



STATE OF NEW YORK
UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

March 18, 2013

TO: All Interested Persons

FROM: John W. McConnell

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

The Matrimonial Practice Advisory Committee has proposed an amendment of 22 NYCRR § 202.16(g), providing for expanded expert disclosure in contested matrimonial actions (Exhibit A). As described in the cover letter of the Committee's Chair, the proposed amendment would require the provision of expanded information in the written reports of experts exchanged and filed with the court before trial, and establish procedures for pretrial discovery of experts, including in custody cases.

Persons wishing to comment on this proposal should e-mail their submissions to OCARule202-16-g@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004.

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.

Comments must be received no later than May 22, 2013.

EXHIBIT A



SUPREME COURT CHAMBERS

Supreme Court State of New York

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Buffalo, NY 14202

e-mail: stownsen@courts.state.ny.us

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March 8, 2013

Hon. A. Gail Prudenti
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: *Discovery of Experts in Matrimonial Cases*

Dear Judge Prudenti:

The Matrimonial Practice Advisory Committee (“MPAC”) recommends that you consider adopting an amendment to 22 NYCRR §202.16(g) regarding Disclosure of Experts in contested matrimonial actions as outlined in the attached Exhibit A. The proposal would not only expand upon the contents of reports exchanged and filed with the Court by experts as required in the existing rule, but would set procedures for pretrial discovery of experts, including in custody cases.

Because the MPAC believes that full details as to expert disclosure in advance of trial in contested matrimonials is necessary to assure fairness in today’s increasingly complex litigation, the requirements as to what the written reports filed and exchanged prior to trial must contain are more specific than what is otherwise required in the existing rule. As currently written, 22NYCRR §202.16(g) of the matrimonial rules requires reports of expert witnesses expected to be called at trial to be exchanged and filed with the Court within 60 days in advance of trial, including information as to the expert’s qualifications, but does not specify what must be contained in the reports or what information as to qualifications is required. The proposed rule requires specifics, including publications authored, cases testified in, and the compensation to be received.

The MPAC proposal would also create a uniform rule which would allow parties to depose experts in matrimonial matters, subject to the discretion of the Court after considering such factors as it deems “fair, relevant, and reasonable,” and the cost and time involved. If the testimony is offered with respect to access, child custody, visitation or abuse, the party seeking the pretrial deposition or disclosure must make an application to the Court, and the Court shall consider, in addition to the other factors named above, the effect of such deposition upon a Court appointed expert’s availability in future cases (*see also Howard S. v Lillian S.*, 14 NY3d 431 [2010]). To the extent that discovery of experts in

matrimonial actions is properly controlled as provided in the proposed rule, MPAC believes it assures that issues are vetted prior to trial.

Please do not hesitate to contact me if you have any questions. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sharon S. Townsend". The signature is fluid and cursive, with the first name being the most prominent.

Hon. Sharon S. Townsend

Chair, Matrimonial Practice Advisory Committee

SST/sdh

Enc.

cc: Susan Kaufman, Counsel to the Matrimonial Practice Advisory Committee
Members of the Matrimonial Practice Advisory Committee

22 NYCRR 202.16 (TEXT UNDERLINED = PROPOSED ADDITIONS/CHANGES)

(g) Expert Witnesses.

(1) Responses to demands for expert information pursuant to CPLR section 3101(d) shall be served within 20 days following service of such demands.

(2) Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR 3101(d)(1)(i). 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. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case.

(3) If any party intends to introduce expert testimony at trial, no later than 30 days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure, including the identification of experts, exchange of reports, and depositions of testifying experts – all of which shall be completed no later than 4 months after the completion of fact discovery. In the event that a party does not consent to the deposition of an expert, the party shall raise the objection to such expert disclosure and shall request a conference to discuss the objection with the court. In ruling upon whether an expert should be compelled to submit to a pretrial deposition, 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. In any case where the expert's proposed testimony is proffered on the issue of child custody, access, visitation, or abuse, the party seeking the pretrial deposition or other pretrial disclosure 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.

(4) The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(5) 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 attorney and any witness required to provide an expert report.

(6) The note of issue and certificate of readiness may not be filed until the completion of expert disclosure and expert disclosure provided after these dates without good cause will be precluded from use at trial.