Manual.* Practice limited to matrimonial and family law.

NORMAN M. SHERESKY, Esq. Harvard Law School, 1953. President, New York Chapter of American Academy of Matrimonial Lawyers 1977-79. Governor of the American Academy of Matrimonial Lawyers. New York Chapter Board of Managers, 1970 to date. Past Adjunct Professor of Law, New York Law School. Author: *On Trial,* Viking, 1977 and *Uncoupling - A Guide To Sane Divorce,* Viking, 1972. Member of the Executive Committee and Chairman of the Supreme Court Committee of the New York State Bar Association, Family Law Section. Governor and Founding Member, International Academy of Matrimonial Lawyers. Past Treasurer, U.S. Chapter of IAML.

APPENDIX C

List of Speakers at Committee Meetings:

Susan Bender, Esq., President, Women's Bar Association of the State of New York

Angelo Cometa, Esq., past President, New York State Bar Association

Barry I. Croland, Esq., New Jersey matrimonial practitioner

Hon. Phyllis B. Gangel-Jacob, Acting Justice of the Supreme Court, New York County

Stephen Gillers, Esq., Professor, New York University School of Law

Mark Green, Commissioner, Department of Consumer Affairs

Hal R. Lieberman, Esq., Chief Counsel, Departmental Disciplinary Committee, First Judicial Department

Hon. Howard Miller, Justice of the Supreme Court, Orange County

Hon. William Rigler, Justice of the Supreme Court, Kings County

Irvin Rosenthal, Esq., Co-Chair, Matrimonial Law Section, New York County Lawyers' Association

Hon. Walter M. Schackman, Acting Justice of the Supreme Court, New York County

Hon. Stephen J. Schaeffer, Presiding Judge, Family Division, Superior Court, Hudson County, New Jersey

Hon. Jacqueline W. Silbermann, Administrative Judge, Civil Court, New York County

Gary N. Skoloff, Esq., New York matrimonial practitioner

Timothy M. Tippins, Esq., Vice-President of the American Academy of Matrimonial Lawyers; President, New York Chapter

Hon. Elliott Wilk, New York County Civil Court Judge

Karen Winner, Author of "Women in Divorce: Lawyers, Ethics, Fees & Fairness," issued by the Department of Consumer Affairs

APPENDIX D

The following is a list of the persons who testified:

January 26, 1993, New York City

Whitney North Seymour, Jr., Esq.
Karen Winner, Author, *Green Report*
Timothy Tippins, Esq., President, N.Y. Chapter, American Academy Matrimonial Lawyers
Gloria Jacobs, Esq.
Lillian Kozak, C.P.A.
Julia Perles, Esq.
Stephen Gillers, Esq., Professor of Ethics, New York University Law School
Mark Green, Commissioner, New York City Department of Consumer Affairs
Hon. Jacqueline W. Silbermann, Administrative Judge, New York City Civil Court
Jo Ann Crock
Susan Bender, Esq., President, New York State Women's Bar Association
Andrew Schepard, Esq., Professor, Hofstra University School of Law
Hon. Stephen Schaeffer, Presiding Judge, Family Division, Superior Court, Hudson County, New Jersey
Janet Pierson
Granville Leo Stevens, Esq.
Deirdre Akerson, Coalition for Family Justice
Hon. William Rigler, Kings County Supreme Court Justice, Matrimonial IAS
Monica Getz, Founder and Chair, Coalition for Family Justice
Hon. Elliott Wilk, NewYork County Civil Court Judge, Matrimonial IAS

February 8, 1993, Albany

John Johnson, C.P.A.
Barbara Handschu, Esq.
Hon. Anthony V. Cardona, Administrative Judge, Third Judicial District
Raymond Pauley, Esq.
Judith Reichler, Esq., National Center on Women and Family Law; past Director, New York State Commission on Child Support
G.Oliver Koppell, Chair, NYS Assembly Judiciary Committee
Deborah C. Murnion, Executive Director, Youth Bureau, Orange County
Monica Strand and **Heidi Boardman**, Greater Rochester NOW "Task Force to Protect the Civil Rights of Primary Caretakers and Their Children"
Marshall Goldman, Esq.
Marilyn Faust, Esq.

February 23, 1993, New York City

Jeffrey Sander Sunshine, Esq., Chair, Family Law Section, Brooklyn Bar Association
Barbara Seaman
Harriet N. Cohen and **Adria S. Hillman**, Co-Chairs, Coalition on Women's Legal Issues
Hon. Kathryn McDonald, Chair, New York Judicial Committee on Women in the Courts
Diana Harding
Veronica Ferrett

Meryl Kovit, Esq.
Stephen Gassman, Esq., Chair, Family Law Section, New York State Bar Association
Roselyn Beckoff
Dr. Laurence Loeb, Pace University Law School
Sean Scully
Haliburton Fales, 2d, Chair, and **Hal Lieberman**, Esq., Chief Counsel, Departmental Disciplinary Committee, First Judicial Department
Dorothy Allen, Associate Director, Legal Awareness of Westchester, Inc.
Mary Frohman
Daniel Capra, Esq., Chair, Professional Responsibility Committee, Association of the Bar of the City of New York
Norman Heller, Esq., Co-Chair, Matrimonial Law Section, New York County Lawyers' Association
Jo Ann Crock

APPENDIX E

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, NEW YORK CHAPTER

"Client's Bill of Rights and Responsibilities"

1. You have the right to discuss the proposed rates, minimum fees, retainer fee with your lawyer before you sign the agreement, as in any other contract.

2. You have the right to know how many attorneys and other legal staff members will be working on your case at any given time, and what you will be charged for their services.

3. You have the right to know, in advance, how you will be asked to pay legal fees and expenses. If you pay a retainer, you may ask reasonable questions about how the money will be spent or has been spent and how much of it remains unspent.

4. You are under no legal obligation to sign a Confession of Judgment or Promissory Note, or agree to a lien or mortgage on your home to cover legal fees. You are under no legal obligation to waive your rights to dispute a bill for legal services. However, the law firm must be paid and if you fail or refuse to pay, or to post security for payment if the firm offers that option, the law firm is entitled to and may withdraw as your attorney.

5. You have a right to a reasonable estimate of future necessary costs. If your lawyer agreed to advance money for preparing your case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. However, if the law firm deems that expenses be incurred or undertaken and you refuse to authorize and pay for same, the law firm is entitled to and may withdraw as your attorney.

6. You have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

7. You have the right to make the final decision regarding the settlement of your case.

8. You have a right to any original documents that are not part of your attorney's work product. For instance, if you gave your present attorney documents from another attorney, you have a right to those documents. You have a right to ask your attorney to forward documents to you in a timely manner as he/she receives them from your spouse's attorney. However, in the event that you owe money to the firm for services rendered or expenses incurred, the firm has a retaining lien and may withhold your file until the account has been settled or a court decides the issue.

9. You have a right to be present at court conferences relating to your case that are held with judges and attorneys, unless a judge orders otherwise.

10. You have a right to know the basis for the cost of bringing a motion.

APPENDIX F

NEW YORK STATE BAR ASSOCIATION, FAMILY LAW SECTION

CLIENT'S BILL OF RIGHTS

The Section endorses the proposal that each client be given, simultaneous with or as part of the retainer agreement, a Client's Bill of Rights, the substance of which we propose as follows:

1. You have the right to discus the proposed rates, minimum fee, and retainer fee with your lawyer before you sign a retainer agreement, as in any other contract.

2. You have the right to know how many attorneys and other staff may be working on your case, and what you will be charged for their services.

3. You have the right to know in advance how you will be asked to pay legal fees and expenses.

4. If you pay a retainer, you may ask reasonable questions about how the money will be charged or has been charged and how much of it remains to your credit.

5. You are under no legal obligation to sign a confession of judgment or promissory note, or agree to a lien or mortgage on your home to cover legal fees. You are under no legal obligation to waive your rights to dispute a bill for legal services. However, the law firm must be paid and if you fail or refuse to pay, or to post a security for payment if the firm offers that option, the law firm may be entitled to withdraw as your attorney.

6. You have a right to a reasonable estimate of future necessary out-of-pocket costs or disbursements, other than legal fees. If your lawyer advances money in preparing your case, you have the right to know periodically how much money your lawyer has spent on your behalf. If the law firm deems that expenses should be incurred or undertaken and you refuse to authorize and pay for same, the law firm may be entitled to withdraw as your attorney upon appropriate application to a court, if necessary.

7. You have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

8. No final settlement of your case will be made without your prior approval.

9. You have the right to receive possession of any original documents that are not part of your attorney's work product. For instance, if you gave your present attorney documents received from another attorney, you have a right to those documents. You have a right to ask your attorney to forward copies of documents to you in a timely manner as he/she receives them from your spouse's attorney. However, in the event that you owe money to the firm for services rendered or

expenses incurred, the firm may withhold possession of your file and such documents until the account has been settled by payment or security or a court decides the issue.[1]

10. Your rights and obligations as a client may be more fully defined by the written retainer agreement which will be prepared by your attorney. Accordingly, you should not sign the retainer agreement until you fully understand it.

I acknowledge that I have received a copy of this Bill of Rights.

Dated:_____ _____

[Client's signature]

[1]This provision could be amended in conformity with our position on the issue of retaining liens, discussed *infra*.

APPENDIX G

Understanding the Law: A Practical Guide for New York Residents
(New York Bar Foundation)

CLIENT'S BILL OF RIGHTS

As a public service, your lawyer is providing you with this statement of a client's rights. To help prevent any misunderstandings between you and your lawyer, please read the Bill of Rights carefully. It tells what you, as a client, are entitled to by law or by custom.

If you ever have any questions about these rights, or about the way your case is being handled, don't hesitate to ask your lawyer. He or she should be readily available to represent your best interests and keep you informed about your case.

When I retain a lawyer, I am entitled to one who:

1. Will be capable of handling my case.

2. Will represent me zealously and seek any lawful means to present or defend my case.

3. Will preserve my confidences, secrets or statements which I reveal in the course of our relationship.

4. Will give me the right to make the ultimate decision on the objectives to be pursued in my case.

5. Will charge me a reasonable fee and tell me, in advance of being hired and upon my request, the basis of that fee.

6. Will show me courtesy and consideration at all times.

7. Will exercise independent professional judgment in my behalf, free from compromising influences.

8. Will inform me periodically about the status of my case and, at my request, give me copies of documents prepared.

9. Will exhibit the highest degree of ethical conduct.

10. Will refer me to other legal counsel, if he or she cannot properly represent me.

APPENDIX H

DIVORCE CLIENT'S BILL OF RIGHTS

BY THE NYC DEPARTMENT OF CONSUMER AFFAIRS

1. You have a right to discuss the proposed rates and retainer fee with your lawyer and you have the right to bargain about the fees before you sign the agreement, as in any other contract.

2. You have the right to know how many attorneys and other legal staff will be working on your case at any given time, and what you will be charged for their services.

3. You have the right to know in advance how you will be asked to pay legal fees and expenses at the end of the case. If you pay for a retainer, you may ask reasonable questions about how the money will be spent or has been spent and how much of it remains unspent.

4. You are under no legal obligation to sign a Confession of Judgment or Promissory Note, or agree to a lien or mortgage on your home to cover legal fees. You are under no legal obligation to waive your rights to dispute a bill for legal services.

5. You have a right to a reasonable estimate of future necessary costs. If your lawyer agrees to lend or advance you money for preparing your case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend.

6. You have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

7. You have the right to make the final decision regarding the settlement of your case.

8. You have the right to any original documents that are not part of your attorney's work product. For instance, if you gave your present attorney documents from another attorney, you have a right to those documents. You have a right to ask your attorney to forward documents to you in a timely manner as he/she receives them from your spouse's attorney.

9. You have a right to be present at court conferences relating to your case that are held with judges and attorneys, and you also have the right to bring a family member or a friend to all court proceedings, unless a judge orders otherwise.

10. You have the right to know the cost of bringing a motion. The cost may vary depending on the lawyer's rates and circumstances of the case, but you have the right to a general estimate.

If at any time, you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to a disciplinary or grievance

committee that oversees lawyer misconduct. If you live in Manhattan or the Bronx, contact: Departmental Disciplinary Committee, 41 Madison Avenue,New York, N.Y. 10010/tel: (212) 685-1000.

If you live in Brooklyn, Queens, or Staten Island, contact:
Grievance Committee for the 2nd and 11th Judicial Districts Municipal Building, 12th Floor, 210 Joralemon Street Brooklyn, N.Y. 11201/tel: (718) 624-7851.

APPENDIX I

FLORIDA STATEMENT OF CLIENT'S RIGHTS

This information about client's rights is being provided to you as a public service by The Florida Bar. To help prevent any misunderstandings between you and your lawyer, please read this pamphlet carefully.

The section, "10 Basic Rights," tells what you, as a client, are entitled to by law or by custom.

The "Statement of Client's Rights" was approved by the Florida Supreme Court in June 1986. It must be read and signed by both attorney and client in most contingency fee matters (that is, a case where the attorney's fee is a percentage of the amount awarded to the client). Before you enter into a contingency fee arrangement, read and understand this information. Many of the suggestions listed in the "Statement of Client's Rights" are helpful to those thinking about hiring an attorney in any situation, not just a contingency fee case.

If you ever have any question about your rights as a client, or about the way your case is being handled, ask your lawyer. He or she should be readily available to represent your best interests and keep you informed about your case.

STATEMENT OF CLIENT'S RIGHTS

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.

2. Any contingent fee contract must be in writing and you have three (3) business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within three (3) business days of signing the contract. If you withdraw from the contract within the first three (3) business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the three-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about his or her actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether he or she intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers he or she should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least one lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract which includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide after consulting with your lawyer how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money which you might have to pay to your lawyer for costs and liability you might have for attorney's fees to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement you need not pay any money to anyone, including your lawyer. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time, you, the client, believe that your lawyer has charged an excessive or illegal fee, you, the client, have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida.

Florida Statement of Client's Rights

10 BASIC RIGHTS

When I retain a lawyer, I am entitled to one who:

1. WILL be capable of handling my case.

2. WILL represent me zealously and seek any lawful means to present or defend my case.

3. WILL preserve my confidences, secrets or statements which I reveal in the course of our relationship.

4. WILL give me the right to make the ultimate decision on the objectives to be pursued in my case.

5. WILL charge me a reasonable fee and tell me, in advance of being hired and upon my request, the basis of that fee.

6. WILL show me courtesy and consideration at all times.

7. WILL exercise independent professional judgment in my behalf, free from compromising influences.

8. WILL inform me periodically about the status of my case and, at my request, give me copies of documents prepared.

9. WILL exhibit the highest degree of ethical conduct.

10. WILL refer me to other legal counsel, if he or she cannot properly represent me.

APPENDIX J

L.A.W., Guidelines for a Retainer Agreement

WORDS AND PHRASES TO AVOID

L.A.W: is concerned about a phrase that is turning up with frequency in retainer agreements - "results obtained", or a variation of those words. This is an open-ended addition to the retainer fee and the hourly rate. L.A.W. alerts consumers to the hidden dangers in such a blank-check agreement. We urge clients to be on the lookout for sentences such as:

> "...the ultimate fee will be based upon time spent plus additional amounts based upon results achieved."
>
> "may be an additional charge based on the complexity of the case..."

Before you sign an agreement containing similar wording, ask the attorney to explain what is meant by this phrase. If you are not satisfied with the explanation, ask the attorney to delete that part of the retainer agreement. Again, and this cannot be stressed too much, never sign anything you do not understand. If an attorney is unwilling to remove a condition to which you do not want to agree, you may want to consider carefully if this is the attorney for you.

* * *

"Thank you for hiring the firm of....." This can mean that the attorney you interview may not be the attorney assigned to your case! This is especially true in large firms with a "big-name" partner. Do not be misled into believing that because your initial interview was with ""big-name," he/she will be the attorney handling your case. ASK QUESTIONS!

* * *

Be extremely careful that "non-refundable" does not appear in any retainer agreement you sign. You should pay only for time expended, and money left over should be returned to you!

* * *

Some attorneys request a "second retainer" when the first fee is used up. This can be a tremendous hardship, and we feel that regular billing eliminates the need for a "second retainer."

Someone once said that oral agreements were not worth the paper they were written on. *AGREEMENTS SHOULD BE WRITTEN*, and any attorney who is willing to agree to something orally should be willing to put that agreement into writing. Once written, once signed, be sure that you have a copy of your retainer agreement. Keep it in a safe place.

* * *

NEVER SIGN ANYTHING YOU DO NOT UNDERSTAND

L.A.W. SAMPLE RETAINER AGREEMENT

Date_____

Dear_____:

This is to set forth the terms upon which you have retained me to represent you with respect to marital matters between you and_____.

With respect to legal fees, you have agreed to pay $..... as a retainer, which sum is to be credited against our fee. I will receive a rate of $.....per hour for my services, and $.....per hour for my associate's services. These hourly rates are charged for all time spent, whether for consultations, telephone calls, negotiations, drafting, court appearances, or otherwise.

Billing and payments will be made on a monthly basis. Included in the billing will be an explanation of services rendered and by whom rendered. In addition to legal fees, you will pay all out-of-pocket disbursements incurred on your behalf, such as court filing fees, photostats, xerox reproductions, long distance telephone calls, messengers, transcripts of Examinations Before Trial, and the like.

You will be consulted if any extraordinary expenses, such as the hiring of accountants, appraisers and such are needed. No arrangements will be made without your prior authorization in these matters.

If for any reason you decide to discontinue my services, I will return any unused portion of the retainer. Any termination does not effect your responsibility to pay me anything owed for services rendered until the date of termination. I will release your file to you immediately upon receipt of any payment due.

Under present law you may request that your husband pay your legal expenses, and efforts will be made to recover these expenses from your husband. However, there is no certainty that any recovery may actually occur. In the event I receive my entire fee and expenses from your husband, I shall return your retainer and any other fees and expenses you may have paid. If the amount received from your husband is less than the entire fee and expenses, you will be liable for the difference.

I will keep you informed as to the status of your case, and agree to explain the laws pertinent to your problem, the available course of action, and the attendant risks. I will notify you promptly of any developments in your case, and will be available for meetings and telephone conversations with you. Copies of all papers will be supplied to you as they are prepared, and if there is a charge for these materials it will be included in your monthly bill.

Neither of us will make any agreement or settlement without the knowledge or consent of the other.

There is to be no change or waiver of any of the provisions of this agreement unless in writing signed by both of us.

If the foregoing correctly sets forth our agreement, please confirm to that effect.

YOUR ATTORNEY

APPENDIX K

RETAINER AGREEMENT

(as written by Deirdre Akerson)

This agreement sets forth our understanding and terms concerning your retention of.....ESQ., as your legal representative in a present or prospective matrimonial action or proceeding, inclusive of the negotiation, preparation, and execution of a separation agreement and a consequent inquest for divorce. It is understood that this representation shall also include any and all negotiations, motions, preparations, and Court representation in any custodial issues that may arise.

In connection with the above services, which shall be inclusive of such Court appearances as may be required in Supreme Court and/or Family Court, an initial retainer in the sum of.....is required.

This initial retainer shall be applicable as against an hourly rate of.....which shall apply to any and all services rendered in this regard, inclusive of conferences, correspondence, motions, court appearances, trial or hearing preparation, and telephone conversations.

It is understood that.....ESQ., will be in charge of, and responsible for, the administration of this matter. However it may be assigned to an associate for day to day work, including telephone calls and miscellaneous paperwork. Services performed by an Associate will be charged at the rate of.....per hour.

In the event that the case is withdrawn, settled, or that this retainer fee is not fully utilized, the excess money shall be refunded to you immediately.

You will be given detailed and itemized monthly statements of legal services rendered, including the actual time expended and costs and disbursements incurred on your behalf.

Your telephone calls and correspondence will be answered in a courteous and timely fashion.

It is further specifically understood and agreed that the undersigned attorney will make every reasonable and appropriate effort to seek by agreement or, if necessary, by court order, payment of your attorney's fees and disbursements by your spouse. In the event that the undersigned is successful, in whole or in part, in the recovery of such monies, the undersigned attorney will refund to you the extent of such recovery.

It is further understood that your attorney will not ask you to sign a Confession of Judgement, nor place any liens on your property in order to secure legal fees.

It is further specifically understood and agreed that your attorney, or any member of his staff, will not enter into any agreement or understanding with anyone concerning this matter without your prior knowledge and consent. Your attorney will provide you with copies of all documents and correspondence in a timely fashion. You have

the right to read and review all papers to be filed with the Court prior to their filing. You will be notified by your attorney of the date, time and place of all Court hearings, conferences and trials, in a timely fashion. If the Court does not permit your attendance and participation at a conference, your attorney will advise you fully and in complete detail with regards to the matters discussed in conference. The undersigned attorney will enter into no agreements or understandings at such conferences without your prior knowledge and consent.

Further, the undersigned attorney may engage on your behalf, and with your prior consent, the services of such professionals as may be required. These may include accountants, real estate appraisers, psychological or psychiatric professionals and any other experts that may be required. Your attorney will make every reasonable effort to seek by agreement, or if necessary, by Court order, payment of your expert fees by your spouse.

You should be aware of the hazards of litigation and that despite your attorney's efforts on your behalf, there is no assurance of the outcome of this matter. Every effort will be made to expedite your case promptly and efficiently according to the highest legal and ethical standards.

APPENDIX L

MASSACHUSETTS DISCIPLINARY RULE

CLIENTS' FILES

DR 2-110. Withdrawal From Employment

(A) In General.

(4) An Attorney must make available to a former client, within a reasonable time following the client's request for his or her file, the following:

(a) All papers, documents, and other materials the client supplied to the attorney. The attorney may at his or her own expense retain copies of any such materials.

(b) All pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the attorney's actual cost for these materials, unless the client has already paid for such materials.

(c) All investigatory or discovery documents for which the client has paid the attorney's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The attorney may at his or her own expense retain copies of any such materials.

(d) If the attorney and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the attorney's work product (as defined in paragraph (f) below) for which the client has paid.

(e) If the attorney and the client have entered into a contingent fee agreement, the attorney must provide copies of the attorney's work product (as defined in paragraph (f) below). The client may be required to pay any copying charge consistent with the attorney's actual cost for the copying of these materials.

(f) For purposes of this Disciplinary Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the attorney or at the attorney's direction by his or her employee, agent, or consultant, and not described in paragraphs (b) or (c) above. Examples of work product include without limitation legal research, records of witness interviews,reports of negotiations, and correspondence.

(g) Notwithstanding anything in this Disciplinary Rule to the contrary, an attorney may not refuse, on grounds of nonpayment,

to make available materials in the client's file when retention would prejudice the client unfairly.

APPENDIX M

Proposed Amendment of Section 90, Subparagraph 10 of the Judiciary Law

10. (a) All papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law shall be sealed and be deemed private and confidential except that, on good cause shown, the Justices of the Appellate Division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged part or all of such papers, records and documents.

(b)(i) The Appellate Division of the Supreme Court in each department shall adopt rules governing the conduct of investigations preliminary to the filing of formal charges in a proceedingto suspend or disbar any attorney and counsellor at law. These rules shall afford respondent the right to answer personally the charges being investigated. No formal charges shall be filed in any such proceeding until it shall have been determined as a result of such preliminary investigation, as prescribed by the rules to be adopted by the Appellate Division, that probable cause exists for the assertion of formal charges.

(ii) Prior to the filing and service of formal charges, the proceeding shall be confidential, except that the pendency, subject matter and status of an investigation may be disclosed if:

(a) the respondent has waived confidentiality;

(b) the proceeding is based upon conviction of a crime: or

(c) the proceeding is based upon allegations that have become generally known to the public.

(iii) Upon the filing and service of formal charges, the proceeding shall be public, except for:

(a) deliberations of the hearing panel or committee, referee or court; and

(b) information with respect to which the hearing panel, committee, referee or court shall have issued a protective order upongood cause shown.

APPENDIX N

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Rule 3-120 Sexual Relations With Client.

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently inviolation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relatons between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

DISCUSSION:

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (citations omitted). Where attorneys exercise under influence over clients or take unfair advantage of clients, discipline is appropriate. (citations omitted). In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600).

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.

APPENDIX O

(ABA standing Committee on Ethics and Professional Responsibility, Formal Opinion 92-364, 7/6/92)

SEXUAL RELATIONSHIP WITH CLIENT

Lawyer's sexual relationship with client, while not expressly prohibited by ethics rules, so greatly jeopardizes lawyer's ability to represent client effectively that violations of several ethics rules may result.

(ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 92-364, 7/6/92)

Digest of Opinion: The Committee has been asked whether a lawyer violates the Model Rules of Professional Conduct or the Model Code of Professional Responsibility by entering into a sexual relationship with a client during the course of representation. The Committee concludes that because of the danger of impairment to the lawyer's representation associated with a lawyer-client sexual relationship, the lawyer would be well advised to refrain from such a relationship. If such a relationship occurs and the impairment is not avoided, the lawyer will have violated ethical obligations to the client.

No provision in either the Rules or the Code specifically addresses, let alone prohibits, sexual relationships between lawyer and client. However, there are several provisions of the Model Rules and Model Code that may be implicated by a sexual relationship.

First, because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that the sexual relationship will have resulted from exploitation of the lawyer's dominant position and influence and, thus, breached the lawyer's fiduciary obligations to the client. The factors leading to the client's trust and reliance on the lawyer also have the potential for placing the lawyer in a position of dominance, and the client in a position of vulnerability. The fiduciary obligation inherent in the lawyer's role is heightened if the client is emotionally vulnerable in a way that affects the client's ability to make reasoned judgments about the future. *See* rule 1.14(a). *Cf.* EC 7-12.

Thus, the more vulnerable the client, the heavier the obligation of the lawyer to avoid engaging in any relationship other than that of attorney-client. If the lawyer permits the client reliance and trust to become the catalyst for a sexual relationship, the lawyer may violate one of the most basic ethical obligations, *i.e.*, not to use the trust of the client to the client's disadvantage. *See* DR7-101(A) (3); Rules 1.7(b) and 1.8(a), (b); DRs 4-101(B) (2), 5-101; and EC 5-3.

The trust and confidence reposed in a lawyer can provide an opportunity for the lawyer to manipulate a client emotionally for the lawyer's sexual benefit. Moreover, the client may not feel free to rebuff unwanted sexual advances because of fear that such a rejection will either reduce the lawyer's ardor for the client's cause or require finding a new lawyer. Such an abuse of client trust, even though not explicitly prohibited by any ethical rule, would nonetheless be inconsistent with the fiduciary obligation reflected in both the Model Rules and the Model Code.

Second, one of the most important aspects of the attorney-client relationship is the attorney's duty to exercise independent professional judgment. Rule 2.1. A lawyer who engages in a sexual relationship with a client during the course of representation risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment.

Third, the lawyer's engaging in a sexual relationship with a client may create a prohibited conflict between the interests of the lawyer and those of the client. Rule 1.7(b) states that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's own interests. See also DR 5-101(A). If the lawyer's interests in the sexual relationship interfere with decisions that must be made for the client, the representation will have been impaired.

Fourth, client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship. The courts will not protect confidences given as part of a non-marital personal relationship. A blurred line between any professional and personal relationship may make it difficult to predict to what extent client confidences will be protected. Expectations of confidences will be forced to rest on ever shifting sands.

The client's consent to sexual relations alone will rarely be sufficient to eliminate the ethical danger. In many cases, the client's ability to give meaningful consent is vitiated by the lawyer's potential undue influence or the emotional vulnerability of the client.

APPENDIX P

THE PRINCIPLES OF MEDICAL ETHICS, 1986 EDITION

Section 2. A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.

1. The requirement that the physician conduct himself with propriety in his/her profession and in all the actions of his/her life is especially important in the case of the psychiatrist because the patient tends to model his/her behavior after that of his/her therapist by identification. Further, the necessary intensity of the therapeutic relationship may tend to activate sexual and other needs and fantasies on the part of both patient and therapist, while weakening the objectivity necessary for control. Sexual activity with a patient is unethical.

APPENDIX Q

FEDERAL RULE 11

RULE 11. Signing of Pleadings, Motions and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statue, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
(As amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987).

APPENDIX R

WEST VIRGINIA STATUTE

DIVORCE, ANNULMENT AND SEPARATE MAINTENANCE §48-2-33

§48-2-33. Disclosure of assets required.

(a) In addition to any discovery ordered by the court pursuant to rule eighty-one of the rules of civil procedure, the court may, or upon pleadings or motion of either party, the court shall, require each party to furnish, on such standardforms as the court may require, full disclosure of all assets owned in full or in part by either party separately or by the parties jointly. Such disclosure may be made by each party individually or by the parties jointly. Assets required to be disclosed shall include, but shall not be limited to, real property, savings accounts, stocks and bonds, mortgages and notes, life insurance, health insurance coverage, interest in a partnership or corporation, tangible personal property, income from employment, future interests whether vested or nonvested, and any other financial interest or source. The court may also require each party to furnish, on the same standard form, information pertaining to all debts and liabilities of the parties. The form used shall contain a statement in conspicuous print that complete disclosure of assets and debts is required by law and deliberate failure to provide complete disclosure as ordered by the court constitutes false swearing. The court may on its own initiative and shall at the request of either party require the parties to furnish copies of all state and federal income tax returns filed by them for the past two years, and may require copies of such returns for prior years.

(b) Disclosure forms required under this section shall be filed within forty days after the service of summons or at such other time as ordered by the court. Information contained on such forms shall be updated on the record to the date of hearing.

(c) Information disclosed under this section shall be confidential and may not be made available to any person for any purpose other than the adjudication, appeal, modification or enforcement of judgment of an action affecting the family of the disclosing parties. The court shall include in any order compelling disclosure of assets such provisions as the court considers necessary to preserve the confidentiality of the information ordered disclosed.

(d) Upon the failure by either party timely to file a complete disclosure statement as may be required by this section, the court may accept the statement of the other party as accurate.

(e) If any party deliberately or negligently fails to disclose information which may be required by this section and in consequence thereof any asset or assets with a fair market value of five hundred dollars or more is omitted from the final distribution of property, the party aggrieved by such nondisclosure may at any time petition a court of competent jurisdiction to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children, if any, with the party in whose name the assets are held declared the constructive trustee, such trust to include such terms and conditions as the court may determine. The court shall impose the trust upon a finding of a failure to disclose such assets as required under this section.

(f) Any assets with a fair market value of five hundred dollars or more which would be considered part of the estate of either or both of the parties if owned by either or both of them at the time of the action, but which was transferred for inadequate considerations, wasted, given away or otherwise unaccounted for by one of the parties, within five years prior to the filing of the petition or length of the marriage, whichever is shorter, shall be presumed to be part of the estate and shall be subject to the disclosure requirement contained in this section. With respect to such transfers the spouse shall have the same right and remedies as a creditor whose debt was contracted at the time the transfer was made under article one-a [§40-1A-1 *et seq.*], chapter forty of this code. Transfers which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth.

(g) A person who knowingly provides incorrect information or who deliberately fails to disclose information pursuant to the provisions of this section is guilty of false swearing.

(1984, c.60; 1990, c.40; 1991, c. 45; 1992, c. 54.)

DATA

"Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomer"
By Marsha Garrison, Professor, Brooklyn Law School

FIGURE 1
PERCENTAGE DISTRIBUTION OF ASSET VALUES IN 1984 CONTESTED CASE SAMPLE

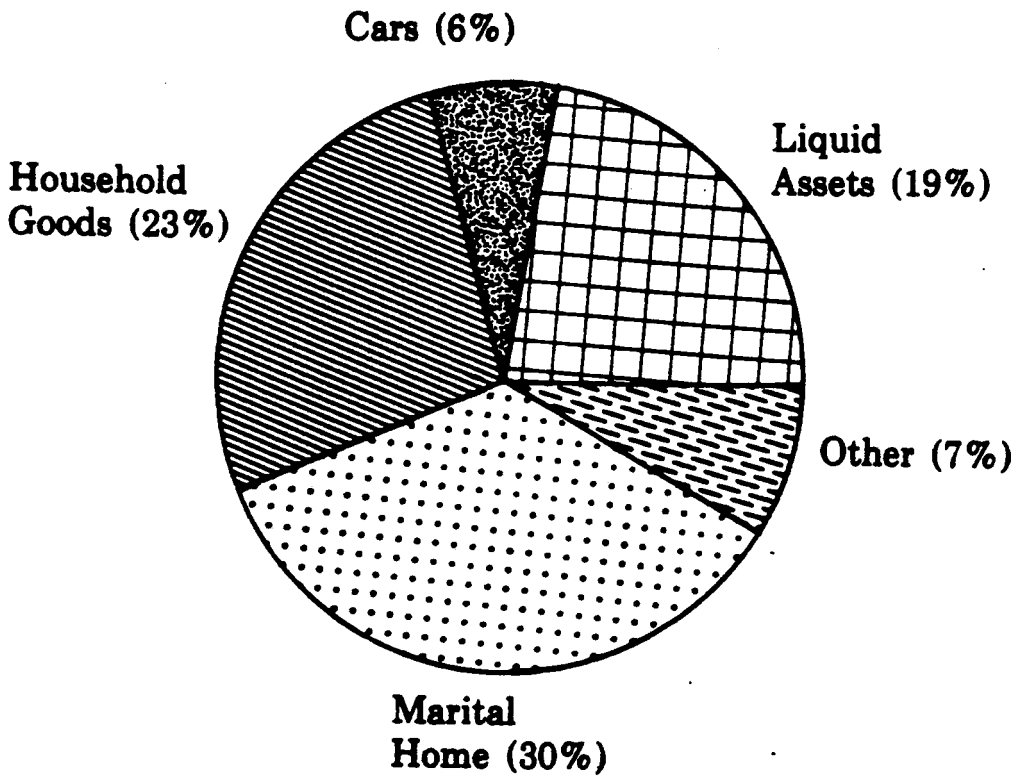

TABLE 1

PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE AWARDED ALIMONY, BY MARITAL DURATION, EMPLOYMENT STATUS, AND YEAR

Marital Duration and Employment Status	1978 %	1978 (n)	1984 %	1984 (n)	Difference
Unemployed wives married ≥ 10 years	67%	(61)	49%	(47)	−18
Unemployed wives married < 10 years	56%	(34)	50%	(32)	− 6
Employed wives married ≥ 10 years	40%	(115)	27%	(132)	−13*
Employed wives married < 10 years	30%	(54)	21%	(73)	− 9

* $p < .05$

[261] For employed wives, chi-square= 6.20315 D.F.=1; p=.0128. For unemployed wives, chi-square=2.80620 D.F.=1; p=.0939.

TABLE 2

PERCENTAGES OF WIVES IN CONTESTED CASE SAMPLE AWARDED ALIMONY, BY YEAR AND WIFE'S INCOME PERCENTAGE (WIFE'S INCOME/FAMILY INCOME)

Wife's Income/ Family Income	1978 %	1978 (n)	1984 %	1984 (n)	Difference
Less than 10%	68%	(101)	58%	(76)	– 10
10% - 29%	46%	(52)	31%	(49)	– 15
30% - 49%	24%	(59)	12%	(57)	– 12
50%+	21%	(19)	4%	(23)	– 17

TABLE 3

CHARACTERISTICS OF COUPLES IN 1984 CONTESTED CASE SAMPLE WHERE WIFE'S INCOME WAS NO MORE THAN 20% OF FAMILY INCOME, BY ALIMONY DECISION

	Awarded Alimony (n=46)	Not Awarded Alimony (n=38)
BEFORE DIVORCE		
Average Age (years)		
Husband	40.6	42.2
Wife	38.7	38.6
Average Income ($ per year)		
Husband	$68,489	$74,087
Wife	$ 2,479	$ 4,336
Per Capita	$25,052	$22,850
Average Marital Duration (years)	15.2	15.2
Average Net Worth	$25,868	$27,435
AFTER DIVORCE		
Average Child Support Award ($ per month)	$ 514	$ 378
Wife's Median Net Property Award	$14,510	$ 5,330
Average Per Capita Income		
Husband's Household	$47,306	$50,634
Wife's Household	$13,258	$ 4,367

NYS UNIFIED COURT SYSTEM

FAMILY COURT - 1992

CUSTODY CASES

	ORIGINAL FILINGS	SUPPLEMENTAL* FILINGS	TOTAL FILINGS	ORIGINAL DISPOSITIONS	SUPPLEMENTAL* DISPOSITIONS	TOTAL DISPOSITIONS	PENDING CASES
TOTAL STATE	72,212	36,812	109,024	71,520	35,363	106,883	26,014
N Y C	20,960	5,887	26,847	20,507	5,783	26,290	5,698
UPSTATE	51,252	30,925	82,177	51,013	29,580	80,593	20,316

NYS UNIFIED COURT SYSTEM
FAMILY COURT - 1992
SUPPORT AND USDL CASES*

	ORIGINAL FILINGS	SUPPLEMENTAL FILINGS	TOTAL FILINGS	TOTAL DISPOSITIONS	PENDING
TOTAL STATE	19,891	96,080	175,971	180,686	43,601
NYC	22,458	16,988	39,446	41,809	14,051
UPSTATE	57,433	79,092	136,525	138,877	29,550

*Uniform Support For Dependents Law

TABLE C

NYS UNIFIED COURT SYSTEM

SUPREME/CIVIL

1992

OF NEW CASES FILED

	NEW CASES (RJI FILED)	CONTESTED MATRIMONIALS	CONTESTED MATRIMONIALS As % of TOTAL FILINGS	UNCONTESTED MATRIMONIALS	ALL MATRIMONIALS as % of TOTAL FILINGS
TOTAL STATE	172,347	14,256	8%	51,193	40%
N Y C	80,128	2,922	4%	23,977	36%
UPSTATE	92,219	11,334	12%	27,216	42%

NYS UNIFIED COURT SYSTEM

SUPREME/CIVIL

NEW CASE FILINGS

1992

LOCATION	CONTESTED MATRIMONIALS	UNCONTESTED MATRIMONIALS	TOTAL MATRIMONIALS
ALBANY	136	703	839
ALLEGANY	74	121	195
BROOME	141	637	778
CATTARAUGUS	100	114	214
CAYUGA	81	198	279
CHAUTAUQUA	184	326	510
CHEMUNG	53	325	378
CHENANGO	40	214	254
CLINTON	66	227	293
COLUMBIA	35	204	239
CORTLAND	26	160	186
DELAWARE	23	120	143
DUTCHESS	174	738	912
ERIE	1,745	1,670	3,415
ESSEX	29	93	122
FRANKLIN	32	142	174
FULTON	51	161	212
GENESEE	58	118	176
GREENE	21	125	146
HAMILTON	0	0	0
HERKIMER	82	160	242
JEFFERSON	172	397	569
KINGS	802	3,851	4,653
LEWIS	27	36	63
LIVINGSTON	91	149	240
MADISON	73	169	242
MONROE	913	1,834	2,747
MONTGOMERY	51	94	145
NASSAU	1,187	4,256	5,443

LOCATION	CONTESTED MATRIMONIAL	UNCONTESTED MATRIMONIAL	TOTAL MATRIMONIAL
NEW YORK	685	14,249	14,934
NIAGARA	396	439	835
ONEIDA	381	548	929
ONONDAGA	666	1,211	1,877
ONTARIO	118	242	360
ORANGE	359	692	1,051
ORLEANS	74	99	173
OSWEGO	151	266	417
OTSEGO	33	167	200
PUTNAM	62	192	254
QUEENS	844	2,691	3,535
RENSSELAER	75	494	569
RICHMOND	344	526	870
ROCKLAND	203	546	749
ST LAWRENCE	91	306	397
SARATOGA	165	535	700
SCHENECTADY	126	459	585
SCHOHARIE	22	79	101
SCHUYLER	11	93	104
SENECA	43	101	144
STEUBEN	136	335	471
SUFFOLK	1,335	2,745	4,080
SULLIVAN	55	277	332
TIOGA	25	151	176
TOMPKINS	68	243	311
ULSTER	161	488	649
WARREN	64	198	262
WASHINGTON	59	136	195
WAYNE	116	287	403
WESTCHESTER	593	2,218	2,811
WYOMING	52	121	173
YATES	29	57	86
BRONX	247	2,660	2,907
NYC	2,922	23,977	26,899
TOTAL STATE	14,256	51,193	65,449

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT

1992

UPSTATE SUPREME COURT JUDGE

A. INTAKE (EXCLUDE UNCONTESTED MATRIMONIALS)	MOTOR VEHICLE	MED. MAL.	OTHER TORT	CONTRACT	CONT. MAT	TAX CERT.	OTHER	TOTAL
1. NEW CASES	60		92	68	172	23	106	521
2. TRIAL NOTES OF ISSUE FILED	44		57	15	108	8	12	244
3. OTHER INTAKE	2		4	2		1	6	15
4. NEW CASE ASSIGNMENTS	60		92	71	172	23	106	524
5. INTERJUDGE TRANSFERS RECD.	30	3	58	26	9	12	19	157
6. OTHER INTAKE TO JUDGE	2		4	2		1	6	15

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT CONT'D

1992

UPSTATE SUPREME COURT JUDGE

B. OUTFLOW (EXCLUDE UNCONTESTED MATRIMONIALS	MOTOR VEHICLE	MED. MAL.	OTHER TORT	CONTRACT	CONT. MAT.	TAX CERT.	OTHER	TOTAL
FINAL DISPOSITIONS PRE-NOTE OF ISSUE								
7. FINAL DISPOSITIONS PRE-NOTE OF ISSUE	10		25	48	11	6	106	206
8. SETTLEMENTS PRE-NOTE OF ISSUE	7	1	19	13	5	13	9	67
FINAL DISPOSITIONS POST-NOTE OF ISSUE								
9. SETTLEMENTS POST-NOTE OF ISSUE	44		51	9	90	1	4	199
10. TRANSFERRED CPLR 325(D)	2		1	1			1	5
11. JURY VERDICTS AND NONJURY DECISIONS	4	1	3	2			4	14
12. MARKED OFF OR STRIKEN								
13. OTHER FINAL DISPOSITIONS	1		5	3	3	3	1	16
14. TOTAL DISPOSITIONS (#7 -#13)	68	2	104	76	109	23	125	507
15. DISPOSITIONS EXCEEDING S&G	12	1	5	1			3	22
16. INTERJUDGE TRANSFERS OUT	6		11	7	5	3	6	38

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT CONT'D

1992

UPSTATE SUPREME COURT JUDGE

	MOTOR VEHICLE	MED MAL.	OTHER TORT	CONTRACT	CONT. MAT	TAX CERT.	OTHER	TOTAL
C. PENDING END OF WEEK (EXCLUDE UNCONT MATS)								
17. PENDING DISPOSITIONS TOTAL	74	1	154	64	73	47	39	452
18. TRIAL NOTES OF ISSUE PENDING DISPOSITION	34		49	9	15	4	10	121
19. TRIAL NOTES OF ISSUE PENDING DISPOSITION BEYOND S&G	4		11	3			4	22

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT CONT'D

1992

UPSTATE SUPREME COURT JUDGE

	MON.	TUES.	WED.	THURS.	FRI.	SAT.	SUN.	TOTAL
D. JUDGE DAYS								
20. JUDGE DAYS	37	38	37	39	37			188
E. GENERAL INFORMATION								
21. APPEARANCES PRE-NOTE ISSUE	218	201	175	503	158			1,255
22. APPEARANCES POST-NOTE ISSUE	197	190	186	145	179			897
23. EX PARTE APPLICATIONS RECEIVED	20	22	21	15	25			103
24. HEARINGS COMMENCED (BY CASE)	4	1	2	1	1			9
25. DAYS OF HEARING	4	2	3	1	2			12
26. MOTIONS FILED	58	47	67	54	42			268
27. MOTIONS DECIDED	60	14	49	282	17			422
28. JURY TRIALS COMMENCED (BY CASE)	5	4	3	2	3			17
29. NONJURY TRIALS COMMENCED (BY CASE)		3	1		2			6
30. DAYS ON TRIAL	9	16	13	12	16			66
F. UNCONTESTED MATRIMONIAL CASES								
31. UNCONTESTED MATRIMONIALS FILED								176
32. UNCONTESTED MATRIMONIALS DISPOSED								172
G. COUNTY COURT SITTING AS APPELLATE COURT								
33. APPEALS DECIDED								

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT

1992

NEW YORK CITY SUPREME COURT JUDGE

	MOTOR VEHICLE	MED MAL.	OTHER TORT	CONTRACT	CONT. MAT.	TAX CERT.	OTHER	TOTAL
A. INTAKE (EXCLUDE UNCONTESTED MATRIMONIALS)								
1, NEW CASES					394			394
2. TRIAL NOTES OF ISSUE FILED					246			246
3. OTHER INTAKE					42			42
4. NEW CASE ASSIGNMENTS					394			394
5. INTERJUDGE TRANSFERS RECD					72		1	73
6. OTHER INTAKE TO JUDGE					42			42

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT CONT'D

1992

NEW YORK CITY SUPREME COURT JUDGE

	MOTOR VEHICLE	MED MAL.	OTHER TORT	CONTRACT	CONT. MAT.	TAX CERT.	OTHER	TOTAL
B. OUTFLOW (EXCLUDE UNCONTESTED MATRIMONIALS)								
FINAL DISPOSITIONE PRE-NOTE OF ISSUE								
7, FINAL DISPOSITIONS PRE-NOTE OF ISSUE					5			5
8. SETTLEMENTS PRE-NOTE OF ISSUE					5			5
FINAL DISPOSITIONS POST-NOTE OF ISSUE								
9. SETTLEMENTS POST-NOTE OF ISSUE					3			3
10. TRANSFERRED CPLR 325(D)								
11. JURY VERDICTS AND NONJURY DECISIONS					172			172
12. MARKED OFF OR STRICKEN					58			58
13. OTHER FINAL DISPOSITIONS					21			21
14. TOTAL DISPOSITIONS (#7 - #13)					264			264
15. DISPOSITIONS EXCEEDING S &G					35			35
16. INTERJUDGE TRANSFERS OUT					24			24

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT CONT'D

1992

NEW YORK CITY SUPREME COURT JUDGE

	MOTOR VEHICLE	MED MAL.	OTHER TORT	CONTRACT	CONT. MAT.	TAX CERT.	OTHER	TOTAL
C. PENDING END OF WEEK (EXCLUDE UNCONT MATS)								
17. PENDING DISPOSITIONS TOTAL					1,410		6	1,416
18. TRIAL NOTES OF ISSUE PENDING DISPOSITION					189			189
19. TRIAL NOTES OF ISSUE PENDING DISPOSITION BEYOND S&G					23			23

NEW YORK STATE UNIFIED COURT SYSTEM

CIVIL CASE ACTIVITY REPORT CONT'D

1992

NEW YORK CITY SUPREME COURT JUDGE

	MON.	TUES.	WED.	THURS.	FRI.	SAT.	SUN.	TOTAL
D. JUDGE DAYS								
20. JUDGE DAYS	35	41	41	42	37			196
E. GENERAL INFORMATION								
21. APPEARANCES PRE-NOTE OF ISSUE	339	390	341	362	134			1,566
22. APPEARANCES POST-NOTE OF ISSUE	245	313	303	362	65			1,288
23. EX PARTE APPLICATIONS RECEIVED	265	258	288	287	238			1,336
24. HEARINGS COMMENCED (BY CASE)	36	51	46	46	13			192
25. DAYS OF HEARING	20	29	26	26	12			113
26. MOTIONS FILED	148	143	159	175	68			693
27. MOTIONS DECIDED	148	151	149	172	50			670
28. JURY TRIALS COMMENCED (BY CASE)	2	1						3
29. NONJURY TRIALS COMMENCED (BY CASE)	4	3	2	4	1			14
30. DAYS ON TRIAL	21	21	19	18	12			91
F. UNCONTESTED MATRIMONIAL CASES								
31. UNCONTESTED MATRIMONIALS FILED								29
32. UNCONTESTED MATRIMONIALS DISPOSED								54
G. COUNTY COURT SITTING AS APPELLATE COURT								
33. APPEALS DECIDED								