Navigating the Matrimonial Preliminary Conference So You Don't Sink the Ship

By Joel R. Brandes

After a matrimonial action is commenced and a request for judicial intervention is filed, the court will schedule the case for a "preliminary conference." The preliminary conference is a vital point in your case. At the conclusion of the preliminary conference the parties and their attorneys are asked to sign a stipulation that will be "so ordered" by the court, in which your client may give up certain statutory rights. This stipulation may bar your client from exercising rights you subsequently discover you need to exercise to be prepared for trial. Counsel must be cautious before stipulating to anything that waives your clients' rights under the Civil Practice Law and Rules or the Domestic Relations Law. While a waiver cannot be inferred from mere silence,[1] it may arise by a failure to act, so as to evince an intent not to claim the purported advantage.[2] Therefore, you must make sure that the stipulation is clear as to what rights your client is not waiving so you don't sink the ship before you leave the port.

It is essential that you prepare for the matrimonial preliminary conference and review the matters that may be considered at the conference, which are specified in the uniform rules.[3] It is suggested that you review the form matrimonial preliminary conference stipulation/order (Contested Matrimonial) in advance with your client, fill it out and bring it with you to the conference for reference. Prior to doing so, contact the Supreme Court Clerk's Office to determine if they have additional requirements to be added in an Addendum to the form, if any.

The Mechanics of the Preliminary Conference

The preliminary conference may be held in the courtroom, unless the judge is engaged in a trial in the courtroom. In such case it may be held in the robing room. If the judge is busy his "court attorney" may conduct the conference, and the judge will address the parties at the conclusion of the conference. It is strongly suggested that the conference be held "on the record" with a court reporter transcribing the conference so that there are no misunderstandings as to what has been orally agreed upon by counsel during the conference. Counsel should request that a court reporter be present well in advance of the conference.

Usually the courtroom clerk gives the form preliminary conference stipulation/order to the plaintiff's attorney, and asks him or her to fill it out before the conference, with the cooperation of the defendant's counsel. Sometimes the judge or court attorney fills out the stipulation/order during the conference.

Counsel must make sure to strike out anything in the preliminary conference stipulation/order that was written in by opposing counsel, which has not been mutually agreed upon. This should be done before giving the preliminary conference stipulation/order to the judge when both attorneys meet with him or her. If something is not stricken from the form that is handed to him the judge will naturally assume that counsel agreed to it. It is important to remember that counsel does not have to sign a preliminary conference stipulation that contains anything that has not been mutually agreed upon. Counsel should also remember that the attorneys have the right to add anything to the preliminary conference stipulation and cannot be compelled by the judge to sign it. If both attorneys are not in complete agreement, neither can be compelled to sign it.

Counsel should read and explain the terms of the preliminary conference stipulation to the client after it is completed by the court, before signing it. The client should know before it is signed, what, if any, of his rights will be waived, and should agree to his attorney signing it. It should be emphasized to the client that the stipulation will become an order when the judge signs it, and he will be required to comply with the provisions of the Stipulation setting deadlines for the production of financial documents and information. Care should be exercised because once the stipulation is signed by counsel and the parties, and is signed by the judge it becomes an order, which can only be modified upon motion for good cause.

The Official Form Preliminary Conference Stipulation/Order

The official form preliminary conference stipulation/order form requires the parties to provide certain information regarding the case. Those sections that can have a profound effect on the case are the ones that stating that a particular matter is "resolved," and those sections which require that an act be completed by a certain date. If an issue is marked "resolved," the court may not let the parties try that issue when it becomes evident during the trial that it was not actually resolved.

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Because the preliminary conference is often held before any pleadings are served, or service of the pleadings is not complete at the time of the preliminary conference, counsel must be careful in making commitments that cannot be complied with due to circumstances that may or may not occur until after the conference. Until counsel knows what allegations are in the pleadings. what causes of action and counterclaims are pleaded, what affirmative defenses are alleged, and what is admitted or denied, counsel should not stipulate to make any kind of motion with respect to the pleadings.

For the same reason, until issue is joined on the answer and counterclaims, if any, defense counsel cannot properly serve disclosure demands or make any motions with regard to any agreements that may be in issue. Counsel should write into the preliminary conference stipulation a provision that disclosure will not commence until after all of the pleadings are served.

Section A of the preliminary conference stipulation is titled "BACKGROUND INFORMATION." It has spaces left for counsel to fill in the contact information for the attorneys, the date the summons was served and filed, the date of the marriage, the names and birth dates of the children, whether an order of protection has been issued and information about where and when it was entered (and requires copies to be attached), whether either party is requesting a translator, and information as to whether any premarital, marital or separation agreements "are asserted." If so, it requests information about the nature of each agreement and the date of the agreement. It contains a place for counsel to indicate the date that any challenge to the agreement may be asserted. It provides: "Any challenge shall be asserted no later than _____."

Under established New York law, a challenge to an agreement must be made in a plenary action, in which the parties have the right to conduct disclosure,[4] and not by motion.[5] A Stipulation in an action can be challenged on motion only where the action in which the stipulation was made is still pending and judgment has not yet been entered.[6] Thus, unless both attorneys agree in writing to permit an agreement to be challenged in the action by a motion, such a challenge may not be made.

By agreeing to make a motion regarding the validity of an agreement by a date certain, counsel may be waiving the right to conduct disclosure with regard to the circumstances surrounding the execution of the agreement. If the date that disclosure must be completed is before issue is joined, counsel may be limited to making a motion to dismiss pursuant to CPLR 3211, and may be waiving the right to move for summary judgment, which can only be made after all of the pleadings are served.[7] As a practical matter, a motion for summary judgment is not usually made until after the depositions of the parties are completed. Counsel should also be cautious about stipulating to an outside date by which to make a motion with respect to an agreement, without specifying what kind of motion will be made, since a motion for summary judgment cannot be made until after issue is joined with respect to the cause of action or counterclaim relating to the agreement. Moreover, until issue is joined there is no way of intelligently framing such a motion.

It is suggested that counsel should not agree to assert any challenge to an agreement by a certain date. There is simply no reason to agree to such a limitation. If counsel is going to sign such an agreement he or she should specify the exact type of motion that will be made and the stipulation should provide that the attorneys are not waiving their rights to make any other motions with regard to the agreement, and that the failure to make such a motion by the time agreed upon will not constitute a waiver of the right to make any other motion with regard to that agreement at a later date.

"It is suggested that counsel should not agree to assert any challenge to an agreement by a certain date. There is simply no reason to agree to such a limitation."

The preliminary conference stipulation/order form contains a Section B entitled "GROUNDS FOR DIVORCE," which contains space for the parties to indicate if the grounds for divorce are resolved. If fault is resolved counsel must indicate in the preliminary conference stipulation/order form the grounds upon which a divorce will be obtained. The form does not leave space for counsel to recite what steps must be taken by the party who is going to obtain the divorce nor contain a deadline for that party to submit the required papers to obtain a judgment of divorce. The preliminary conference stipulation/order form merely provides, if the issue of grounds is resolved: "The parties agree that _____ will proceed on an uncontested basis to obtain a divorce on the grounds of _____." This language does not anticipate a situation where the party who has agreed to go forward with the divorce changes his or her mind. If that happens the party who has agreed to obtain a divorce cannot be compelled to obtain a divorce, since a contract to obtain a divorce violates the public policy of New York State.[8]

It is suggested that counsel write into the stipulation the following:

> The plaintiff shall proceed on his/her cause of action for a divorce, by submitting to the court the required papers for an uncontested divorce on the grounds of _____ upon 10 days' notice of settlement, and withdraws all other causes of action for a divorce. The defendant withdraws his/her answer to that cause of action, and his counterclaims for a divorce, on the condition that the plaintiff submits all of the required papers on or before _____ in which case the plaintiff withdraws his/her reply to the counterclaims for divorce. In the event that the plaintiff has not submitted such papers by ____ ____ the defendant shall proceed on his counterclaim for a divorce, by submitting the required papers for an uncontested divorce on the grounds of _____ upon 10 days' notice of settlement, and withdraws all other counterclaims for a divorce. In such case the Plaintiff hereby withdraws his/her reply to that counterclaim.

The preliminary conference stipulation/order form also provides: "If the issue of grounds is unresolved: _____ A trial of this issue shall be held on _____ and a jury _____ is or _____ is not requested."

There is a statutory right to trial by jury on the grounds for divorce, and a constitutional right to a jury trial where the grounds for divorce are adultery.[9] Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed within 15 days after service of the note of issue.[10] Once a jury demand is timely served, it may be waived only by failing to appear at trial or by filing a written waiver or by making an oral waiver in open court.[11] The general rule is that a jury trial in a civil case may be waived by the agreement of the parties. If a jury trial is not demanded by either party in a note of issue the right to a jury trial is deemed waived.[12] After first requesting a jury trial, the plaintiff cannot, without the consent of the defendant, place his case on the non-jury calendar.[13]

If at the time of the preliminary conference counsel does not know whether he or she wants a jury trial, the safer course is to select neither option, and write into the form that counsel for the _____ reserves the right to request a jury trial.

The preliminary conference stipulation/order form also contains the following language: "Any appointment of an attorney for the child/guardian ad litem or forensic evaluator shall be by separate order which shall designate the attorney for the child appointed, the manner of payment, source of funds for payment and each party's responsibility for such payment."

Supreme Court judges routinely appoint attorneys for children in contested custody cases and direct one or both of the parties to pay his or her legal fees, which in many instances, are set by the court without a motion or the submission of financial affidavits. Often the court will direct one spouse to pay a retainer to the child's attorney and to pay him or her at an hourly rate. The First and Second Departments[14] have held that the Supreme Court and Family Court may award the child's attorney fees in excess of the amount provided in Judiciary Law § 35(3) for court-appointed attorneys for children. The Third Department has held otherwise.[15] The Fourth Department has held that the Family Court does not have the authority to do so, but has never decided the question of whether the Supreme Court may do so.[16]

Counsel should be wary about agreeing to allow the court to make such a financial determination without a formal motion on notice. Such a stipulation denies the client of the right to a determination of the counsel fee obligation on the merits, a hearing, if there are disputed issues of fact, and the right to an appeal from such an order. It is suggested that the client should be advised of the effect of such a stipulation and give his informed consent[17] to it in writing before counsel makes such an agreement.

This provision can be construed as authorizing the judge to appoint an attorney for the child, guardian ad litem or forensic evaluator and determine who shall pay such fees and the amount of fees to be paid. It may be construed as a waiver by the clients of the right to select their own forensic evaluator, and challenge the necessity for, reasonableness and amount of the fees of the attorney for the child or court-appointed expert. To prevent this from happening the wording of the form should be modified to add the following sentence after the word "payment": "The separate order shall be made after formal motion by either of the parties in accordance with 22 N.Y.C.R.R. § 202.16(k) which shall include a current statement of net worth."

The preliminary conference stipulation/order form contains a Section E entitled "OTHER." It requires that parties to "List all other causes of action and ancillary relief issues that are unresolved." It then states: "Any issues not specifically listed in this Stipulation as unresolved may not be raised in this action unless good cause is shown."

If all of the pleadings have not yet been served counsel should strike out the sentence which provides that

"[a]ny issues not specifically listed in this Stipulation as unresolved may not be raised in this action unless good cause is shown."

Until such time as all pleadings are served counsel cannot anticipate what claims are doing to be interposed in an answer or counterclaim. Counsel should not have to guess as to what issues should be listed in the Stipulation that have not been raised.

The preliminary conference stipulation/order form contains a Section F entitled "PENDENTE LITE RELIEF," where the court can indicate any directions it has made or any stipulation of the parties. Absent the consent of the parties, the court cannot make any directions, unless it is determining a motion, or the parties have so stipulated.[18] Counsel should object to any directions which are inserted by the court without their consent, and have the right to refuse to sign such a stipulation.

The preliminary conference stipulation/order form contains a Section G entitled "DISCOVERY." The first part of this section requires each party to maintain all financial records in his or her possession through the date of the entry of a judgment of divorce, including electronic evidence.

Counsel should obtain his/her client's approval before committing him or her to maintain these records, and should make sure that his client has these records in his possession before making such a commitment. If counsel decides to leave this provision in the stipulation, he or she should insert the dates that the term "relevant dates" refers to. If his client is not sure which of these records he has in his possession, counsel should not make this commitment, or should condition this commitment upon the client having first ascertained what records he has in his possession. In such a case counsel should add to the stipulation the following: "This provision shall not become effective unless and until the attorney for the _____ notifies the attorney for the _____ that his or her client has such documents in his possession."

The second part of the preliminary conference stipulation/order form contains spaces for filling in dates for the service of disclosure devices. This portion of the statement may impose limitations upon a party's right to conduct pre-trial disclosure. Although it does not state so, some New York courts have construed the dates filled into the form by counsel as limitations upon the right to serve disclosure demands and request expert fees.

Very frequently all of the pleadings have not been served prior to the preliminary conference. This often occurs in cases where the action is commenced by the filing of a summons with notice and the defendant does not serve a demand for a complaint with his notice of appearance. The pleadings define the issues between the parties. The admissions in an adverse party's pleading "require no proof."[19] A party may not raise an issue that he has admitted in his answer or reply to a counterclaim. Admissions in an answer or reply to a counterclaim are conclusive upon the parties and upon the court, and no other evidence can properly be received. If countervailing evidence is received, either by inadvertence or consent, it may not be considered.[20]

Unless all of the pleadings have been served before the preliminary conference, the plaintiff's counsel may find himself in the unenviable position of being asked to agree to a timetable for discovery before issue is joined on the complaint. Similarly, the defendants counsel may be asked to agree to such a timetable before issue is joined on the counterclaims. It is unwise to agree to a timetable to conduct discovery before all of the pleadings have been served and all of the issues are defined. Discovery conducted before all of the issues are defined may amount to no more than the proverbial "fishing expedition."

Article 31 of the Civil Practice Law and Rules deals with disclosure. It permits a party to serve disclosure demands after the commencement of the action. The only limitation is in CPLR § 3108 (a), which provides, *inter alia*, that leave of the court granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired. This provision gives the plaintiff priority in taking the defendant's deposition. However, Domestic Relations Law § 236 (B)(4)(a) limits the use of the disclosure devices listed in CPLR 3101. It provides for "compulsory financial disclosure" in matrimonial actions. It does not permit the commencement of financial disclosure until after issue is joined. It provides, in part, as follows: "In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered."

Disclosure on fault or custody grounds is not permitted in matrimonial actions except in "rare circumstances."[21] The only disclosure that is permitted is financial disclosure. The Domestic Relations Law only allows disclosure in matrimonial actions and proceedings in which alimony, maintenance or support is in issue. Therefore, based upon the provisions of Domestic Relations Law § 236(B)(4)(a), financial disclosure is not available in a matrimonial action until issue is joined. The disclosure provisions in Domestic Relations Law § 236 (B)(4), an inconsistent statute, take precedence over the disclosure provisions in the CPLR.[22]

Domestic Relations Law § 236 (B)(4) also provides that: "A sworn statement of net worth[23] shall be provided upon receipt of a notice in writing demanding the same, within 20 days after the receipt thereof. In the event said statement is not demanded, it shall be filed with the clerk of the court by each party, within 10 days after joinder of issue, in the court in which the proceeding is pending." Thus, if a statement of net worth is not demanded by the

adversary, it need not be filed until 10 days after issue is joined. A statement of net worth is not a disclosure device.[24]

Paragraph 2 of this part of the preliminary conference stipulation/order form contains an agreement that the parties will exchange the following documents no later than 45 days after the date of the Order: "Federal, state and local tax returns, including all schedules, K-1 's, 1099 s, W-2's and similar data; Credit card statements for all credit cards used by a party; Joint checking account statements, checks and register; Individual checking account statements, checks and register; Brokerage account statements; Savings account records, Other: (specify)."

The preliminary conference stipulation/order form provides that:

> Absent any specified time period records are to be produced for the three years prior to the commencement of this action through the present. If a party does not have complete records for the time period, the party shall provide a written authorization to obtain such records directly from the source within five days of presentation. Any costs associated with the use of the authorization shall be paid by _____ OR _____ reserved for the Court once the amount is determined.
>
> No later than _____ the parties shall notify the Court of all items to be provided above that have not been provided. Failure to comply with the scheduled discovery may result in sanctions, including the award of legal fees.

This last sentence should be modified for the circumstances of your case, or struck out of the preliminary conference stipulation/order form. If issue has not yet been joined counsel may have to strike all or part of this provision.

Paragraph 2 also contains space for the parties to fill in outside dates ("No later than _____") for the service by each party of a notice for discovery and inspection, interrogatories, party depositions, and the completion of third party depositions.

This is no rule or law that requires counsel to conduct discovery in the order set forth in the preliminary conference stipulation/order form, and signing a stipulation that provides otherwise may result in a waiver of a client's right to disclosure under Article 31 of the CPLR. Counsel is entitled to conduct disclosure in accordance with the provisions of the Civil Practice Law and Rules and is entitled to do so in the order he/she chooses. Unless the client signs a stipulation providing otherwise, he/she is not limited to conducting disclosure within the time fixed in the preliminary conference stipulation/order form, or in any particular order. The law does not require counsel to use a second disclosure device until he or she has received responses to or completed the use of a prior disclosure device. The general rule is that a party is "free to choose both the pretrial disclosure devices it wishes to use and the order in which to use them."[25]

Since the dates for disclosure in the preliminary conference order can be and often are construed by the court to limit the rights of the parties to conduct pre-trial disclosure, the dates for service of disclosure devices in the preliminary conference order must indicate the dates that responses will be served, and must condition the service of additional disclosure devices by that party upon the full and complete compliance by the adverse party with that party's previously served disclosure demands. If not, counsel may find himself in a position where he will be compelled to conduct a deposition before receiving full and complete answers to interrogatories or a complete response to a notice for discovery and production. And, once counsel conducts the deposition without such responses, it may be argued that counsel waived the right to the responses.

Many matrimonial attorneys try to conduct disclosure by serving interrogatories first, then serving notices for discovery and production, and then conducting depositions of the parties.

Counsel should write into the preliminary conference stipulation/order form, the order in which he or she intends to conduct disclosure. Counsel should indicate that they will not be required to proceed with a second disclosure device before receiving full and complete answers to the first disclosure device, unless an order of the court, granted upon motion, provides otherwise.

The paragraphs of the preliminary conference stipulation/order form where the parties are required to indicate outside dates for the service of disclosure devices do not take into consideration that: (a) a motion for a protective order will be made by the adverse party, pursuant to CPLR 3103, staying disclosure; (b) that the requested disclosure will not be timely provided, or will not provided at all; or (c) a disclosure demand will not served by the date it is required to be served because of a delay in receiving responses from the adverse party to a prior disclosure demand. For that reason, counsel should strike out the provision in the form which states: "Compliance with discovery demands shall be on a timely basis pursuant to the CPLR. Failure to comply may result in sanctions, including the award of legal fees." It should be replaced with the following provision:

> The failure of a party to serve any of the disclosure devices in accordance with the schedule set forth above shall not constitute a waiver of the right of the parties to use such device or any other disclosure device where a motion has been made pursuant to CPLR 3103, staying disclosure; other requested disclosure has not

been timely provided, or has not been provided at all; there has been a delay in receiving responses from the adverse party, to a prior disclosure demand; or for other good cause.

The preliminary conference stipulation/order form contains a Section H entitled "EXPERTS." It requires the parties to check a box if "Valuation/Financial Experts and Other Experts are required to value any of the following: (1) Deferred compensation; (2) Retirement assets; (3) Business interest; (4) Professional practice; (5) License/degree; (6) Art, antiques, personal property, jewelry; (7) Separate property; (8) Residential real estate; (9) Commercial real estate; (10) Stock options, stock plans or other benefit plan; (11) Intellectual property; (12) Other (identify)." It also contains space for the parties to fill in the valuation dates for specific items, if they can agree to those dates.

Counsel should confer with their experts before filling in valuation dates. If they wait until after the conference to do this, they may find that their experts cannot complete their valuation by the dates they have chosen and that they are bound by those dates.

The preliminary conference stipulation/order form contains a section entitled "Neutral Experts." It lists options for the court with regard to the appointment of a neutral expert "pursuant to a separate order which shall designate the neutral expert, what is to be valued, the manner of payment, the source of funds for payment, and each party's responsibility for such payment," or for each party to select his/her own expert.

If the parties chose for the court to appoint a neutral expert, this provision can be construed as authorizing the judge to appoint one of the enumerated experts and determine who shall pay the experts fees and the amount of fees to be paid. It may be construed as a waiver by the client of the right to challenge the necessity for, reasonableness and amount of the fees of the court appointed expert. It is suggested that he wording of the stipulation/order form should be modified to add the following sentence after the word "payment": "The separate order shall be made after formal motion by either of the parties. in accordance with 22 N.Y.C.R.R. 202.16(k), which shall include a current statement of net worth."

That portion of the preliminary conference stipulation/order form that is to be filled in when the parties select their own experts requires that the experts:

> Shall be identified to the other party by letter with their qualifications and retained no later than _____. If a party requires fees to retain an expert and the parties cannot agree upon the source of the funds, an application for fees shall be made no later than _____. Any expert retained by a party must represent to the party hiring such expert that he or she is available to proceed promptly with the valuation. Expert reports are to be exchanged by _____. Absent any date specified, they are to be exchanged 60 days prior to trial. Reply reports are to be exchanged 30 days after service of an expert report.

Counsel should make the client aware that by leaving the first two sentences of this paragraph untouched they will be waiving their right, under CPLR 3101(d), to select an expert any time prior to the trial, and that they may also be waiving their right, under Domestic Relations Law § 237, to make an application for expert fees any time prior to trial. By leaving the third sentence as is counsel may be limiting the experts that are available for the client and may be placing himself in the position of having to account to the court if the expert his client retains does not proceed promptly. Many experts cannot or will not make such a commitment. Nor should counsel commit to a date certain to exchange expert reports unless the following is added after the last sentence: "provided that the (plaintiff) (defendant) promptly provides the other party's experts with all information and documents which the expert has requested, in writing, from him or her."

The preliminary conference stipulation/order form contains a section entitled "Additional Experts." It provides that if "a net worth statement has not been served prior to this order or a party cannot identify all assets for valuation or cannot identify all issues for an expert, the party promptly shall notify the other party as to any valuation or as to which an expert is needed. If the parties cannot agree upon a neutral expert or the retention of individual experts, either party may notify the Court for appropriate action. Timely application shall be made to the Court if assistance is necessary to implement valuation or the retention of an expert."

This section uses the words "appropriate action," but does not define what action the court may take, and whether it may do so without a formal motion on notice. We suggest that the words "appropriate action," in the last two sentences, should be defined or the provision should be stricken out.

The preliminary conference stipulation/order form contains a section entitled, "I. CONFIDENTIALITY/ NON-DISCLOSURE AGREEMENT" which provides:

> 1. Plaintiff or Defendant anticipates the need for a Confidentiality/Non-Disclosure Agreement as to the following issues: _____.
>
> 2. The party demanding the Agreement shall prepare and circulate the proposed agreement among the parties involved. If the parties cannot agree, or fail to timely respond, the demanding party

> shall promptly notify the Court. The failure to promptly seek a confidentiality agreement may result in its waiver.

There is no statutory right to a "confidentiality agreement" or a confidentiality order. This section appears to indicate that if the parties fail to promptly seek a confidentiality agreement it may result in its waiver, but we fail to see how a party can waive something that he is not entitled to in the first place. It does not define "promptly," nor does it define what action the court may take if the parties cannot agree or fail to timely respond. Nor does it indicate what relief the court could grant without a formal motion on notice. It makes no sense to provide that the parties waive the right to seek a confidentiality agreement, since the parties can make such an agreement at any time, with or without the approval of the court. And, as a practical matter, a confidentiality order is usually granted upon motion, or upon the stipulation of the parties, and joint motion. This provision appears to be meaningless. It is suggested that, to avoid further confusion, counsel should strike out the sentence which provides: "The failure to promptly seek a confidentiality agreement may result in its waiver."

The preliminary conference stipulation/order form contains a section entitled "FURTHER ORDERS." This is for the use of the court in filling in the date for a compliance conference, the date for the service of a note of issue to be filed and the date of trial. The stipulation provides that a "Note of Issue shall be filed on or before _____. Failure to file a Note of Issue as directed herein may result in dismissal pursuant to CPLR 3216."

This stipulation will become an agreed upon order when signed by counsel.

A trial date should not be agreed upon unless all disclosure demands are fully and completely answered, or a court has granted a protective order prohibiting further disclosure.

Often, during the deposition of a party or witness, he or she agrees to provide certain documents to opposing counsel, after the deposition, or agrees to provide certain information to counsel when he or she signs the deposition, if a space is left in the transcript for such information. Stipulating that a case is ready for trial before receiving the signed transcripts with the information that was to required to be supplied, or the documents that the witness agreed to produce, can be an invitation to disaster.

If counsel signs a preliminary conference stipulation/order fixing a trial date, the stipulation should specifically state that the date set for trial is conditioned upon the completion of all outstanding disclosure. It is suggested that the stipulation should also provide that: "If either counsel submits an affirmation to the court, upon __ days notice of motion, attesting to the fact that outstanding disclosure is not complete, and specifying the reasons why it is not complete, the trial date shall not be the date(s) in the stipulation, but shall be the date set by the court after determining such motion."

The court may try to settle any outstanding motions at the preliminary conference. If a motion is settled the attorneys should write a separate stipulation specifying the terms of the settlement, and ask that it be "so ordered" by the court. Otherwise counsel should dictate a stipulation settling the motion, on the record in open court and ask that it be "so ordered."

Conclusion

The preliminary conference stipulation/order can change the ordinary rules of civil practice for the case and can result in an unintentional waiver of a client's rights. Counsel is not obligated to stipulate, nor can a court order counsel to stipulate.

Counsel should not feel compelled to stipulate because he or she feels pressured by the judge, or merely because counsel feels that the judge will think badly of him or his client if he does not agree to what the court suggests. If the judge strikes something from the form, or adds something that counsel does not want to agree to, counsel should make his position known, and refuse to sign that part of the stipulation. Counsel has an ethical and legal obligation to protect the rights of the client.

Endnotes

1. *In re City of Rochester*, 208 N.Y. 188, 197, 101 N.E. 875 (1913) (citing *Jewell v. Jewell*, 84 Me. 304, 24 A. 858 (1892); *Golfo v. Kycia Associates, Inc.*, 45 A.D.3d 531, 845 N.Y.S.2d 122, 124 (2d Dep't 2007).
2. *See Hadden v. Consolidated Edison Co. of New York, Inc.*, 45 N.Y.2d 466, 469, 410 N.Y.S.2d 274, 382 N.E.2d 1136 (1978); *Peck v. Peck*, 232 A.D.2d 540, 649 N.Y.S.2d 22 (2d Dep't 1996).
3. 22 N.Y.C.R.R. § 202.16(f)(2)(iv). *See* UCS eff. 1/31/18 at https://www.nycourts.gov/LegacyPDFS/forms/matrimonial/PreliminaryConferenceOrder.pdf (last accessed April 15, 2019).
4. However, financial disclosure is limited to the period up to and prior to the execution of the agreement and disclosure is permitted with regard to all matters relating to the claims to set aside the agreement. See *Oberstein v. Oberstein*, 93 A.D.2d 374, 462 N.Y.S.2d 447 (1st Dep't 1983).
5. *See Marin v. Anisman*, 69 A.D.3d 440, 892 N.Y.S.2d 390 (1st Dep't 2010) ("A separation agreement that is incorporated but not merged into a divorce judgment survives as a separately enforceable contract that can only be set aside by plenary action, not by motion in the divorce action ... As a result, the motion court properly declined to vacate the child support provisions of the parties' separation agreement.").
6. *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56, 421 N.Y.S.2d 556, 396 N.E.2d 1029 (1979). *See Arguelles v. Arguelles*, 251 A.D.2d 611, 675 N.Y.S.2d 551 (2d Dep't 1998) (Where, as here, an action has not been terminated, a challenge to a stipulation entered into during the course of the litigation need not be made by commencing a plenary action, but may be made by motion.); *see* also *Zeppelin v. Zeppelin*, 245 A.D.2d 504, 666 N.Y.S.2d 486 (2d Dep't 1997).
7. *See* CPLR 3212.

8. *See* GOL § 5-311; *see Taft v. Taft*, 156 A.D.2d 444, 548 N.Y.S.2d 726 (2d Dep't 1989).
9. DRL § 173; There is a right to a trial by jury on the grounds for annulment, except physical incapacity. *See* DRL §143.
10. CPLR 4102(a).
11. CPLR 4102(c). In *Calabro v. Calabro*, 133 A.D.2d 604, 519 N.Y.S.2d 633 (2d Dep't 1987) the Appellate Division affirmed an order granting the wife's motion to vacate an untimely jury demand stating that the decision of whether to relieve the husband of his waiver of the right to a jury trial rested within the sound discretion of the Supreme Court.
12. CPLR 4102(a).
13. *Schnur v. Gajewski*, 207 Misc. 637, 140 N.Y.S.2d 82 (Sup 1955).
14. *See Stephens v. Stephens*, 249 A.D.2d 191, 671 N.Y.S.2d 268 (1st Dep't 1998); *Plovnick v. Klinger*, 10 A.D.3d 84, 781 N.Y.S.2d 360 (2d Dep't 2004).
15. *Redder v. Redder*, 17 A.D.3d 10, 792 N.Y.S.2d 201 (3d Dep't 2005); *Lynda A. H. v. Diane T. O.*, 243 A.D.2d 24, 27-28, 673 N.Y.S.2d 989 (4th Dep't 1998); [Family Court "had no authority to compel the parties to pay the Law Guardian's legal fees and expenses"].
16. *Lynda A. H. v. Diane T. O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't 1998) ("Family Court has no authority to award counsel fees to the law guardian in excess of that provided for in the Judiciary Law.").
17. 22 NYCRR Part 1200, Rule 1.0 (j) of the Rules of Professional Conduct provides: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.
18. *See* CPLR 2214 and 2215.
19. *Paige v. Willet*, 38 N.Y. 28, 1868 WL 6161 (1868).
20. *Id*.
21. *See Howard S. v. Lillian S.*, 14 N.Y.3d 431, 437, 902 N.Y.S.2d 17, 20, 928 N.E.2d 399 (2010).
22. CPLR 101 provides, in part: "The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute." *See Ling Ling Yung v. County of Nassau*, 77 N.Y.2d 568, 569 N.Y.S.2d 361, 571 N.E.2d 669 (1991).
23. A statement of net worth is not a disclosure device. *See* CPLR 3101 which lists the disclosure devices.
24. *See* CPLR 3101 which lists the disclosure devices.
25. *Kaye v. Kaye*, 102 A.D.2d 682, 692, 478 N.Y.S.2d 324 (2d Dep't 1984):

> ("Finally, we find that plaintiff's initial use of interrogatories as a disclosure device in this case did not constitute an abuse necessitating an exercise of discretion by Special Term to expedite disclosure. The general rule is that a party is 'free to choose both the [pretrial disclosure] devices it wishes to use and the order in which to use them' (*Barouh Eaton Allen Corp. v. International Business Machs. Corp.*, 76 AD2d 873, 874). Further, the use of interrogatories as an initial disclosure device in complex equitable distribution cases will, in our view, expedite the discovery process (*see Myers v. Myers*, 108 Misc 2d 553; Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY. Book 14, Domestic Relations Law, C2366:6; Brandes, Disclosure Requirements Under Equitable Distribution, NYLJ, June 21, 1983, p.1, col. 2). Accordingly, Special Term's direction that the parties proceed to depositions upon oral examination will not expedite disclosure but may instead operate to prejudice plaintiff by preventing use of another, more appropriate, intermediate device.").