Managing Matrimonial Motion Practice

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The object of a matrimonial motion, like any other motion, is to convince the judge to either grant the relief you can seek or deny the same to your adversary. To accomplish this goal you need first to conform with the rules, and second to present your argument in a cogent convincing manner.

The quest for relief should start with a call to the other side. All too many attorneys make motions without first talking to their adversaries to see if the relief that they are asking for can be voluntarily obtained. If not all relief can be achieved, find out if the issues can be narrowed and consent achieved for some of the issues. In the proposed legislation which would make frivolous motion subject to the same sanctions as frivolous law suits, failure to do so may result in monetary sections being imposed upon both client and lawyer.

Rule 1:6-2 requires that before seeking any type of pretrial discovery there be a certification stating that the attorney for the moving party has personally conferred orally or has made a specifically described good faith attempt to confer orally with the opposing attorney to resolve the issues raised by the motion by agreement or consent order, and that such efforts have been unsuccessful.

Although the above only applies to discovery motions, it is good practice regarding any issue to first discuss the matter with your adversary and see what can be resolved.

How often at oral argument do you hear the counter argument to a counsel fee application that the motion or parts of it would be unnecessary if they had only asked?

Be Reasonable

Unreasonable demands, sometimes contained in grossly inflated Case Information Statements, are not good negotiating techniques and may give the opposition no choice but to reject your entire offer. Also, do not be a "hired gun" for your client to the effect that you are an instrument of torture. Making unreasonable demands for the purpose of making the other party "suffer," to "get even" or to punish them, is counterproductive. Filling your motion with emotional arguments to placate your client's need to "vent" is counterproductive and forces the judge to take needless time to sift through the chafe to get to the grist.

Be honest with your clients. Tell them what is normally given in a matrimonial situation, and do not give them unreasonable expectations. Give them the best and worst scenarios and tell them what the judge has done in the past. Also, tell them about the possibility of a completely abhorrent decision, to the extent that judges sometimes make strange

rulings. I tell clients that I have seen "elephants fly in the courtrooms," meaning that anything can happen with a particular judge on a particular day.

If litigation has already begun, motions should be served upon your adversary. If it is a post-judgment notice, and more than 45 days have elapsed from the date of the final judgment, then it must be served upon the other party and not their former attorney. It is good practice and a matter of professional courtesy to supply a copy of the motion to the former attorney of record.

When the motion is served upon a pro-se litigant, it is a good practice to serve by regular and certified mail, return receipt requested.

Rule 1:6-4 provides that the original motions and orders to show cause are filed with the clerk of the county in which they are to be heard. The county clerk forwards a copy to the clerk of the Superior Court.

If a judge has already been assigned to a case, and under modern practice one judge is supposed to be completely in charge of a case, then make sure a copy is sent to the judge directly and not just to the county clerk, to avoid processing delays.

Either request oral argument or waive oral argument, enclose a copy of the proposed order, a list of the papers to be filed and attach a form of the order. Remember to enclose your check for $15 for the cost of the motion.

Except for discovery motions or if the motion is addressed to the calendar -- that is, the date of the various matters -- you need to include a statement of reasons why oral argument must be granted.

Most discovery matters are on the papers; most others, if requested by either party or the court, are usually oral.

Rule 5:5-4 states that "the court shall order and grant a request for oral argument on substituted or non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions."

If there are any interested third-parties involved, (including grandparents, probation department, welfare department, corporation, employers, banks, etc.), from whom you are asking relief or upon whom you are seeking to impose prohibitions, they also should be served and notified. Once they have been served and notified, if relief is justified, the court cannot turn down your application because of the infirmity of not having an integral party notified, and be given an opportunity to participate.

One basic thing to be aware of is that you must have *in personam* jurisdiction over the party in order to serve them.

Time for Service

All pre-divorce motions, all enforcement motions (also known as motions for enforcement of litigant's rights. R.1:10-3) or motions that deal with the status of children must be filed 16 days before the return date. Since most motion days are on a Friday, motion papers must be filed on the Wednesday 16 days before. Therefore, a response and/or cross motion must be filed 8 days (Thursday) before the return date. All post-judgment motions including all motions for modification of alimony, child support, custody or visitation must be filed 29 days (Thursday) before the (Friday) return date. Therefore a response and/or cross motion must be filed 15 days (Thursday) before the return date. If you mail your papers, you must add three days to the above time periods. Any of the above may be shortened by the court. Notice must be given as to where to respond and whom to call.

There is no provision in the rules for a second reply certification, i.e. your adversary makes a motion, you answer his motion, he replies to that answer, you cannot reply to his reply, but all too many times someone tries to slip one in.

Post-judgment motions cannot be made sooner than 29 days before the specified return date, unless the post-judgment motion is within 45 days of the entry of the judgment in which case it can be made in normal time; or if it involves the "status of a child," or if brought pursuant to Rule 1:10-3 (enforcement of prior order), in which case it can be made in normal motion time.

Some judges will give you the entire relief upon the return date if it involves the status of a child; other judges will give you the relief regarding the status of the child when they see an emergent situation, and then wait 29 days to give you the other relief you have linked to your other motions.

Relief can begin on shorter notice by orders to show cause. Most judges hate the process and are not fond of the attorneys who continuously bring them. In some counties one judge is assigned to handle all orders to show cause. Find out if that's the case and be sure you present your papers to the right judge. Many attorneys abuse the process and bring applications under orders to show cause for non-emergency purposes.

Some of the most important immediate relief is the granting of custody, the return of children from out of state, emergency monies for mortgages or utilities or to stop the dissipation of bank accounts; that is, bank accounts that are being invaded by one party.

Before temporary restraints or any interim relief is granted, your adversary must be given notice, or consent to appear, and the specific facts, the affidavit and verified complaint must show immediate and irreparable damage will result. Most courts require you to deliver your papers to your adversary before your appearance but do not require him or her to respond. Under some circumstances, if you can convince the judge that notice is not necessary because it will result in immediate and irreparable damage -- like a bank account being cleaned out -- the court will grant immediate relief and the interim restraints, ex-parte without notification. See Rule 4:67-2.

Even in cases regarding the return of a child, notice should be given to the other party or your adversary of the application before the court, unless there is a fear of flight.

Except for the immediate relief that is requested and possibly granted, the rest of the motion cannot proceed until the other party is (1) served with a summons and complaint and (2) has an opportunity to answer the complaint after the time required. That would be at least 35 days after service. You may ask in your papers for an abbreviation at this time.

If this is a short matter, one that can be completely disposed of, and minimal testimony is necessary even though you are just beginning a complaint at this time and serving it by the order to show cause, you may make application to fix a short date for the trial of the action. Rule 4:67-5.

Form of the Motion

The form specifies the time and place of the motion, the grounds upon which it is made, and the nature of the relief sought.

Your motion must either request oral argument or waive it, and the proposed form of the order should be attached to the motion pursuant to Rule 3:1-4(a) and Rule 4:42(a).

A good practice is to put the return date of the motion on the front page of the motion, and the certification, and to put the date of the certification on the certification only.

When the motion is for enforcement or modification of prior order or judgment, a copy of the order or judgment sought to be enforced or modified has to be included.

When the motion is for modification of an order or judgment for alimony or child support, you must attach both the prior case information statement or statements filed before the entry of the order, as well as your updated case information statements. Rule 5:5-4.

If the motion is for pendente lite support, pursuant to Rule 4:7-2, a completed case information statement must be attached and detailed in Rule 5:5-2. If you have already submitted a case information statement, it must be amended no later than eight days prior to the motion hearing date. A case information statement is also required in any response to the application for pendente lite support, with the same requirement as far as amendments are concerned.

If you are asking for any preliminary restraint or to hold a party in contempt in your pendente lite relief, then that application must be made by an order to show cause.

Rule 1:4-4 (c) permits fax signatures of clients to be used instead of originals provided that the attorney offering the document certifies that the affiant acknowledged the genuineness of the signature and that the document or a copy with an original signature affixed will be filed if requested by the court or a party.

A Rule 5:5-4(c) Notice to Litigants must be attached to *all* motions. Other notices are optional but a good practice to include the applicable case.

The Art of Convincing

Make sure you attach to your certification all previous pleadings and exhibits. Do not rely upon the judge to go through the file, which may or may not be before him, to look at the pleadings that you are referring to.

If there is a pertinent part in the pleading, that's particularly important not only refer to it, as attached, actually repeat specific paragraphs that you deem pertinent in the body of your certification. This makes it easier for the judge to find and read what you want him to read, and you have also given him verification in the form of an exhibit.

It flows much more easily if everything is in the certification, and the judge does not have to flip back and forth, between the certification, the exhibits, the pleadings and the file to find out what you want him to know.

A certification itself should only contain information that the affiant personally knows, based on their personal knowledge and setting forth facts that are only admissible in evidence. Too often, attorneys make certifications of facts told by their clients, or clients make certification of facts which are revealed by others, including children or psychologists. It is also clear that merely appending relevant documents to the motion, including, letters by psychologists, psychiatrists or doctors, is also inappropriate. See Rule 1:6-6.Those documents can be incorporated only if there is a certification by the people making them as to their authenticity and veracity. See *Celino v. General Acc. Ins.*, 211 N.J. Super. 538 (App. Div. 1986).

Thus, inadmissible hearsay mentioned in a certification does not become admissible because either you or your client repeats it. Affidavits by attorneys or facts related to them within the primary knowledge of their client are inadmissible hearsay. See *Murray v. Allstate Insurance Company*, 209 N.J. Super. 163, 169 (App. Div. 1986).

Instruct your client not to respond by reference to other certifications. For instance, your client should not say, "I deny everything my wife said in paragraph 15 of her certification," or "the real truth to what she says in paragraph 15 is...."

When responding to allegations made in other certifications, clients should refer to the paragraph number, but paraphrase what was said there, so again, the judge has a reference if he wants it, but has all the information in front of him if he does not want to go back and forth between certifications. For example, the client should state:

[indent]In paragraph 15, of the certification of my wife of January 5, 1992, she states that I have a part-time job and earn an additional $5,000 per year. This is not true. In 1992, although I did not have a part-time job, I only earned $40,000, through my regular employment.

or

What my wife says in paragraph 5 of her certification regarding my not showing up for visitation at 7 p.m. on Wednesday night is incorrect. I did show up at 7 p.m., but she refused to answer the door, and I waited outside until 7:30 p.m. for her to respond and then went home. [end indent]

Say what you want--do not leave the judge guessing. It is not sufficient for you to say that your clients want support or alimony, or that they cannot afford what the other spouse demands. After a careful analysis of the income and expenses of each party, state to the judge what your client needs for support and the reasons for it; or what your client can afford to pay, and what the other spouse's true expenses are.

Coordinate certification with motion. Too many times relief is sought in the motion, and not backed up by the certification, or the opposite is true. In the certification, certain relief is asked for which is not in the motion. Both these deficiencies will lead to your relief being denied.

Use Headings. Make a request easy for the court to define. If you are responding to a particular point, or want to ask for a particular relief, put the relief requested in capital bold letters as a heading.

Under each heading and in separate paragraphs, which need not be limited, (1) ask for the relief that you wish granted, or (2) give your version of those matters that are requested of you.

In a reply certification to a motion you make, it is a good idea to include in the very beginning under the headings Uncontested Matters, Consented to Matters, or Unopposed Application all those items that your adversary has either agreed to in his or her certification, or did not answer. *Do not make personal attacks against the other attorney for a failure or omission on his or her part.* Although such conduct may have occurred, using it as the basis for an attack is certainly unprofessional, and with most judges, is counterproductive. Courtesy should still prevail in matrimonial matters. Point out the deficiencies, but do not personalize them.

For instance, state that the certification contains a hearsay statement which is not permitted by law, cite the relevant provision and ask that it be stricken. Do not state that your adversary has put hearsay testimony in, and should know better since he or she has been practicing for 15 years.

Do not make the certification a hate letter between your client and his or her spouse. At times, for the sake of the attorney-client relationship and to "set the record straight," your client feels that it is necessary to tell the "entire truth" about the matrimonial situation. If you must do this, put it at the end of the certification, after you have hit the hard facts and financial issues. You will not lose the interest of the judge who is reading the motion to

determine how much money your client is going to give or get, and who really does not care about who caused the problem.

By putting this "get even" information at the end of the certification, you both let the judge get to the facts right away, and satisfy your client's concern that their story is not being told correctly.

Include a partial certification regarding your counsel fees along with the motion, or have it prepared for the time of trial. In that certification, you can put down the anticipatory time, i.e., court appearance if the certification is prepared before you go to court, and wrap up time, in order to finalize the motion.

Do not file a cross motion simply asking that all relief of the moving party be denied. File a cross motion if you believe the motion to be frivolous, and you ask for counsel fees. Unless you ask by a cross motion for counsel fees, courts need not grant it.

Do not put settlement negotiations in your certification, and do not refer to what has already been settled unless your adversary agrees and consents to these matters having been settled. This is improper and will certainly prejudice your relationship with your adversary now and in the future. Your adversary would consequently assume that you cannot be trusted.

Unless the matter is truly agreed to, those discussions dealing with it, and temporary concessions given to you cannot be included. You certainly can provide a track record of payment of items, but do not include items that may have been only tentatively agreed upon.

Critically review your own motion and certification as though you were a judge, and see if you would grant the relief asked for in the papers. Is there enough information for the court to make a determination? Is your position reasonable? Is the relief asked for likely to be granted? Does this pleading make sense?

Adjournment and Reconsideration

If you need more time in order to answer a motion, ask your adversary for consent for the adjournment, with any relief being retroactive to the return date. Secure the adjournment from the court and confirm by letter. When you give your answering papers, give your adversary, who has just granted you an adjournment and the court who has consented to it, enough time to read your papers and respond to them.

Do not ask your adversary for an adjournment while planning to file a cross motion without his or her knowledge. Your adversary will probably consent to the adjournment anyway.

A motion for reconsideration need not be made within 10 days of the order, because it is not a final judgment or order.

Rule 1:7-4 does provide that a party make a motion to the court no later than 10 days after the entry of the final order or judgment for a rehearing or to amend this judgment.

The case of *Johnson v. Cyklop Strapping Corp.*, 220 N.J. Super. 250, 263 (App. Div. 1987), points out that since the amendments to Rule 1:7-4 and Rule 4:49-2 were meant to liberalize the rules, that case construed the 10-day practice provided for both these rules as applicable to final dispositions rather than interlocutory orders. A pendente lite application is an interlocutory order and thus, the 10-day rule does not apply.