

# New York Lawyers' Practical Skills Series



Includes Forms  
on CD

# Matrimonial Law

Willard H. DaSilva, Esq.

2012–2013

NEW YORK STATE BAR ASSOCIATION 

## CONTENTS

I.	Introduction.....	1
II.	Initial Conference .....	1
	A. Purpose.....	1
	B. Scheduling the Client.....	1
	1. Arrangements .....	1
	2. Conference Time .....	2
	3. Conference Fees .....	2
	C. Attendees .....	2
	1. Confidential Relationship.....	2
	2. Third Parties .....	2
	3. Staff .....	2
	4. Children .....	3
	D. Marshaling of Information.....	3
	1. Identifying Information .....	3
	2. Marital History .....	3
	3. Husband's Income.....	4
	4. Husband's Assets.....	4
	5. Wife's Income .....	6
	6. Wife's Assets.....	6
	7. Joint Assets .....	6
	a. Existing Assets .....	6
	b. Transferred and Dissipated Assets.....	6
	8. Separate (Nonmarital) Assets .....	7
	a. Identification.....	7
	b. Transmutation.....	7
	c. Contamination .....	7
	9. Obligations .....	8
	a. Major Liabilities .....	8
	b. Other Obligations .....	8
	c. Potential Liabilities.....	8
	10. Support Routine.....	8
	11. Marital Problems .....	9
	12. Evaluation of the Case.....	10
	a. Grounds .....	10
	b. Projections of Equitable Distribution .....	10
	c. Projections of Maintenance and Child Support.....	11
	d. Projections of Custody and Visitation .....	12
	e. The Parenting Coordination Program.....	12
	13. Expenses of the Case .....	12
	a. Attorney Fees.....	12
	b. Experts' Fees .....	13
	c. Other Disbursements .....	13
	14. Time Required .....	13

15. Alternative Procedures .....	13
16. Statement of Client's Rights and Responsibilities .....	14
<b>III. The Retainer.....</b>	<b>14</b>
A. Retainer Conference .....	14
B. Retainer Agreement .....	15
1. Services Included.....	16
2. Expenses or Disbursements Not Included.....	16
3. Method of Computing Fees.....	16
4. Refunds of Fees .....	17
5. Signing the Retainer Letter.....	17
6. Filing the Retainer Letter and Closing Statement .....	18
<b>IV. Additional Information .....</b>	<b>18</b>
A. Standard of Living .....	18
B. Budgets .....	18
C. Financial Records .....	19
D. Detailed Marital History .....	19
E. Action to Be Taken .....	20
1. Injunctive Relief .....	20
2. Custody and Visitation .....	20
3. Support .....	20
4. Venue.....	20
5. Termination of the Acquisition of Marital Property.....	21
<b>V. Basic Law .....</b>	<b>21</b>
A. Jurisdiction.....	21
B. Grounds.....	21
1. Void and Voidable Marriages .....	21
2. Action for a Divorce.....	22
3. Action for a Separation.....	22
4. Residence Requirements .....	23
C. Equitable Distribution.....	23
1. Generally .....	23
2. Definitions .....	23
3. Professional Licenses and Higher Education .....	24
4. Appreciation of Separate Property .....	25
5. Transmutation and Contamination .....	25
6. Valuations.....	25
7. Distribution.....	26
a. Factors .....	26
b. Contributions to Separate Property.....	27
c. Distributive Award .....	28
D. Post-Divorce Maintenance Awards .....	28
E. Child Support.....	32
F. Custody .....	35
1. Presumptions .....	35
2. Factors .....	35

	3. Agreements.....	36
	4. Relocation.....	36
VI.	Agreements .....	37
	A. Generally.....	37
	1. Purpose of the Agreement .....	37
	2. Nature of the Agreement .....	38
	B. Contract Law.....	39
	1. The Making of the Agreement .....	39
	2. Proper Representation .....	40
	C. Drafting the Agreement .....	41
	1. Use of Forms .....	41
	2. Formatting the Agreement.....	41
	D. Content of the Agreement.....	42
	E. Execution of the Agreement .....	43
VII.	Commencement of the Case .....	44
	A. Analysis of Information .....	44
	B. Communication With the Other Spouse .....	44
	1. Letter.....	45
	2. Litigation Papers.....	45
	3. Certification of Papers .....	46
	4. Attorney Contact .....	46
	C. Information From the Other Lawyer .....	46
	D. Negotiations .....	46
VIII.	Commencement of the Action .....	47
	A. Mandatory Automatic Restraining Orders and the Preliminary Conference.....	47
	B. Motions .....	49
	1. Temporary Support.....	49
	2. Custody and Visitation .....	51
	3. Attorney Fees.....	52
	4. Experts' Fees .....	52
	5. Injunctive Relief .....	53
	6. Procedural Motions .....	54
IX.	Disclosure .....	55
	A. Purpose.....	55
	B. Net Worth Affidavit.....	55
	C. Bill of Particulars .....	57
	D. Discovery and Inspection.....	57
	E. Interrogatories .....	58
	F. Depositions .....	58
	1. Examination of the Spouse .....	58
	2. Third Parties .....	59
	G. Experts' Reports .....	60
X.	Trial Preparation .....	60
	A. Dispositional Statement .....	60
	B. Trial Outline.....	61
	C. Preparation of Exhibits .....	62

D.	Trial Memoranda .....	62
E.	Client Preparation .....	63
	1. Review of Facts .....	63
	2. Review of Procedures.....	63
	3. Review of Strategy .....	64
F.	Witnesses .....	65
	1. Generally .....	65
	2. Expert Witnesses .....	65
	3. Children .....	66
XI.	The Trial .....	67
A.	Pretrial Conference .....	67
B.	<i>Prima Facie</i> Case.....	67
C.	Stipulations .....	68
D.	Spouse's Case .....	68
E.	Rebuttal.....	68
F.	Attorney Fees.....	69
G.	Temporary Orders.....	69
XII.	Judgment.....	70
A.	Decision .....	70
B.	Judgment.....	72
C.	Notice of Appeal .....	73
XIII.	Enforcement.....	74
A.	Generally .....	74
B.	Enforcement of Contracts .....	74
	1. Remedies .....	74
	2. Choice of Forum.....	75
	3. Procedures .....	76
	4. Attorney Fees.....	76
C.	Enforcement of Orders.....	77
	1. Choice of Forum.....	78
	2. Attorney Fees.....	78
XIV.	Modification.....	79
A.	Modification of Agreements .....	79
	1. Generally .....	79
	2. Modification at the Time of Divorce.....	79
	3. Contract Provisions .....	80
B.	Modification of Orders .....	80
	1. Generally .....	80
	2. Procedures .....	81
	3. Disclosure Procedures .....	81
	4. Trial of the Issues .....	81
	5. Attorney Fees.....	82
XV.	Domestic Relations Law § 10-a, New York's Same Sex Marriage Law.....	82
XVI.	Conclusion .....	84

Appendix A	N.Y. Rules of Professional Conduct: Amended Disciplinary Rules.....	85
Appendix B	Rules Governing the Conduct of Lawyers in Matrimonial Actions .....	87
Appendix C	Uniform Rules for the New York State Trial Courts .....	93
Appendix D-1	Statement of Client's Rights .....	99
Appendix D-2	Statement of Client's Responsibilities .....	101
Appendix E	Child Support Standards Chart .....	103
Appendix F	2011 New York Laws Chapters 95 and 96 .....	125
	Matrimonial Forms Index .....	133
	Table of Authorities .....	335
	About the Author .....	341

## INDEX OF FORMS

Statement of Client's Rights and Responsibilities .....	135
Nonengagement Letter.....	137
Retainer Letter .....	139
Standard of Living Form.....	141
Prospective Budget Form.....	145
Demand for Net Worth Statement and Statement of Net Worth (DRL § 236) .....	149
Letter to Spouse .....	164
Separation Agreement.....	165
Letter to Client re: Proposed Settlement Agreement (Confidential) .....	198
Letter to Client re: Proposed Settlement Agreement .....	199
Letter to Attorney re: Proposed Separation Agreement (Open) .....	200
Letter to the Other Party's Attorney.....	201
Letter to Client re: Tax Consequences .....	202
Memorandum of Separation Agreement.....	203
Summons (Irreconcilable Differences) .....	205
Summons with Notice.....	207
Complaint (Uncontested Action) .....	211
Complaint (Irreconcilable Differences) .....	217
Complaint (Constructive Abandonment) .....	221
Client/Attorney Certification .....	225
Answer (Uncontested Action) .....	227
Verified Reply .....	229
Typical Preliminary Conference/Stipulation Letter .....	231
Plaintiff's Statement of No Barriers .....	239
Defendant's Statement of No Barriers .....	240
Plaintiff's Supporting Affidavit (Uncontested Action) .....	241
Plaintiff's Affidavit in Support of Judgment.....	249
Attorney's Affidavit of Regularity (Uncontested Action—Court Form).....	253
CSSA Computation Chart for Child Support .....	255

\* Some of the forms contained in this monograph are omitted from the forms CD accompanying this publication because they are available from government agencies. These forms are obtainable from the following government agencies: the New York State Unified Court System (1-800-268-7869) <[www.nycourts.gov](http://www.nycourts.gov)> and the Internal Revenue Service (1-800-829-1040) <[www.irs.gov](http://www.irs.gov)>.

Court Child Support Summary Form (UCS-111).....	259
Support Collection Unit Information Sheet .....	261
Certificate of Readiness for Trial .....	263
Note of Issue (Uncontested Divorce).....	264
Certificate of Dissolution of Marriage.....	265
Findings of Fact (Uncontested Action).....	267
Judgment (Uncontested Action) .....	277
Notice of Entry.....	282
Qualified Medical Child Support Order .....	283
Uncontested Divorce Check List for Court Submission .....	287
Request for Copy of Tax Return (IRS Form 4506).....	289
Request for Transcript of Tax Return (IRS Form 4506-T) .....	291
Release of Claim to Exemption (IRS Form 8332).....	293
Request for Judicial Intervention .....	295
Request for Preliminary Conference.....	297
Demand for Discovery and Inspection.....	299
Notice for Preservation of Evidence .....	305
Notice to Provide Experts' Information.....	307
Notice to Take Deposition.....	309
Corrections to Deposition .....	313
Notice of Motion to Preclude.....	315
Affidavit in Support of Motion to Preclude .....	317
Statement of Proposed Disposition.....	319
Notice to Admit Truth of Facts .....	321
Witness Subpoena .....	322
Subpoena <i>duces tecum</i> .....	323
Notice of Settlement .....	324
Notice of Appeal .....	325
Consent to Change Attorney .....	326
Answer with Alternate Right of Defendant .....	327
Notice of Appearance with Demand for Relief .....	331
Custody and Visitation Legislation Database Review Information Sheet .....	333

**WILLARD H. DASILVA, ESQ.**

Willard H. DaSilva, senior member of the "AV"-rated DaSilva, Hilowitz & McEvily LLP, is a veteran matrimonial law practitioner with offices in Garden City and New City, New York. He is one of fewer than 100 attorneys in the United States invited to be a Diplomate of the American College of Family Trial Lawyers. His biography appears in *Who's Who in America*, and for 25 years he has been listed in *The Best Lawyers in America*. He is currently listed in *New York Magazine's Best Lawyers in the New York Metropolitan Area* and in the *New York Times* as a "Super Lawyer." He is a past President of the American Academy of Matrimonial Lawyers, New York Chapter, and is Editor Emeritus of the ABA's *Family Advocate* magazine; editor emeritus of the New York State Bar Association *Journal*; Chairman of the Board of Editors of the nationally published *Matrimonial Strategist*; and author of *New York Matrimonial Practice*, published by The West Group. He is a former Council Member of the American Bar Association's Section of Family Law, a Master and Past President of the New York Family Law American Inn of Court, a former member of the New York State Bar Association's House of Delegates, and past Chair of the Association's General Practice Section. His extensive lecturing schedule to judges and lawyers includes seminars sponsored by bar associations and civic organizations throughout the United States, Canada and Europe.

Mr. DaSilva, a *magna cum laude* graduate of New York University and member of Phi Beta Kappa, received his law degree at Columbia University Law School. He is a widely quoted commentator in the *New York Times*, *Newsday*, *USA Today*, *Newsweek* and *U.S. News & World Report* and the *New York Law Journal*, which has referred to him as the "Dean of Matrimonial Lawyers." He has appeared on both network and syndicated television programs such as the *Today Show*, the *Phil Donahue Show*, the *Regis Philbin Show*, CNN's *Sonya Live* and NBC's *Newtwork News*, as well as radio programs throughout the United States.