NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

COMMITTEE ON CHILDREN AND THE LAW

KAREN FISHER GUTHEIL
Chair
Legal Aid Society Juvenile Rights Practice
199 Water Street, 3rd Floor
New York, NY 10038
212/577-3389
FAX 646/616-4389
kfgutheil@legal-aid.org

May 21, 2013

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Proposed amendment of 22 NYCRR § 202.16(g), relating to enhanced expert disclosure in contested matrimonial actions

Dear Mr. McConnell:

On behalf of the New York State Bar Association Committee on Children and the Law, I write to express our disapproval of the Office of Court Administration's proposed amendment of 22 NYCRR § 202.16(g), relating to enhanced expert disclosure in contested matrimonial actions as described in your March 18, 2013 memorandum. These comments are solely those of the Committee on Children and the Law and do not represent the position of the New York State Bar Association.

We strongly believe that the enactment of these amendments would lead to substantially greater cost and delay in reaching resolution in these matters, which is rarely in the best interests of children. The amendments would be financially burdensome to the government and place less-monied litigants at a serious disadvantage. The effect would be the creation of separate tiers of justice for well-off litigants and those without resources.

Finally, the amendments fail to make it clear that the provisions would apply to all counsel, including the Attorney for the Child.

Based upon our review of the proposed amendments, we cannot support this proposal.

Sincerely,

Karen Fisher Gutheil

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

NYSBA

Memorandum in Opposition

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #4 May 22, 2013

Proposed Rule 202.16(g) By: OCA's Matrimonial Practice Advisory Committee

A PROPOSAL to amend New York Uniform Civil Rules §202.16(g), in relation to the deposition of expert witnesses.

RULE & SECTION OF LAW REFERRED TO: 22 NYCRR §202.16(g) and CPLR §3101(d)

THE PROPOSED RULE IS OPPOSED

The proposed amendments to Uniform Civil Rule §202.16(g) ("Proposal") would add four new subdivisions to expand expert reports and permit the deposition of expert witnesses in matrimonial actions. In its current form, Rule 202.16(g) only sets the deadline for responses to demands for expert information pursuant to CPLR 3101(d) and provides for written reports from any expert witness a party expects to call during trial. If enacted, the Proposal would permit the deposition of experts who are expected to testify at trial; require certain content in the written reports to be exchanged between the parties and filed with the court; prevent the filing of a note of issue and certificate of readiness until the completion of expert disclosure; and preclude the use of untimely expert disclosure at trial, except for good cause.

The Proposal is new, and purports to expand upon CPLR §3101(d)(1).

The Proposal is opposed for the following reasons.

First, the Proposal contradicts CPLR §3101(d), the statute regulating expert discovery. CPLR §3101(d)(1)(i) limits the disclosure of experts to the identification of each expert, the subject matter upon which each expert is expected to testify, the substance of the facts and opinions upon which each expert is expected to testify, and the qualifications of each expert. CPLR §3101(d)(1)(iii) further restricts expert disclosure by requiring the party seeking additional discovery to obtain a court order after a showing of special circumstances, which is subject to court-imposed restrictions concerning scope as well as fees and expenses. There is a significant body of case law already governing the 'special circumstances' requirement – the burden the applying party must meet before the Court can authorize a deposition of the expert witness. Under the statute, it is the Justice deciding the particular case, not the Chief Administrative Judge, the Administrative

Board of the Courts or the Office of Court Administration, who must determine whether expert witnesses should be deposed.

Simply put, the Proposal contradicts a specific statutory mandate and, thus, is outside the rulemaking authority bestowed upon the Chief Administrative Judge. *See Harbolic v. Berger*, 43 N.Y.2d 102, 109 (1977); *Sciara v Surgical Assoc. of W. N.Y., P.C.*, 104 A.D.3d 1256, 1257 (4th Dep't 2013); *City of New York v. Stone*, 11 A.D.3d 236, 237 (1st Dep't 2004); and *Motor Vehicle Mfrs. Asso. v. State*, 146 A.D.2d 212, 220 (3d Dep't 1989). To the extent there is momentum to permit routine deposition of experts, CPLR 3101(d) itself must be amended. Commercial actions, with higher stakes and deeper pockets, not matrimonial proceedings, would be the logical place to start. *See* John W. McConnell, Esq., "Proposed New Uniform Rule of the Commercial Division Relating to Enhanced Expert Disclosure," April 26, 2012, http://www.nycourts.gov/rules/comments/PDF/expert-disclosure-rule-pc-packet.pdf.

Second, and what many Committee members consider to be of greater concern, is the potential cost to litigants as well as abuse by parties and their attorneys that deposing experts would entail. By opening the door to expert discovery, the Proposal has as great a likelihood of encouraging continued litigation as it does of encouraging settlement, at further cost to the marital estate. The Proposal also invites additional motion practice over issues such as the payment of counsel and expert fees, and puts the non-monied spouse at a potentially greater disadvantage while he or she awaits a ruling on who will pay for expert depositions.

Third, the Proposal subjects divorcing parties to an additional layer of discovery that could be used by the litigants and attorneys to prolong the final determination of an action. While the Proposal contemplates an additional four months for expert disclosure, in practice, that timeframe could become substantially longer as a result of the increased number of applications for legal fees and for expert depositions in custody cases.

Fourth, the Proposal affords no guidance on how the "issues are [to be] vetted prior to trial." (March 8, 2013 cover letter from Hon. Sharon S. Townsend, at 2.) Given that under existing Rule 202.16(g)(2) an expert report is required and that "[i]n the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case," it remains unclear why expert depositions are needed. (Even the existing Rule 202.16(g) could be considered an impermissible expansion of CPLR 3101(d) to the extent it purports to expand on the expert disclosures required by that statute.) In custody disputes, issues raised in the forensic report could be addressed by the parties before deposition or trial ever occurs. Most importantly, any delay resulting from depositions could be contrary to the best interests of the child – particularly where there are issues of parental alienation or child abuse.

Fifth, the separation of 'fact discovery' and 'expert discovery' in the Proposal, and the addition of four months to complete expert disclosure, should not be formalized by rule. Many courts already bifurcate custody proceedings from fact proceedings, but that should be done on a case-by-case basis.

Sixth and finally, in upstate jurisdictions, expert reports are generally discussed with litigants and then subject to settlement conferences. Some upstate courts will additionally allow a second expert to review the first's expert's report (although not the first's expert's notes.) Thus, here again, allowing depositions of experts will to prolong the litigation and increase the cost to the litigants.

For the foregoing reasons, the Committee on Civil Practice Law and Rules **OPPOSES** the proposed rule.

The Person Who Prepared the Memorandum: R. Kenneth Jewell, Esq.

Chair of the Committee: Robert P. Knapp, III, Esq.

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Opposition

FAMILY LAW SECTION

FLS #1 May 22, 2013

PREPARED BY FAMILY LAW SECTION COMMITTEE ON LEGISLATION

Proposed Rule 202.16(g) By: OCA's Matrimonial Practice Advisory Committee

A PROPOSAL to amend New York Court Rule § 202.16(g) in relation to depositions of expert witnesses.

RULE & SECTION OF LAW REFERRED TO: 22 NYCRR 202.16(g) and CPLR 3101(d)

THE PROPOSED RULE IS OPPOSED

The proposed amendments to Rule 202.16(g) ("Proposal") would add four new subdivisions to permit depositions of expert witnesses in pending matrimonial actions. In its current form, Rule 202.16(g) only provides a timeline for any responses to demands for expert information in addition to a timeline for written reports from any expert witness a party expects to call during trial. If enacted, the Proposal would permit depositions of experts who are expected to testify at trial, require certain content in the written reports that would be exchanged between the parties and filed with the court, and prevent the filing of a note of issue and certificate of readiness until the completion of expert disclosure and/or preclude expert disclosure if the proposed timeline is not timely complied with.

The Proposal is new, and expands upon CPLR 3101(d)(1).

The Proposal opposed for the following reasons.

First, and what many Committee members consider to be of great concern, is the potential cost to litigants as well as abuse by parties and their attorneys that deposing experts would provide under the Proposal. Indeed, the Proposal provides opportunity to a party to continue advocating positions that are entirely unreasonable and unsupported by law – at substantial cost of the marital estate. Thus, the Proposal has as great a likelihood of encouraging continued litigation as it does settling the action. Also, the Proposal invites additional motion practice over issues such as the payment of counsel and expert

fees, and puts the non-monied spouse at a potentially greater disadvantage while they wait for a decision on whether the resources to fund the preparation and taking of expert depositions will become available.

Second, the Proposal subjects divorcing parties to an additional layer of discovery that could be used by attorneys and/or the litigants to unnecessarily prolong the final determination of an action. To be clear, while the Proposal contemplates an additional four months to an action, in practice, that timeframe could become substantially longer when considering the impact the increased number of applications for legal fees and/or requests for expert depositions in custody cases will have on a court's docket.

Third, the Proposal runs afoul of CPLR § 3101(d), the statute regulating the discovery of experts. CPLR § 3101(d)(1)(i) limits the disclosure of experts to the identification of each expert, the subject matter upon which each expert is expected to testify, the substance of the facts and opinions upon which each expert is expected to testify, and the qualifications of each expert. CPLR § 3101(d)(1)(iii) further restricts expert disclosure by requiring the party seeking additional discovery to obtain a court order after a showing of special circumstances which is, in any event, subject to court-imposed restrictions concerning scope as well as fees and expenses. There is a significant body of case law already governing the 'special circumstances' requirement – a burden the applying party must meet before the Court can authorize a deposition of the expert witness. Thus, it is respectfully submitted that the Proposal contradicts a specific statutory mandate and, thus, is outside the rulemaking authority bestowed upon the Office of Court Administration. *See Harbolic v. Berger*, 43 N.Y.2d 102, 109 (1977); *Sciara v Surgical Assoc. of W. N.Y., P.C.*, 104 A.D.3d 1256, 1257 (4th Dep't 2013); *City of New York v. Stone*, 11 A.D.3d 236, 237 (1st Dep't 2004); and *Motor Vehicle Mfrs. Asso. v. State*, 146 A.D.2d 212, 220 (3d Dep't 1989).

Fourth, the Proposal neither identifies nor otherwise provides any guidance on how "issues are [to be] vetted prior to trial." At the outset, the proposal explicitly provides that any drafts of these reports are not discoverable. Given that an expert's trial testimony is limited to the statements contained in their report, and that an expert's notes can be subpoenaed by a party seeking clarification of said report, it remains unclear why expert depositions are needed, particularly if a court rule is adopted in the future requiring the expert's notes to be provided to counsel well before a scheduled trial in the action – something which we urge OCA to consider. In custody disputes, significant waste can occur because the issues raised in the forensic report could likely be addressed by parties before a deposition or trial ever occurs. Most importantly, any extension that results from depositions could end up being contrary to the best interests of the child or children involved – particularly where there are issues of parental alienation or child abuse.

Fifth, the references to 'fact discovery' and 'custody discovery' contained in the Proposal have no relation to each other. Consequently, the provision which tags 'custody discovery' to four months after completion of 'fact discovery' does not seem to have any basis. Many courts, in any event, already bifurcate custody proceedings from fact proceedings.

Finally, in upstate jurisdictions, expert reports are generally discussed with litigants and then subject to settlement conferences. Some upstate courts will additionally allow a second expert to review the first's expert's report. Thus, here again, allowing depositions of experts to proceed will only serve to prolong the litigation and increase the cost of prosecuting and defending the action to litigants.

Based on the foregoing, the Family Law Section Committee on Legislation **OPPOSES** the proposed rule.

Memorandum prepared by:	R. Kenneth Jewell, Esq.
Co-Chairs of the Committee:	Benjamin E. Schub, Esq., Richard B. Alderman, Esq., Joan Warren, Esq., Alan R. Feigenbaum, Esq.
Chair of the Section:	Pamela M. Sloan, Esq.

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Briana Denney, Esq., Co-Chair

Dror Bikel, Esq., Co- Chair
Matrimonial Law Section
New York County Lawyers' Association
14 Vesey Street
New York, NY 10007

May 20, 2013

Comments from the New York County Lawyers' Association Matrimonial Law Section Regarding the Proposed Amendment of 22 NYCRR § 202.16(g)

The Matrimonial Law Section of the New York County Lawyers' Association (the "Section")1 submits these comments on the proposed amendment to 22 NYCRR § 202.16(g) regarding expert disclosure ("Proposed Rules").

While the Section favors open and fair trials in all matters, there is no basis provided in the Proposed Rules as to why experts in matrimonial litigation should be treated differently from experts appearing in general civil litigation. The only rationale set forth by the Matrimonial Practice Advisory Committee ("MPAC") is that the Proposed Rules are "necessary to assure fairness in today's increasingly complex litigation." All civil litigation is increasingly complex; this complexity is not limited to matrimonial practice. The Section also has significant concerns with minimizing the burden to depose an expert in matrimonial actions, as seemingly would be the case under the Proposed Rules.

First, the language is unclear as to whether the Proposed Rules present a shift in burdens on parties seeking to depose an expert and whether the burden on financial experts varies from that of custody experts. Paragraph (3) indicates that the party opposing such a deposition "shall raise the objection." However, it goes on to state that the court will rule upon whether "an expert should be compelled to submit to a pretrial deposition," seemingly indicating that there is a motion before the court to compel such disclosure made by the party seeking such disclosure. The Proposed Rules then state that an application is required for depositions in custody-related matters. Based on these conflicting paragraphs, it is unclear (1) if the rules are changing the current law regarding expert depositions in matrimonial matters, (2) where the burden lies for such disclosure, and (3) what the proper procedure is for seeking or objecting to such disclosure. The Section recommends that expert depositions be the exception, not the rule, and that the rules be amended to clarify that the burden always lies with the party seeking such depositions. Additionally, it should be the same standard for depositions of custody experts and non-custody experts.2

In addition to the Proposed Rules' ambiguity as to the burden, it seems unjust for the court to create differing standards for custody experts in Supreme Court and Family Court. Since the proposed rules do not apply to the Family Courts, the rules would create two separate standards in two separate courts for the same cases, namely, custody. Such a discrepancy would undoubtedly result in forum shopping with the more monied parent – more able to afford extensive and prolonged litigation and depositions – to choose to litigate custody in Supreme

---

1 The views expressed are those of the Matrimonial Law Section only, have not been approved by the New York County Lawyers' Association Board of Directors and do not necessarily represent the views of the Board.

2 It should be noted that some Section members favored the right to be able to depose experts. However, due to the confusion generated by the language in the Proposed Rules regarding standards between neutral and court-appointed experts and custody and non-custody experts, consensus was not reached about whether the Proposed Rules, in the current form, should be implemented and if not, what changes should be made.

Court and the non-monied parent more likely to choose Family Court. If enacted, the rules must be universal as to experts in both courts.

Along with the conflicting procedures and ambiguity, the Section is especially concerned with the potential for abuse of depositions and the escalating costs of matrimonial litigation should the burden for deposing experts be minimized. Under the current law and rules, depositions of experts in matrimonial matters are a rare event.3 It is feared that if the Proposed Rules are enacted, deposing an expert will no longer be an exception, but will in fact become the rule for practitioners. While preparing for and conducting depositions are not an issue for wealthier matrimonial litigants, should depositions become regular practice, they will have the inherent effect of prolonging matrimonial litigations and driving up costs, thereby unfairly prejudicing a less monied spouse. More expert fee applications will be necessitated, thereby increasing counsel fees and the work required by the court, which is already overburdened. Furthermore, since it is rarely the case that all expert and attorney fees of the less monied spouse are paid in full even when applications are made to and granted by the court, making depositions more readily available will provide the monied spouse with an additional tool to leverage the less monied spouse into settling matters prior to trial. Such effect would equate to financial coercion, unless the court somehow ensures fees for the less monied spouse are more readily available.

It must also be acknowledged that, in addition to the increasing costs of litigation to the parties, the Proposed Rules would also increase the costs to the State and City governments in cases where 18-B attorneys and forensic evaluators paid for by the government are participating. This should factor into the determination of whether to enact the Proposed Rules, especially in light of the recent court system cut backs and belt tightening.

If, ultimately, the determination is made to enact the Proposed Rules and make depositions more available, there should be strict time limits placed on the duration of such depositions, especially in the case of neutral, court-appointed experts, who will not be able to perform the work they have been ordered to perform by the court if they are engaged in days-long depositions.

The Section, however, does recommend that OCA proceed with one element of the Proposed Rules, namely, requiring more extensive details in reports from retained experts. More complete and detailed reports can only be beneficial to ensuring all relevant facts are brought to light in matrimonial litigation.

For the reasons described above, it is the recommendation of the Section that pretrial depositions of experts remain the exception rather than the rule in New York State. A presumption against expert depositions should, therefore, be maintained, unless a court finds compelling evidence to the contrary.

---

3 Indeed, prevailing case law in the First and Second Departments does not permit<u>any</u> discovery in regards to custody and visitation. The ability to depose a forensic parenting expert is contradictory to the prevailing rule of law.

NASSAU COUNTY BAR ASSOCIATION

T: 516.747.4070
F: 516.747.4147

15th & West Streets
Mineola, NY 11501

info@nassaubar.org
www.nassaubar.org

May 21, 2013

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004

Dear Mr. McConnell,

The Board of Directors of the Nassau County Bar Association was presented with a Resolution of the Matrimonial Law Committee of the Association at its May 14, 2013 meeting. The enclosed resolution was unanimously passed.

We thank you in advance for your kind attention and your consideration of our Association's position.

Sincerely,

Marian C. Rice, Esq.
President

enc.

NASSAU COUNTY BAR ASSOCIATION

RESOLUTION PROVIDING COMMENT TO THE OFFICE OF COURT ADMINISTRATION ON THE ISSUE OF ENHANCED EXPERT DISCLOSURE IN CONTESTED MATRIMONIAL MATTERS

The Matrimonial Law Committee of the Nassau County Bar Association ("The Committee") having asked the Nassau County Bar Association ("NCBA") to respond to the Office of Court Administration's ("OCA") request for comment on the issue of enhanced expert disclosure in contested matrimonial matters, has considered the issues at hand and has undertaken a review of the proposal submitted by the Matrimonial Practice Advisory Committee ("MPAC") as presented by OCA for consideration. That proposal is attached.

The proposal would amend 22 NYCRR § 202.16(g) to expand disclosure beyond what is currently permitted by rule and case law in matrimonial matters, including providing for specifics as to the expert's qualifications; history of case testimony; compensation; statements of all opinions, facts and data considered; exhibits to be used; as well as providing for pre-trial depositions. Notably, expert depositions and other disclosure on custody related issues, as in the past is still subject to restriction, but an application to the court may now be specifically made to seek such relief where before it was extremely limited if not actually prohibited by case law. The MPAC believes that the proposal is necessary to ensure fairness in today's increasingly complex litigation and will also promote uniformity

The following issues have also been considered in coming to a recommendation on the proposal:

1. The proposed rule basically provides for greater detail in expert reports and in certain

cases requiring the expert to submit to a pretrial deposition. The proposed rule in part stems from the federal rules which provide much broader pretrial disclosure from experts than does New York State, and from various proposals regarding expert disclosure that have been approved by the NYS Bar Association for the Commercial Parts in New York State.

2. The consensus is that the existing rule regarding exchange of expert reports is not sufficient and fails to require sufficient guidelines for what constitutes a proper expert report.

3. Not only is 22 NYCRR §202.16(g) insufficient, but CPLR 3101(d)(1), also dealing with expert disclosure is similarly deficient. For example, CPLR § 3101(d)(1) speaks of "reasonable detail" in response to a demand under that section. What constitutes "reasonable detail" has engendered a great deal of litigation, and the rule has been interpreted so as not to require in the summary of the expert's testimony "fundamental factual information upon which the expert's opinions were made". (*Richards v. Herrick*, 292 AD2d 874 [4th Dept. 2002]).

4. It is the belief of many who have litigated cases in other jurisdictions where pretrial disclosure of experts is broader, even to the extent of depositions of experts witnesses (e.g., Florida), that (a) trial by ambush is obviated; and (b) generally, the more each party knows about the other party's case, the greater the likelihood of settlement.

AND the Committee having provided the NCBA with the text of the proposal which is subject to OCA's request to comment as well as OCA's Memorandum dated March 18, 2013 requiring such comment by May 22, 2013;

AND the Committee having advised the NCBA that it recommends adoption of the MPAC proposal for the reasons stated.

NOW PURSUANT to the Committee's recommendation therefore, be it

RESOLVED that the NCBA hereby provides its Comment to OCA and recommends that the proposal of the Matrimonial Practice Advisory Committee for enhanced expert disclosure in contested matrimonial actions be adopted.

May 14, 2013

John W. McConnell, Esq, Council
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Dear Mr. McConnell,

The New York State Psychological Association (NYSPA) is the largest scientific and professional organization representing psychology in New York and is the state's largest association of psychologists. NYSPA's membership includes over 2,500 researchers, educators, clinicians, consultants and students. Through its divisions and affiliations with county psychological associations, NYSPA works to advance psychology as a science, as a profession and as a means of promoting human welfare. The Foundation of NYSPA's primary purpose is to increase public knowledge and understanding of psychology, the psychology profession and the science upon which mental health depends.

NYSPA has reviewed the recommendation of the Matrimonial Practice Advisory Committee (MPAC) that an amendment be adopted to 22 NYCRR 202.16(g) regarding Disclosure of Experts in contested matrimonial actions.

It is generally recognized that nearly 90% of child custody evaluations performed by independent court-appointed evaluators settle following completion of the report. The approximately 10% of cases that do go to trial most typically represent one or two litigant-parents who appear determined to take the matter all the way to trial, irrespective of continued adverse psychological impact on their child as well as the financial implications for themselves (which ultimately also impacts their child). NYSPA is concerned that the proposed additional step of a deposition will further add to "costs" --- both psychological and financial --- unless it can be shown that depositions in contested custody cases significantly reduce the likelihood of a subsequent trial.

NYSPA wishes to bring to your attention the following considerations.

Adverse effect on the child: Already the innocent victim of divorce and contested custody, the child, under the proposed rule change, would experience further anxiety and stress from an additionally prolonged period of uncertainty amidst intense parental conflict. NYSPA is unaware of any data or convincing research that shows that depositions result in fairer, less harmful custody disputes. However, there is much evidence linking the length and contentiousness of custody disputes to a wide range of problems in the child, such as:

- Negative emotions (i.e., fear, worry, sadness, etc.)
- Negative behaviors (i.e., disruptive behaviors at home and/or in school, drop in academic performance, fighting with peers, etc.)
- Negative thoughts (i.e., Who will take care of me?.....Where will I live?.....Why are Mommy and Daddy fighting all the time?.....etc.).

Adverse effect on the parents, which in turn creates a further adverse effect on the child: Under the proposed rule, the deposition would provide an additional forum for prolonged, intense parental conflict. The resultant anxiety and stress in the parent becomes transmitted to the child, eroding the parents' most significant responsibility as the child's primary source of safety, security and social support. This substantially increases the likelihood of significant negative impact on the child, as cited in the paragraph immediately above.

6 Automation Lane, Suite 103, Albany, NY 12205
Phone: (518) 437-1040 (800) 732-3922 Fax: (518) 437-0177 E-mail: nyspa@nyspa.org Web site: www.nyspa.org

Added costs for one or both parents, which ultimately also impacts the child: The added cost becomes an additional financial burden for families already under significant financial distress due to the impending divorce. Consider the following points:

- The added cost becomes a deterrent for parties truly needing a quality custody evaluation.
- Unless it can be demonstrated that the deposition process in a custody matter significantly reduces the likelihood of a trial, the expert will unnecessarily be providing similar testimony twice.
- Although the financially better-off parent may bear a proportionally larger share of the litigation expenses, the less advantaged parent may "give up" due to the ongoing accumulation of significant expenses, with the extra step of a deposition further adding to those expenses.
- With increased costs, there may be an increased likelihood of disenfranchising members of groups with fewer financial resources (i.e., women and minorities).

In addition to the above perspectives that concern both direct and indirect impact on the child, NYSPA wishes to express the following additional concerns regarding the amendment proposed by MPAC.

Ethical issues of privacy and confidentiality: The proposed rule would require the psychologist to list all other cases in which he/she has testified during the previous four years. Revealing names of previous clients for whom the psychologist performed a custodial evaluation appears to be an unnecessary violation of privacy. (While it is true that there is no confidentiality within any given evaluation, such previous clients should not have their names openly and unnecessarily exposed in matters that do not concern them.)

Misleading perspective on the evaluator's experience: The proposed rule would specifically require "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." There is no mention in the proposed rule about custodial evaluations that had been completed in which there was never any court testimony. Since approximately 90% of these cases settle after the evaluator's report and before trial, counting up "only" deposition or trial appearances can give a very misleading picture as to a psychologist's experience in conducting custody evaluations. NYSPA maintains that questions and concerns about an evaluator's experience and suitability can be raised and in fact are raised prior to appointment as an independent evaluator. Furthermore, any additional questions as to an evaluator's qualifications can be raised subsequently during trial, if the matter proceeds to trial.

Unnecessary information concerning the evaluator's compensation: The proposed rule would require "a statement of the compensation to be paid for the study and testimony in the case." NYSPA maintains that the specific amount of compensation paid is unnecessary information; the percentage of compensation paid by each party should suffice. Furthermore, it is generally accepted that psychologists who are engaged as expert witnesses are compensated for their time and expertise, not their testimony.

Unrealistic anticipation of issues to be raised during trial: The proposed rule states "The report must contain a complete statement of all opinions the witness will express and the basis and reasons for them." It is unrealistic to know all opinions that will be expressed in a future trial appearance, because a witness cannot know in advance all the questions that may be asked during any future questioning.

Thus NYSPA wishes to express its opposition to the amendment as currently proposed by MPAC.

At the same time, NYSPA wishes to express its interest and availability to work conjointly with the Administrative Board or MPAC toward the ultimate goal of ensuring fair trials while minimizing the difficulties for families and most especially children involved in the divorce process.

Sincerely,

Eric Neblung, PhD
President

NANCY S. ERICKSON, ESQ.
Brooklyn, NY

May 21, 2013

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th floor
New York, NY 10004

Re: Comments on OCA Proposed Amendments to 22 NYCRR 202.16(g) re enhanced expert disclosure in contested matrimonial actions.

Dear Mr. McConnell:

Thank you for the opportunity to comment on these proposed amendments. Because I have previously commented on the proposed amendments regarding access to custody evaluation reports, I will not repeat here my interest and expertise in issues regarding custody evaluations.

The issues addressed in the current proposed amendments are perhaps even more complicated than the issues addressed in the proposed amendments regarding access to custody evaluation reports, so I will start with a summary.

SUMMARY OF COMMENTS:

This Proposal deals with expert disclosure in contested matrimonial actions on two issues:

1. Financial Issues (child support, maintenance, equitable distribution)
2. Custody

With regard to expert disclosure concerning financial issues in divorce, there is no apparent reason not to support the proposed amendments. They would appear to encourage more efficient and effective disclosure on financial issues and could expedite the trial. However, I express no opinion on this matter.

With regard to expert disclosure concerning custody, however, the Proposed Amendment should not be promulgated at this time, for the reasons stated below.

The parts of the Proposed Amendment dealing with depositions of experts have problems that need to be ironed out before being promulgated.

A more important amendment concerning discovery of experts in custody cases -- which should be considered and promulgated as soon as possible -- is an amendment that would require full disclosure of the evaluator's entire file, including all underlying notes and test data.

COMMENTS:

Due Process

Preliminarily it should be emphasized that courts have two choices regarding the use of custody evaluators : (1) courts may chose not to use them (apparently most upstate judges do not use them), or (2) courts may chose to use them, in which case those courts must use them in ways that comport with Due Process and other constitutional and statutory mandates.

Currently, some courts use custody evaluators, but in the process there are many Due Process violations, such as a denial of the right to full disclosure of the evaluator's entire file, including all underlying notes and test data.

The Current Proposal

With regard to experts in child custody cases, there are at least three layers of statutes, cases, and court rules at the present time. The Proposal would add another layer. When those layers are analyzed, it appears that even the current legal situation with regard to experts in custody cases is unclear. That lack of clarity needs to be acknowledged (and, preferably, addressed) before another layer is added.

The first layer is CPLR 3101(d)1(i), which governs all disclosure in all cases. It simply provides that "upon request" by one side, the other is required to "identify each person whom the party expects to call as an expert witness at trial" and "shall disclose" the following:

- "the subject matter on which each expert is expected to testify"
- "the substance of the facts and opinions on which each expert is expected to testify,"
- "the qualifications of each expert witness," and
- "a summary of the grounds for each expert's opinion."

Second is the case law that has carved out an exception to disclosure in divorce cases (and, presumably, in family court custody cases) with regard to grounds and custody. Case law has created a distinction between upstate and downstate concerning disclosure in custody cases. Upstate, discovery is permitted regarding custody. Downstate it is not.

Perhaps this distinction is one reason why custody evaluators are used more downstate than upstate -- in essence, custody evaluators are being used downstate as a substitute for discovery on custody issues.

The fact that discovery is permitted upstate but not downstate regarding grounds and custody is longstanding and problematic. Commenting on the Court of Appeals case of Howard S. v. Lillian S., 14 NY3d 431(2010), Prof. Timothy Tippins has written:

> There has long been a divide between upstate courts, embraced by the Third and Fourth departments, and downstate courts in the First and Second departments with respect to the scope of disclosure in matrimonial actions. Simply stated, upstate courts allow disclosure on all issues, including grounds, while the downstate courts have categorically excluded disclosure on the issue of grounds. The Court of Appeals has now sided up with the restrictive view. This is beyond dubious.

Timothy M. Tippins, Restrictive Disclosure: An Egregious Usurpation New York Law Journal July 01, 2010.

Mr. Tippins noted in a footnote: "The same departmental divide exists with respect to disclosure in child custody litigation. The [Howard S. v. Lillian S.] decision does not in any manner address that question and should leave the upstate/downstate conflict as it stands."

Sooner or later, the upstate/downstate conflict on disclosure in custody litigation will have to be addressed either by the Legislature or by the courts -- preferably by the Legislature. However, the conflict exists at the present time and therefore needs to be considered by the OCA. One of the goals of the current Proposal appears to be a partial elimination of this conflict.

The third layer of statutes, cases, and rules regarding the issue of disclosure concerning experts in custody cases is the current version of 22 NYCRR.16(g),

which expands on CPLR 3101 in several ways (but only with regard to matrimonial and perhaps family law cases):

1. It gives a timeline for responding to demands for expert information (CPLR 3101 has no deadline); and

2. It requires each expert witness whom a party expects to call at the trial to file with the court a written report (again, deadlines are given); and

3. It provides that "except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial" (although it does not say that no other expert may be called later if a party discovers the need for another expert); and

4. It provides that "In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross examination;" and

5. It provides that "[i]n the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case."

The current version of 22 NYCRR 202.16 (g) seems to have been directed primarily at experts on financial issues. There are certain aspects of it that do not quite fit when applied to experts on custody matters.

For example, 22 NYCRR 202.16(g)(2) refers to "each expert witness whoa party expects to call at the trial...." (emphasis added). In many custody cases, however, the custody evaluator is the court's witness and is called by the court, not by a party. (It has been pointed out by scholars, including Prof. Timothy Tippins, that this is not proper procedure -- an expert should be called by a party and that party should do the direct examination of the expert, with the advserse party having the cross-examination of the expert. However, some judges continue to use this improper procedure).

Another provision in 22 NYCRR 202.16(g)(2) that does not quite fit with experts on custody matters, as opposed to experts on financial matters, is the provision permitting the court to decide that "written reports may be used to substitute for direct testimony at trial...." Reports by custody evaluators are replete with hearsay, and that hearsay should not be allowed into evidence. The expert should testify on

direct, and the report should not be allowed to substitute for the expert's direct examination.

As demonstated above, there is already some confusion as to discovery in custody cases, including use of custody evaluators as experts in custody cases. There is no uniformity statewide regarding discovery per se in custody cases -- upstate has one rule and downstate has another. But there is uniformity in the sense that throughout the state, by caselaw and by practice, custody evaluators may be appointed by the court to do a so-called "neutral" evaluation (no evaluation can possibly be totally neutral, because every human being has biases).

My research has not revealed enough about what happens upstate to know what a party can do to get a second evaluation if dissatisfied with the so-called "neutral" evaluator appointed by the court. My experience downstate has been that a judge will not allow a second evaluation by another evaluator, without a clear showing that the first evaluation was fatally flawed, and sometimes not even then. I do not know whether the practice is the same upstate.

Currently, it appears that the only way to effectively challenge the opinions of a court-appointed custody evaluator is by obtaining a review of the evaluation. The reviewer might have one of two roles -- either to assist the attorney to prepare cross-examination questions or to testify to try to discredit the court-appointed evaluator. See Tippins, T. "Testimonial and Nontestimonial Experts in Custody Cases," NYLJ November 04, 2008.

There is also a difference between upstate and downstate in that downstate there is a relatively new rule that requires that judges must use only custody evaluators who have been accepted onto the "Panel," absent a compelling reason to use a non-Panel evaluator.

Although there is no requirement by statute or in court rule 202.18 that evaluators on the Panel must be licensed psychiatrists, psychologists, or social workers, only members of those licensed professions are permitted to be on the Panel in the First and Second Departments. In other words, no matter how much expertise another professional has with regard to custody issues (e.g., an individual with a Ph.D. in Psychology who teaches at a university but is not licensed), that individual cannot be accepted onto the Panel.

Upstate, on the other hand, it appears that an evaluator need only be an expert as usually defined: that is, a person who is qualified by education, training, or

experience in the matter for which expert testimony is to be given. Upstate, therefore, theoretically many other professionals could conduct custody evaluations. For example, licensed professionals with master's degrees such as school psychologists and holders of the newly created licenses of "mental health counselor" and "marriage and family counselor" apparently could qualify, if they had the necessary education, training, and/or experience.

On top of this confusion in regard to experts in custody cases, the Proposal would place another layer of regulation. This layer seems unobjectionable (perhaps even good, but I will express no opinion on this) with regard to experts on financial matters. With regard to experts on custody matters, however, this layer of regulation does not appear to add anything beneficial and, in fact, raises new questions.

Paragraphs 3 through 6, which are proposed as additions to 22 NYCRR 202.16, would do the following.

Paragraph 3 would require that the parties confer on a schedule for expert disclosure "no later than 30 days prior to the completion of fact discovery...." This is confusing in light of the fact that, downstate, there is no "fact discovery" on custody.

Paragraph 3 also deals with depositions of experts, including depositions of custody evaluators. Currently in the First and Second Departments, in conformity with the general rule in those departments barring discovery in custody cases, depositions (which are a discovery tool) are not used in custody cases. Therefore, to my knowledge, depositions of custody evaluators are not conducted.

In fact, it is even difficult to obtain orders from some matrimonial and family court judges allowing an attorney to obtain the notes and raw data of the court-appointed custody evaluator. Although a recent Proposed Rule dealt with the issue of who should be allowed to have a copy of the custody evaluation, only conflicting caselaw now deals with the issue of whether a party, a party's attorney, or an Attorney for the Child is entitled to the notes and raw data of the evaluator.

The 2006 Matrimonial Commission came down squarely in favor of disclosure of such material, stating that "all underlying notes and test data, including raw test material, should be made available in discovery to counsel for the litigants, attorney for the child(ren), or a professional designated by counsel to review the material" (pp. 52-53, note 60).

Many experts in the field persuasively argue that to deny to a litigant the right to inspect the notes and other raw data of the custody evaluator would be a violation of Due Process. See, e.g., Tippins, T. "Forensic Custody Reports: Where's the Due Process?" NYLJ May 6, 2010; Tippins, T. "Due Process of Law or Dancing in the Dark?" NYLJ September 9, 2012 ; Martindale, D."Integrity and Transparency: A Commentary on Record-keeping in Child Custody Evaluations," J. Child Custody 1:1, 33-42 (2004); Yeamans, R. "Urgent need for quality control in child custody psychological evaluations," in DOMESTIC VIOLENCE, ABUSE AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES (M. Hannah & B. Goldstein, Eds.). Kingston, NJ: Civic Research Institute (2010).

Because the law on entitlement to the raw notes of the evaluator is unsettled, it would not make sense to promulgate a rule providing that the evaluator is subject to being deposed. A deposition could not be truly effective without a requirement that the evaluator be required to produce her or his notes and raw data.

Paragraph 3 of the Proposed Rule specifically refers to and attempts to regulate depositions of experts "on the issue of child custody, access, visitation, or abuse." That paragraph states:

> The party seeking the pretrial deposition<u>or other pretrial disclosure</u> from the other party's expert or the court appointed expert shall be entitled to such disclosure only upon application to the Court. In determining such application, the court shall consider, in addition to such factors as it deems fair, relevant and reasonable, the cost and time involved in the taking of an expert's deposition and the effect of such deposition upon a court-appointed expert's availability in future cases (emphasis added).

By inserting the phrase "or other pretrial disclosure," the Proposed Rule seems to be indicating that disclosure of the evaluator's notes and other raw data may be obtained only by application to the court and will be governed by the factors listed in the Proposed Rule. Such a major change in procedure regarding disclosure of the evaluator's notes and raw data certainly should not be hidden deep in a Proposed Rule that seems to be directed primarily to depositions; instead, it should be treated as the important -- indeed crucial -- issue that it is.

Regarding the issue of whether a deposition should be ordered in a particular custody case, the factors listed in the Proposed Rule are far from clear. There are two factors specifically listed: (1) "the cost and time involved in the taking of an expert's deposition" and (2) "the effect of such deposition upon a court-appointed

expert's availability in future cases." A judge faced with an application for a deposition of a custody evaluator would be hard pressed to determine how to rule on a deposition request based on those factors.

With regard to time, for example, a deposition will always take time. With regard to cost, the parent disfavored by the evaluator often might feel the need to pay any price he or she could muster to try to discredit the evaluator in a deposition. The favored parent usually would be dead set against a deposition.

The factor of "the effect of such deposition upon a court-appointed expert's availability in future cases" would be even more difficult for a judge to apply. From whom should the judge attempt to elicit information on "the effect of such deposition upon [the particular] court-appointed expert's availability in future cases"? The expert would likely indicate that he or she would refuse to conduct custody evaluations in the future if accepting such a role would open up the possibility of being deposed. Being cross-examined on the witness stand at trial is not usually a pleasant experience, and cross-examination at a deposition can be even more unpleasant than cross-examination at trial.

Paragraph 4 of the Proposed Rule lists what a report from an expert must contain. The10-year limit on publications authored should be omitted, because all publications should be revealed. Then the following should be added to the list:

1. All education and experience in the area on which the expert will be testifying and all memberships in professional organizations
2. If the expert holds a professional license from any state, the report must contain a statement listing any complaints filed against the licensee and the determination of the licensing board.

With those additions, the list may be appropriate with regard to financial experts (on this issue I express no opinion), but questions arise when applied to custody experts.

For example, proposed (g)(4)(i) states that the report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Some judges ask custody evaluators to give recommendations on custody and visitation, but others specifically indicate that they do not want recommendations. Presumably a recommendation would be considered to be an "opinion," but many other comments in custody evaluations could also be considered "opinions." Thus, this provision could invite litigation on whether the

report contains "the basis and reasons for" each and every lower-level opinion expressed therein. Clarification is needed.

Paragraph 5 of the Proposed Rule provides:

> It shall not be required that the report of an expert contain "drafts of any report" prepared prior to the completion and submission of the report submitted to the court, or communications between the party's attorneys and any witness required to provide an expert report.

This paragraph states that certain material is not required to be in the expert's report, but it does not indicate whether that material must be retained for possible later discovery.

It is unclear what the first part of that paragraph -- concerning "drafts" -- means and why it is being proposed. When an expert submits a final report, the expert would not submit all his or her drafts of the report. Counsel wanting to discredit the report might request, as part of discovery, any drafts of the final report that might be in the evaluator's file, but that would be at a later stage. Additionally, an evaluation might go through dozens of drafts, so is the proposed rule implying that the evaluator must retain each and every draft so all could be handed over later in discovery?

The second part of paragraph 5 states: "It shall not be required that the report of an expert contain ... communications between the ... attorney [for the party who intends to introduce expert testimony at trial] and any witness required to provide an expert report."

This seems to assume that the expert is not a so-called "neutral" appointed by the court but is an expert chosen by one party. Additionally, even assuming that the custody evaluator was chosen by one party and was being offered as an expert by that party, the evaluator would not normally discuss in the report any "communications between the ... attorney [for the party who intends to introduce expert testimony at trial] and [the expert] witness." With regard to "neutral" evaluators, in fact, many judges specifically state in their appointment orders that the custody evaluator may not speak with counsel in the case. Thus, the language in the second part of paragraph 5 would be unnecessary.

It is true that a party may want to offer testimony in a custody case from an expert other than a custody evaluator. For example, if a case involves allegations that a

parent is a substance abuser, a party might want to offer testimony by an expert on substance abuse and how it relates to childrearing. In such a case, all the rules (and proposed rules, if adopted) on expert witnesses would apply to the substance abuse expert. Normally an expert hired by one party would have in-depth communications with the attorney hiring him or her, and those communications would not be discoverable. Thus, it is unclear what, if anything, the second part of paragraph 5 would add. It would only confirm that those communications would not be discoverable.

Paragraph 6 of the Proposed Rule seems self-explanatory and unobjectionable.

In conclusion, the Proposed Rule raises more questions than it answers when applied to custody evaluators and other experts on custody issues. It should be limited to financial experts and then re-issued as a proposed rule on financial experts for further comments.

In the meantime, however, what is truly needed is a rule that would do what the Matrimonial Commission recommended seven years ago -- namely, a rule that would require full disclosure of the evaluator's entire file, including all underlying notes and test data.

Respectfully Submitted,

Nancy S. Erickson

Nancy S. Erickson, Esq.
J.D., LL.M., M.A. (Forensic Psychology)
[redacted]
Brooklyn, NY 11217

Friedman and Molinsek, P.C.

Attorneys and Counselors at Law

2 Normanskill Boulevard
P.O. Box 69
Delmar, New York 12054-0069
(518) 439-0375
Fax (518) 439-0521
E-mail: mfriedman@fmpclegal.com
smolinsek@fmpclegal.com
nredmond@fmpclegal.com
awood@fmpclegal.com

Michael P. Friedman
Stephen L. Molinsek

Nicole R. Redmond
Andrew H. Wood

April 5, 2013

Via Mail and Email – OCARULE202-16-g@nycourts.gov

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

RE: Proposed Amendment of 22 NYCRR §202.16(g)
Relating to Enhanced Expert Disclosure in
Contested Matrimonial Actions

Dear Mr. McConnell:

Thank you for soliciting my comments on the proposed changes to 22 NYCRR §202.16(g) as recommended by the Matrimonial Practice Advisory Committee. While I am not sure any comment could dissuade the adoption of such rule when recommended by the MPAC, here are my impressions:

This Rule should never be implemented.

As with all Court Rules, one needs to ask (a) does it address a need of matrimonial litigants, (b) would it be subject to abuse, and (c) is it economical.

While MPAC states that this Rule is necessary to assure fairness in increasingly complex litigation, there is no general failure of litigants to learn the necessary facts and information from matrimonial experts. The current Rule requires the exchange of reports. CPLR 3101(d)(1) allows upon request complete information on any expert who opinion will be proffered in litigation. There is not one reported Appellate case where a litigant raised successfully the issue of the inability to cross-examine or challenge an expert opinion based upon current Rules of Evidence as well as the disclosure requirements in matrimonial actions. The question then becomes why is this rule being suggested now? It addresses no burning disadvantage to any litigant today.

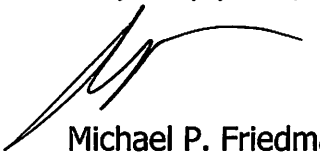
Is it subject to abuse? You bet it is. The presumption of the ability to take the deposition of an expert other than in a custodial matter leaves open the litigants to vast

expenses and delays. Also, the Rule makes no sense. Your Rule requires completion "no later than four months after the completion of fact discovery." What the heck is fact discovery? All discovery is fact based, and there is no delineation within the current Court Rules of fact discovery verses any other kind of discovery. It also contradicts the current Rules concerning the timing of matrimonial litigation. As a result of the Milonas Commission Report as well as the 2006 Matrimonial Commission Report, rules were put into place to move matrimonial litigation. 22 NYCRR 202.16(f)(3) requires the court to schedule a date for trial not later than six months from the date of the conference in a non-complex case. How can this occur when you have a certain period of time for something known as fact discovery, and four months later for the completion of expert information.

If for no other reason, this Rule should never be adopted because of cost. The vast majority of matrimonial litigants cannot even afford to take the deposition of the other spouse, let alone protracted litigation. The only people who would clamor for this kind of a Rule are the very rich and the attorneys who service them. Virtually every Rule and form promulgated by the Chief Judge, the Uniform Rules and the forms of the Office of Court Administration have vastly expanded the cost of matrimonial litigation for the citizens of the State of New York. Unlike the simplified forms in other states, the booklet of instructions for an uncontested divorce is now 41 pages. There are 32 forms on your website to be used in an uncontested divorce. Most of these forms serve no purpose other than statistical collection, such as your incomprehensible UCS-111 for the assembly of support information. What is the purpose of the DOH 2168 Department of Health form or your newly devised, unduly lengthy Matrimonial Addendum to the RJI (UCS-840M)? There is nothing you can do about the foolishness of the Legislature to require notices that serve no legitimate purpose, such as the protection of household pets including fish in family offense matters or required language about health insurance. However, at some point a method has to be developed for the average matrimonial litigant to get through the process of attaining a judicial dissolution of a marriage without the Byzantine process forced upon them by rules that require further conferences between attorneys, applications to a court, considerations by a Justices that can only lengthen the process and increase the fees. We are bound to charge by the hourly rate. Everything you do that extends the time to bring people to a final resolution increases cost. For once, the Office of Court Administration, the Chief Judge and the others who are considering this Rule should think of the average matrimonial litigant in the State of New York as opposed to the very rich and the attorneys who represent them.

Thank you again for the opportunity for comment.

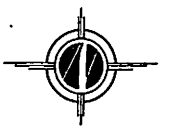
Very truly yours,



Michael P. Friedman

MPF/lal

BST
BST VALUATION & LITIGATION ADVISORS, LLC
Valuation, Forensic, and Litigation Services



April 15, 2013

VIA E-MAIL AND MAIL
Michael P. Friedman, Esq.
Friedman & Molinsek, P.C.
2 Normanskill Boulevard
P.O. Box 69
Delmar, NY 12054

Dear Michael:

I received your letter of April 1st and have gone through and read the proposed changes to the rule regarding expert witnesses. I offer you my thoughts. The March 8th correspondence from Justice Townsend to Justice Prudenti cites amongst other factors, the increasing complexity of the litigation that has come before the Courts. As you know, the vast majority of my practice involves cases that would fall into that category and are mostly highly contested matters. I have now been involved in over two thousand matters and have only testified approximately one hundred and fifty times, i.e., less than ten percent of all the cases in which I am involved.

I believe that the requirement that experts be deposed will add significant cost to the overall world of matrimonial litigation given that most cases settle, notwithstanding that deposing experts is common practice in other jurisdictions. With the added requirement that depositions be done, that will require that reports suitable for submission at trial be completed prior to deposition and both expert and opposing counsel will have to prepare for a "quasi-trial". In complex cases, all of the information following production, which can be thousands, even tens of thousands of documents, has to be digested, analyzed, valuations have to be performed, and comprehensive reports have to be prepared. This will most likely be completed toward the end of the four month period following the close of discovery given the breadth of the process.

The proposed rules go on to state (in number 6) that a note of issue and a certificate of readiness may not be filed until all of those disclosures and processes are complete. I assume, therefore, that the trial itself would not be scheduled until that four month period has expired and all of the expert disclosure has been completed, including the depositions. It may therefore be months before the actual trial is scheduled which will require new preparation at that time, since it is impossible to maintain trial readiness over an extended period of time when you have many other cases that you are involved with in the interim.

Also, we many times undertake settlement discussions with opposing experts, ideally prior to the issuance of reports which this new set of rules could impact. Once reports are issued, the experts

have a tendency to "dig their heels" in on their respective positions and I have found a much higher degree of reluctance to compromise on issues once they have been formalized in a report. This process will make that difficult to do, as following discovery the focus will be on performing the valuation and drafting reports. Since the requirement was instituted where reports get exchanged 60 days before trial, with reply reports due 30 days thereafter, I rarely have issue with reports being not comprehensive enough. In most cases, I am able to garner all the information that I need from an opposing expert's report to ready counsel for trial and to write a comprehensive reply report under the existing rules. I believe that the exchange of reports and the issuance of reply reports under the existing 60/30 day rule is sufficient.

I believe that many professionals involved will see this as an additional opportunity to charge more fees and it will create an overall greater cost to the universe of matrimonial matters. Once again, less than ten percent of the cases that I deal with actually go to trial and ninety percent of them resolve themselves in settlement. This is true in most cases in discussions I have with other professionals. So any claim that a deposition would heighten the possibility for settlement may be somewhat misplaced.

As to the other changes involving what has to be in the report, draft reports, communication with counsel, etc., I do not see any of them as problematic. Our reports are very comprehensive and already include most of what would be required. It certainly is not like the old days where you had "trial by ambush". Since the 60/30 day rule was instituted, I think that much of the problem has been alleviated.

Very truly yours,

BST VALUATION & LITIGATION ADVISORS, LLC

John R. Johnson, Managing Partner

Friedman and Molinsek, P.C.

Attorneys and Counselors at Law

2 Normanskill Boulevard
P.O. Box 69
Delmar, New York 12054-0069
(518) 439-0375
Fax (518) 439-0521
E-mail: mfriedman@fmpclegal.com
smolinsek@fmpclegal.com
nredmond@fmpclegal.com
awood@fmpclegal.com

Michael P. Friedman
Stephen L. Molinsek
Nicole R. Redmond
Andrew H. Wood

April 17, 2013

Via Mail and Email – OCARULE202-16-g@nycourts.gov

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

RE: Proposed Amendment of 22 NYCRR §202.16(g)
Relating to Enhanced Expert Disclosure in
Contested Matrimonial Actions

Dear Mr. McConnell:

I enclose herewith a letter of John R. Johnson which addresses the proposed Rules concerning expert disclosure in matrimonial matters. I am forwarding this to you as I have the permission of Mr. Johnson to do so. Mr. Johnson is the Managing Partner of the BST Valuation & Litigation Group. Not only is he a frequent lecturer with the New York State Bar Association, among other organizations, he has also been a member of the Executive Committee of the Family Law Section of the New York State Bar Association. Mr. Johnson also served on the Matrimonial Commission appointed by Chief Judge Judith Kaye who submitted their report in February of 2006. He is a well-respected expert and lecturer with extensive experience in matrimonial matters.

Very truly yours,

Michael P. Friedman

MPF/lal
Enc.
cc: John R. Johnson, C.P.A.

OCARule202-16-g - Proposed Amendment of 22 NYCRR Section 202.16(g)

From: Robert Jones <rjones@valuationresource.com>
To: "'OCARule202-16-g@nycourts.gov'" <OCARule202-16-g@nycourts.gov>
Date: 4/3/2013 10:47 AM
Subject: Proposed Amendment of 22 NYCRR Section 202.16(g)

To Whom It May Concern:

I am an attorney and economist who has served as an expert witness on business valuation for the past fourteen years. I offer the following comments on the proposed amendments to 22 NYCR Section 202.16(g).

With regard to allowing deposition of expert witnesses, will there be any provision specifying who will be responsible for payment of the experts' fees, such as in Rule 76(g) of the U.S. Code? The cost of depositions could tilt the playing field in favor of the more monied spouse, especially if that spouse retains a more expensive expert (and the party taking the deposition has to pay).

I anticipate that there will be added costs that will be incurred for the preparation of the expert reports. In the past, attorneys and clients often request abbreviated reports that reflect the high likelihood that cases will settle. With the specifically enumerated requirements being encoded, that option would appear to be eliminated.

While it strikes me that in larger disputes with substantial assets these disclosure rules could expedite settlement via greater disclosure, and therefore reduce the cost of litigation, I anticipate that for the majority of "middle market" divorce cases, the new rules are going to increase divorce costs by a few to several thousand dollars.

Robert W. Jones, J.D., MBA, Ph.D.
[redacted]
East Greenbush, New York 12061
[redacted]