



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE

HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE

DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on a Proposal for a New Matrimonial Rule 202.16-c and new NYSCEF Appendix to Ensure Compliance with Domestic Relations Law § 235 Regarding Access to NYSCEF by Attorneys in E-Filed Matrimonial Actions

Date: November 16, 2023

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The Administrative Board of the Courts is seeking public comment on a proposal to create a new Rule 202.16-c (22 NYCRR § 202.16-c) and a new NYSCEF Appendix regarding access to NYSCEF by attorneys in e-filed matrimonial actions.

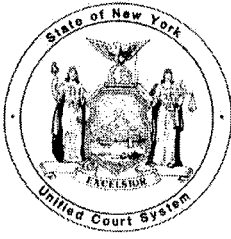
As noted in the attached memorandum from the Statewide Coordinating Judge for Matrimonial Matters, the proposed rule: (1) requires removal from NYSCEF by attorneys and non-parties in compliance with CPLR § 321 and DRL § 235; (2) makes changes to NYSCEF Options for Attorney and Non-Party Removal in matrimonial cases required by a NYSCEF Appendix; and (3) clarifies that an attorney appointed as attorney for the child in a matrimonial action may register and consent to e-file, and thereafter will have the same access to the file as attorneys for the parties.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than December 18, 2023.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance

of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.



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UNIFIED COURT SYSTEM
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HON. JOSEPH A. ZAYAS
Chief Administrative Judge

JEFFREY S. SUNSHINE
Statewide Coordinating
Judge for Matrimonial Matters

HON. NORMAN ST. GEORGE
First Deputy Chief Administrative Judge

MEMORANDUM

Date: November 14, 2023

To: Hon. Joseph A. Zayas, Chief Administrative Judge
Hon. Norman St. George, First Deputy Chief Administrative Judge

From: Hon. Jeffrey S. Sunshine, Statewide Coordinating Judge for Matrimonial Matters

Re: Proposal for New Matrimonial Rule 202.16-c and new NYSCEF Appendix to Ensure Compliance with DRL 235 Regarding Access to NYSCEF by Attorneys in E-Filed Matrimonial Actions

This memorandum proposes the adoption of a new 202.16-c to the Matrimonial Rules addressing rules for electronic filing of matrimonial actions. The proposed rule requires removal from NYSCEF by attorneys and non-parties in compliance with CPLR 321 and DRL 235. It also proposes changes to NYSCEF Options for Attorney and Non-Party Removal in matrimonial cases required by a new Appendix to the NYSCEF Rules. The Rule Proposal also clarifies that attorneys appointed by the court as attorneys for the child(ren) in a matrimonial action may register and consent to e-file, and, having done so, shall have the same access to the file in the case as attorneys for the parties.¹

¹ In the past, attorneys for children had reported difficulties accessing files on NYSCEF. A new functionality recently added to NYSCEF allows County Clerks to add a section for the attorney representing a child to record their consent and acquire access.

Rationale

DRL 235 restricts access to matrimonial files only to the parties and their attorneys, but currently such access for attorneys and non-parties may be broader on NYSCEF than in hard copy filings. These proposals are designed to prevent violations of the confidentiality requirements of DRL 235 in E-Filed Matrimonial Actions. They are necessary because currently, the Matrimonial Rules do not address removal of attorneys and non-parties from NYSCEF, and currently NYSCEF offers only limited options for attorneys to remove their consent/representation from NYSCEF. The matrimonial rules should require that an attorney or a non-party withdraw from access to NYSCEF if they no longer have a legal basis to remain in the action pursuant to DRL 235, and NYSCEF should provide options for such removal. The following describes situations where the legal basis of the attorney or non-party no longer exists and access to NYSCEF cannot be justified.

I. Matrimonial Actions

A matrimonial action has concluded when there is a Judgment of Divorce, Separation, Annulment, or Judgment to declare a marriage void or voidable and it has been signed, entered in the Office of the County Clerk, and served with Notice of Entry. Pursuant to DRL 235(1), as a result of the matrimonial matter concluding/ending, the original attorney's consent/access to the file should also be concluded at this point, unless there is some legal basis to continue consent/access for a limited time such as submission of Retirement Benefit Orders (QDROS's or DRO's), or the filing of a Notice of Appeal in the action in which attorneys have been retained as counsel.

II. Attorneys for Non-Parties' Applications in Matrimonial Actions

Attorneys for non-parties in matrimonial actions who have limited access to NYSCEF because they have sought judicial relief for their non-party clients should remove themselves from NYSCEF once an Order has been issued with Notice of Entry (or So Ordered Stipulation signed) relating to their application or cross application in the proceeding. Otherwise, they continue to receive notices of document filings.

III. Post Judgment Applications in Matrimonial Actions

The e-filing rules address post-judgment matrimonial proceedings and provide that the consent to e-filing that exists in the original action no longer applies to a post-judgment proceeding. The matrimonial rules also require that a new retainer agreement must be executed post judgment. 22 NYCRR 1400.1 specifically states that Part 1400, which includes the requirement for a retainer agreement in 22 NYCRR 1400.3, applies not only to any actions or proceedings in Family or Supreme Court for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, but also to any action or proceeding *to enforce or modify a judgment or order (frequently such actions are brought post-judgment)* in connection with any actions or proceedings.

The Second Department has held that a new retainer is required for a post-judgment matter. See *Sherman v. Sherman*, 34 A.D.3d 670, 824 N.Y.S.2d 656 (2d Dept. 2006) (where the Court made clear a new retainer was required post judgment, not merely a ratification of the original retainer); See also *Hyman & Gilbert v. Withers*, 151 A.D.3d 945, 58 N.Y.S.3d 90 (2d Dept. 2017) (which required a new retainer agreement for a post judgment matter, including an appeal); *Weissman v. Weissman*, 116 A.D.3d 848, 985 N.Y.S.2d 93 (2d Dept. 2014) (where the Appellate Division affirmed an award of attorney's fees to Defendant's counsel in a post judgment plenary action on the basis that the retainer agreement was in substantial compliance with the matrimonial rules and where sanctions against Plaintiff for frivolous conduct were warranted). If there are post-judgment proceedings in matrimonial actions, the recording of consent by a "new" attorney, or by the re-recording of consent by the original attorney, will allow access to the post-judgment applications and the case file on NYSCEF.

Except where there is already a post-judgment action pending, service of new documents in post-judgment applications in conformity with the existing NYSCEF rules, are made in hard copy by Order to Show Cause, requiring service as determined by the Judge, and are accompanied by a *notice of electronic filing for post-judgment matrimonial proceedings*. This is necessary as many post-judgment matrimonial applications involve "new" counsel and/or parties may also appear self-represented. The applications can also be made well after the Judgment of Divorce is entered. The attorney may no longer represent the client, have any further contact with the client, or may no longer be practicing law. However, in certain situations it may make sense to allow service of post-judgment applications in matrimonial actions to be electronic, and therefore, the rule proposal allows the Court to authorize electronic service of post-judgment applications.

These post-judgment proceedings are commonly concluded by stipulation, final order before or after a hearing, or withdrawal of the post-judgment proceeding, and they too should be concluded at that point in time and the attorney's consent/access to the file should also be concluded at the end of the specific proceeding.

IV. Completion of Limited Scope Representation

CPLR 321 was amended by Chapter 710, Laws of 2022 by adding a new section (d) to provide for limited scope representation in all civil proceedings. It requires the attorney to file with the court a notice of appearance of the limited scope representation. The notice of appearance must state the purposes of the limited scope representation, and unless otherwise directed by the court, the attorney may proceed with the limited scope representation and then file a notice of completion when the representation is completed. Unless otherwise directed by the Court upon a finding of extraordinary circumstances and for good cause shown, the filing of the notice of completion constitutes withdrawal of the attorney from the action. The rule proposal would require removal of the attorney from NYSCEF within 60 days after the notice of completion of the limited scope representation required by the new statute is filed in matrimonial actions.

Current Rule

There is no current rule in the matrimonial rules governing filing by electronic means in matrimonial actions, except for an Appendix to an Administrative Order adopted during the covid pandemic available at PDF B.pdf (nycourts.gov) which does not address the issue of withdrawal of attorneys and non-parties from NYSCEF.

The current NYSCEF options for attorney removal are shown on Exhibit 2.

Proposed Rule

The proposed new 22 NYCRR 202.16-c is shown on Exhibit 1.

The proposed new NYSCEF Appendix is shown on Exhibit 2.

**Exhibit 1 to Memorandum
Proposal for New 22 NYCRR 202.16-c**

Proposal:

Part 202 of the New York Rules for New York State Trial Courts is hereby amended by adding a new Section 202.16-c to the Uniform Civil for the Supreme and County Courts (22 NYCRR § 202.16-c) addressing rules governing the electronic filing of matrimonial actions in supreme court:

§ 202.16-c) Rules Governing the Electronic Filing of Matrimonial Actions in Supreme Court

(a) Application

(1) Pursuant to 22 NYCRR § 202.5-b, documents may be filed and served by electronic means in matrimonial actions in the Supreme Court of authorized counties subject to the conditions set forth below. Except as otherwise required by this rule, the provisions of 22 NYCRR § 202.5-b shall apply.

(2) For purposes of this rule:

(i) "Matrimonial actions" shall mean those actions set forth in CPLR § 105(p) and DRL §236, as well as plenary actions for child support, custody or visitation, an order of protection pursuant to DRL § or an application pursuant to the Child Parent Security Act, wherein:

(A) the action is contested, and addresses issues including, but not limited to, alimony, counsel fees, pendente lite, maintenance, custody and visitation, child support, [or] the equitable distribution of property, or domestic violence, abuse, paternity, or parental rights; or

(B) the action is uncontested; or

(C) the action is a post-judgment application that was initiated electronically that addresses an underlying matrimonial action previously filed in hard copy or electronically.

(ii) A "party" or "parties" shall mean the party or parties to the action or counsel thereto (as set forth in 22 NYCRR § 202.5-b(a)(2)(viii)) and the attorney(s) for the minor child(ren).

(3) No paper or document filed by electronic means in a matrimonial action shall be available for public inspection on-line or at any computer terminal in the courthouse or the office of the County Clerk; provided that nothing herein shall restrict access by a party whether or not

such party is self-represented or access by a party's attorney, to a paper or document in the matrimonial action in which the party is involved on-line or at any such computer terminal.

(4) Nothing in this section shall be construed to abrogate existing personal service requirements as set forth in the domestic relations law, family court act or civil practice law and rules.

(5) Unless otherwise directed by the court, evaluations or investigations of the parties or a child by a forensic mental health professional (including underlying notes), and reports by a probation service or a child protective service in proceedings involving custody, visitation, neglect or abuse, and other matters concerning children, shall not be filed electronically.

(6) Unless the Court authorizes service to be effectuated via NYSCEF, service of the initiating documents in post-judgment applications subject to consensual e-filing must be effectuated in hard copy and accompanied by a notice of electronic filing. Proof of hard copy service shall be filed by electronic means.

(7) In a matrimonial action, attorneys appointed by the court as attorneys for minor children of the parties may register as an authorized e-filing user of the NYSCEF site and consent to e-file.

(8) In a matrimonial action, attorneys for the parties or for minor children of the parties must remove their representation of such parties or such minor children from the NYSCEF record by following the instructions on the NYSCEF website for such removal in an e-filed action, within sixty (60) days after the earlier of:

(i) a judgment of divorce, separation, annulment or action to declare a marriage void or voidable has been signed and entered in the office of the County Clerk, with notice of entry also signed and served; and where any post-judgment or plenary proceedings before the Court in which the attorney represented the party have concluded by stipulation, final order or withdrawal of the post-judgment or plenary proceeding, and there are no other such proceedings pending; and where any Qualified Domestic Relations Orders or Domestic Relations Orders have been signed and served with notice of entry, and no notice of appeal has been filed in which attorneys for the parties or the minor children have been retained as counsel. If counsel is retained on an appellate issue, they may remain on NYSCEF for the duration of the appellate proceeding or as may be otherwise ordered by the Court.

OR

(ii) they cease to be the attorney of record in the action or cease to be associated with the law firm that is the attorney of record in the action;

OR

(iii) they have filed a properly executed consent to change attorney pursuant to CPLR 321 (b)(1);

OR

(iv) an order of the Court authorizing the withdrawal or change of attorney has been filed and entered pursuant to CPLR 321 (b)(2);

OR

(v) they have filed a notice of completion of limited scope representation in the action pursuant to CPLR 321(d)

(9) Counsel shall promptly comply with any requirements in CPLR 321 for counsel to provide notices to parties or self-represented litigants or attorneys or anyone else directed by the Court as to a change in or authorized withdrawal of representation or as to completion of limited scope representation in the action. Counsel shall also promptly provide notice of any consent to change attorney or notice of completion of limited scope representation to the Court, unless otherwise directed by the Court.

(10) In a matrimonial action, attorneys for non-parties to the action must remove their consent from NYSCEF and the right to receive notices in an e-filed action by following the instructions for such removal on the NYSCEF website within ten (10) days after the matters before the Court related to the non-party application or any cross application have concluded, except in the event of a pending appeal on the issue.

EXHIBIT 2 TO MEMORANDUM

CURRENT NYSCEF REMOVE/REPRESENT PAGE

NYSCEF - New York State Courts Electronic Filing (Live System)	
Home NYSCEF Home Unrepresented Litigants File Documents Appellate Court Civil Court Court of Claims Digital Submission Supreme Court Town & Village Court Cases My Cases/Appeals My Digital Content Remove Consent Case Search Resources Forms PDF Checker Authorized Courts Available Documents Rules & Legislation NYSCEF Updates My Account	<h4>Remove Consent/Representation</h4> <p>Instructions</p> <p>This page allows you to remove your consent/representation from any party in any matter that you have previously recorded it for. By clicking the remove button, your consent/representation will be removed from all parties in the selected matter. If there are other parties that you may still represent in that matter, you must re-record your consent/representation for each party.</p> <p>STEP 1: Reason for withdrawal of consent/representation</p> <p>I wish to remove my consent/representation from a party/parties to a matter and understand that I will have to re-record my consent/representation if there are other parties in that matter that I will continue to represent. I affirm that I am authorized to withdraw as counsel pursuant to the following:</p> <p><input type="radio"/> CPLR - 321(b)1 - In the matter I select below, I have e-filed a consent to change attorney signed by me, as the retiring attorney, and signed and acknowledged by the party.</p> <p><input type="radio"/> CPLR - 321(b)2 - In the matter I select below, an order of the court has been e-filed authorizing the withdrawal/change of attorney.</p> <p><input type="radio"/> I am no longer an attorney associated with the firm -OR- attorney representation is changing within the firm - In the matter I select below, I understand that my consent will be removed as long as there remains an attorney recorded for the party/parties for which I seek removal.</p> <p><i>Please Note: Pursuant to 202.5-b(b)2, once your representation is removed, you will no longer have the ability to file, serve and be served electronically. If you are representing more than one party, your consent/representation will be removed from all parties. If you wish to maintain representation for one of the other parties removed as a result of this request, you will be required to re-record your consent through the "Consent/Represent" link. Please contact the NYSCEF Resource Center if you need assistance.</i></p> <p>STEP 2: Select the matter to remove your consent/representation from</p> <p>Narrow Your Cases</p> <p>Narrow by Court <input type="text"/> Narrow By Case Type <input type="text"/> Case Number <input type="text"/> <input type="button" value="Narrow Results"/></p>

PROPOSED APPENDIX TO NYSCEF FOR REMOVAL OF CONSENT/REPRESENTATION BY COUNSEL OR NON PARTIES IN MATRIMONIAL ACTIONS

Remove consent/represent

This page allows you to remove your consent/representation from any party in any matter in which you have previously recorded it. By clicking the remove button, your consent/representation will be removed from all parties in the selected matter. If there are other parties that you may still represent in that matter, you must re-record your consent/representation. Due to the confidentiality requirements of DRL 235, additional fields are required for removal in matrimonial actions pursuant to 22 NYCRR 202.16-c as proposed below.

Step 1: Reason for withdrawal of consent/representation by attorney

I wish to remove my consent/representation from a party/parties to a matter and understand that I will have to record my consent/representation if there are other parties in that matter that I will continue to represent. I affirm that I am authorized to withdraw as counsel pursuant to the following: ... *(as in original)*

ADDITIONAL REQUIRED REMOVAL FIELDS IN MATRIMONIAL ACTIONS

***(new addition)**

CPLR – 321(d) – In the matrimonial matter I select below, I have completed the purposes for which I have originally filed a notice of limited scope appearance defining the purposes of the limited representation subject to court permission, and I have subsequently filed a notice of completion which constitutes my withdrawal from the action or proceeding.

***(new addition)**

In the matrimonial matter I select below, the judgment of divorce, separation, annulment, or judgment to declare a marriage void or voidable has been signed and entered in the office of the County Clerk and served with Notice of Entry also signed and served; and there is no other legal basis for me to continue to have access to the file pursuant to DRL 235(1) or DRL 235(2)

***(new addition)**

In the matrimonial matter I select below, the post-judgment proceedings in which I represented the party or child(ren) have concluded by stipulation, final order or withdrawal of the post-judgment proceeding and there are no other such proceedings or cross application/proceedings pending; and any QDROS or DRO's have been signed and served with Notice of Entry, and no Notice of Appeal has been filed for which I have been retained as Counsel.

***(new addition)**

In the matrimonial matter I select below, I am an attorney for a non-party, and the matters before the Court related to the non-party application or any cross application have concluded.

STEP 2: Select the matter to remove your consent/representation from

Narrow Your Cases

Narrow by Court

Narrow by Case Type

Case Number

Narrow Results