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The Preliminary Conference Order in Matrimonial Actions: Something's Got to Give

Often, divorce clients' first experience with the Court is at the Preliminary Conference, which they are required to attend. At the Conference, they curiously observe their respective attorneys filling out pages of a document and, sometimes, arguing over the various provisions. Ultimately, asked to sign the document, the clients query counsel, "What is this again?" As it turns out, what this is and what this was designed to be—this preliminary conference document that emerges into the Preliminary Conference Order—are not the same. The discrepancy between the theoretical purpose of the Preliminary Conference Order and the actual, practical consequences of the Order needs to be investigated.

By Jane K. Cristal

A Preliminary Conference Order contains basic information about the matrimonial case, including, in part, representations relating to income, work, assets and insurances in play; statuses of motions; requests for the appointment of appraisers or experts of one kind or another; and, most importantly, the financial discovery schedule. The purpose of the Preliminary Conference and Order is to make Court appearances more meaningful and the progression of the case itself more streamlined. After all, the Preliminary Conference Order is entitled to the same weight and dignity as any other Order of the Court. In fact, the Order itself provides (with some variations in language) that:
The parties and counsel are reminded that this document is a Court Order requiring compliance and that sanctions shall be imposed, when warranted, in the event of noncompliance. Counsel are directed to supply their respective clients with a copy of this order.

In practice, however, the Preliminary Conference Order is essentially treated as a mere information-gathering form that both sides may disregard, paying no heed to the ordered discovery deadlines. Even more problematic is the circumstance where one side's good-faith efforts at compliance are frustrated by the adversary's strategic non-compliance with the Order, defiance of which appears to yield no significant consequences.

As a result, the Preliminary Conference Order is not as effective as it was designed to be. Agitated clients, forced to take precious time off from work or juggle child care arrangements and pay for hours of their attorneys' time for numerous court appearances, demand an explanation why dates, ordered by the Court, are simply disregarded. The culture of leniency regarding the enforcement of the discovery deadlines on the Preliminary Conference Order results not only in confused litigants but also in necessitated motion practice which further taxes the already strained resources of both the Court and the parties.

In *Kihl v. Pfeffer*, writing for a unanimous Court, former Chief Judge Judith Kaye declared that that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."1 Although these principles have since been repeated by the Court of Appeals in several significant decisions that, read together, constitute a campaign against a practice that disregards deadlines,2 New York litigants still disregard court-ordered discovery deadlines and courts still frequently forgive a party's repeated and contumacious failure to comply with ordered compliance. Indeed, despite the issue being called out and addressed by former Chief Judge Kaye in 1999, and repeatedly reiterated by the Court of Appeals in the years following, the problem nevertheless persists.

In 2010, the Court of Appeals again confronted the issue of litigants ignoring discovery orders with impunity in*Gibbs v. St. Barnabas Hospital*.3 In *Gibbs*, the Court of Appeals ultimately reversed a supreme court decision that refused to strike a pleading upon violation of the terms of a conditional order of preclusion. The result in Gibbs is hardly unusual; yet, *Gibbs* is significant for the Court's recognition of the frustration that all members of the bar, litigants and the public encounter in response to "chronic" non-compliance with court-ordered discovery.

The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."4

The Court of Appeals concluded its lengthy decision in *Gibbs* by declaring: "In reaching this conclusion, we reiterate that '[l]itigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated.'"5

It is clear that a Preliminary Conference Order may form the basis for relief under CPLR § 3126.6 In 2011, Justice Robert A. Bruno, citing to *Gibbs*, denied a litigant's application to, inter alia, vacate the Note of Issue, schedule the depositions of the parties and allow for additional document discovery. 7 Justice Bruno reasoned:
Defendant's failure to avail itself of the appropriate procedural remedies and sleep on its rights is no excuse for failing to comply with court orders. To allow this type of lackadaisical conduct will only encourage and add to more delays and expenses to litigants anxious to conclude their matrimonial action and add additional work to a judicial system that is already over taxed.8

A number of factors contribute to the Court's ostensibly tolerant treatment of discovery schedule violations, among them: the sheer volume of cases pending before the Court; the budgetary constraints and security concerns that no longer permit working through lunch or past 5:00 p.m.; the overlap of legal issues, psychological overlays and judicial responsibility to provide legal protection to its wards, the children of the marriage; and the long-standing philosophy that adversarial counsel work out discovery issues without the need for court intervention.

This discussion is not to suggest that the Court's compassion for attorneys and litigants be abandoned. On the contrary, effective judicial management on a case-by-case basis is invaluable to effective litigation practices. Instead of a sharp change in custom, the Court's sage judicial guidance could be directed to fostering a concerted effort between the Bench and Bar to change the expectation of unjustified delays in discovery. For example, certainly, where opposing counsel agree on soft discovery deadlines, the Court may, in its discretion, give a particular case some breathing room. When one side is compliant with

deadlines, however, then the other must likewise be, unless a reasonable basis for seeking extensions is offered. The Court's flexing its muscle in the latter instance would greatly benefit the court system by lessening both its burdens as well as those of the Bar. It seems axiomatic that instilling certainty of the consequences that will result from a failure to adhere to the ordered discovery deadlines will lead to a reduction in litigation delays, including fewer, but more meaningful, Court appearances.

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1. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999).
2. *Wilson v. Galicia Contracting & Restoration Corp*., 10 N.Y.3d 827 (2008); *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C*., 5 N.Y.3d 514 (2005); *Miceli v. State Farm Mut. Auto. Ins.* Co., 3 N.Y.3d 725 (2004); *Brill v. City of New York*, 2 N.Y.3d 648 (2004).
3. *Gibbs v. St. Barnabas Hosp*., 16 N.Y.3d 74 (2010).
4. Id. at 81 (quoting Kihl, 94 N.Y.2d at 123).
5. Id. at 83 (quoting Andrea, 5 N.Y.3d at 521).
6. *John R. Souto Co. v. Coratolo*, 293 A.D.2d 288 (1st Dept. 2002).
7. Fahrbach v. Fahrbach, 31 Misc. 3d 1238(A) (Sup. Ct. Nassau Co. 2011).
8. Id.

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