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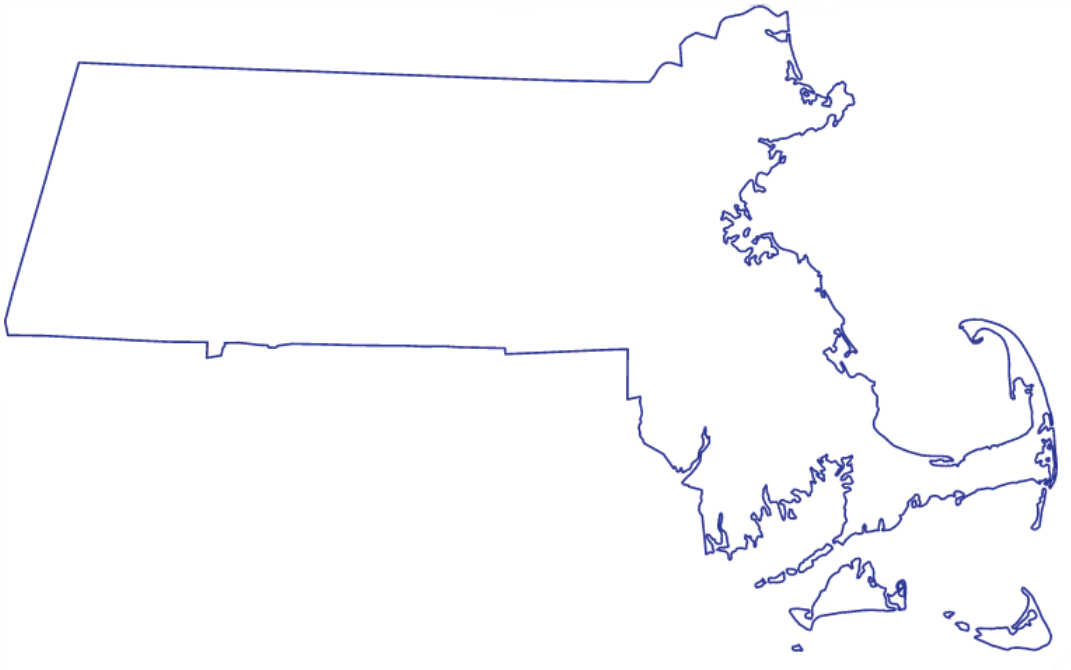
MASSACHUSETTS
ACCESS TO JUSTICE COMMISSION

Access to Attorneys Committee
Report on Fee Shifting in Family Law Litigation



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Summary

Providing access to funds for an attorney can be an important way to provide equitable access to justice in family law cases, particularly when one party earns significantly more than the other. Statutory law allows for allocation of marital funds for an attorney for either party in divorce actions and fee shifting in contempt actions involving a monetary dispute. Our committee's investigation of fee shifting in these actions found that awards are made infrequently. Two surveys, one given to Probate and Family Court judges and the other to family law practitioners, revealed a highly varied approach to fee shifting among judges, resulting in a lack of clarity and consistency with respect to factors impacting awards and leaving many practitioners reluctant to seek fees, particularly fees *pendente lite*.[1] In the Committee's view, this is a lost opportunity to provide access to justice at a critical point in people's lives. In most cases, a divorce action significantly impacts litigants' fundamental rights with respect to parenting and may have long-term impact on litigants' ability to meet basic human needs. Litigating a divorce can be complex in both procedure and substance, and lawyers play a critical role in navigating rules, presenting evidence, and counseling clients on realistic goals. The workgroup believes that every effort should be made to maximize consideration of *pendente lite* awards in appropriate cases.

The workgroup recommends that the Probate and Family Court consider whether a set of guidelines for fees *pendente lite* would increase consistency and predictability in awards and lead to greater use of fee shifting as a means to provide representation in appropriate divorce actions. A form similar to the one created for deviations from the Massachusetts Child Support Guidelines might be sufficient to help practitioners, litigants, and judges alike home in on and weigh the factors most important to assessing a request for fees in each case. Brief and frequent trainings for judicial staff and practitioners would remind both of the availability of this tool to "level the playing field"[2] and educate lawyers on its appropriate use. Guidance on mass.gov would provide assistance to unrepresented litigants.

The workgroup concludes that fee shifting in contempt actions is more complicated and, while an important incentive to encourage compliance or appropriately distribute the costs of non-compliance, it is a less effective tool for providing a lawyer where one would not otherwise be affordable. The goal of a contempt action is compliance and compliance short of a judgment of contempt does not result in an award of fees. As a result, the workgroup concludes that it is not reasonable to rely on fee shifting to fund efforts to gain compliance.

[1] Fees *pendente lite* present a special form of fee shifting. Rather than awarding fees to the prevailing party, fees *pendente lite* grant the judge authority to allocate marital funds between the parties to provide both parties the opportunity to present their respective cases with the assistance of counsel.

[2] This phrase was used in a response to the judicial survey and echoes recommendations made in a Supreme Judicial Court report more than thirty years ago: "[T]here is too little legal help available to moderate-income women, in part because judges fail to award adequate counsel fees, especially during the pendency of litigation. … Judges must award adequate attorney's fees during the pendency of litigation." Report of the Gender Bias Study of the Supreme Judicial Court, p. 20 (1989).

Introduction

Between 2017 and 2020, a workgroup of the Access to Attorneys Committee explored fee shifting practices in the Probate and Family Court through development, distribution, and analysis of two surveys, the first directed to judges and a second to practitioners. The project flowed from the Committee's 2017 report to the full Commission, which included a review of fee shifting statutes and recommended: "Survey the practices of current Probate and Family Court justices in order to better understand the present and potential reach of fee shifting as a tool in family court litigation." Fee shifting is permitted by statute in divorce cases[3] and in actions for contempt.[4] However, committee members were aware of a persistent circular argument: lawyers/litigants don't request fees because judges don't award fees and judges don't award fees because lawyers/litigants don't request fees. The primary goal of the surveys was to either bolster or disprove the general impression that fee shifting infrequently occurs, whether because of infrequent requests or infrequent awards. Secondarily, we were interested in deepening our understanding of how lawyers and judges make decisions about when to request and when to award fees.

Through the lengthy process of drafting, revising, distributing, collecting, and comparing results of the two surveys, the Committee learned a great deal about both the complexity of surveying and the complexity of factors impacting fee awards in the Probate and Family Court. The surveys were prepared by Committee members, with input from family law practitioners and the Administrative Office of the Probate and Family Court. Notably, we did not have the benefit of experts in the field of survey construction and administration. The data collected and our ability to draw conclusions from the data is limited by the structure of the surveys--questions asked and answers permitted--as well as by the total number of participants and unknowns about who chose to participate and who chose not to participate.

Additionally, lack of data both drove our desire to create surveys and impacted our ability to carefully craft survey questions and analyze surveys results. It is the Committee's understanding that data is not collected uniformly throughout the Probate and Family Court Department, which makes it difficult or impossible to compile detailed information about particular practices in particular causes of action. For example, we understand that a majority of cases in the Probate and Family Court involve at least one unrepresented litigant[5], but we do not know if percentages are consistent across all types of actions or are more concentrated in some than in others. This is significant because statutory law does not enable fee shifting in all causes of action; for example,

[3] G. L. c. 208, s. 17 provides: "The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action…."
[4] G.L. c. 215, s. 34A provides: "In entering a judgment of contempt for failure to comply with an order or judgment for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the judgment on the monetary arrears, all of his reasonable attorney's fees and expenses relating to the attempted resolution, initiation, and prosecution of the complaint for contempt. The contempt judgment so entered shall include reasonable attorney's fees and expenses unless the probate judges enters specific findings that such attorney's fees and expenses shall not be paid by the defendant."
[5] Massachusetts Justice for All Strategic Action Plan, 2017, p.37.

it is available in divorce and contempt actions and not in paternity and guardianship actions. We were reluctant to add questions to the survey about the frequency of unrepresented litigants in divorce and contempt actions because we feared a longer survey would be completed by fewer participants. However, without this information, we cannot compare the frequency of fee shifting requests to the frequency of need for a lawyer. Nonetheless, the survey responses are rich in qualitative information and add to our understanding of how lawyers, litigants, and judges currently approach fee shifting. A summary of our process also provides important guidance for future surveying efforts.

The Survey Process

We began with a survey for judges, which was distributed in the winter/spring of 2018/2019. The survey contained 22 questions, some with a range of check-box response options and some with opportunity for opened-ended response. The survey was divided into two sections, the first focused on judicial practices when responding to requests for fees *pendente lite* and the second focused on actions for contempt. Questions were drafted to obtain data on the number of motions filed and on the range and nature of factors considered when addressing a motion for fees. Thanks to tremendous support and assistance from Probate and Family Court Chief Justice John D. Casey, 39 of the 40 judges seated at the time responded to the survey.

Review of judicial survey responses revealed a wealth of interesting information and also a number of imperfections and errors in the survey. The benefit of hindsight provided us with an opportunity to make improvements to the attorney survey before circulating it. However, we wanted to balance the desire to get better data with our desire to get comparable data. The resulting attorney survey contains a combination of questions intended to mirror the judicial survey, improve on the judicial survey, and pursue themes found in the judicial survey responses. We did not change the basic structure of the survey. Similar to the judicial survey, the practitioner survey contains 23 questions, some with a range of check-box response options and some with opportunity for opened-ended responses. The questions were divided into the same two sections: fees *pendente lite* and fees in contempt actions. Here, again, Chief Justice Casey was incredibly supportive, reviewing the survey and authoring a message encouraging all family law practitioners to participate in the survey. In addition, we sent the survey to Bar Associations and Affinity Groups (through the Trial Court's Bar Liaisons contacts), as well as to our own colleagues/peer groups and professional associations and asked that they forward the survey to their colleagues and peer groups. These combined efforts resulted in 187 completed surveys. Our sense is that this response rate represents less than half and quite possibly an even smaller percentage of lawyers currently practicing family law in Massachusetts. Unfortunately, we were not able to determine how many family law attorneys practice in Massachusetts courts, so we cannot quantify the result rate. We had intended to continue pursuing survey results when the Covid-19 pandemic arrived, turning everyone's attention to the very different world in which we are now operating. Respondents represent a range of legal service models:

- Legal services and law school clinics 24 (13%)

- Solo practitioners 81 (43%)
- Small firms 69 (37%)
- Medium firms 04 (02%)
- Large firms 06 (03%)
- Other 04[6] (02%)

All respondents reported practicing family law, with the following concentrations: all (52%), most (35%), or some (13%).

Fees Pendente Lite

The judicial survey asked participants to report on the number of requests for fees *pendente lite* acted on in the previous twelve months. These motions are filed only in divorce actions and, in 2018, 11,714 new complaints for divorce were filed in the Probate and Family Court. If these complaints were assigned evenly among the forty seated judges, each would have presided over 300 new complaints involving 600 litigants in the twelve-month period leading up to the survey responses. We intentionally did not differentiate between *pendente lite* requests allowed and requests denied; we wanted to get a sense of how often judges encountered the issue. Available responses were ranges: zero, 1-10, 11-25, 25-50, 50 or more. (The overlapping ends of some ranges was an error in drafting.) We asked the question in two ways. In the first of the two questions, we asked about requests filed by self-represented litigants, and in the second we asked about requests filed by an attorney. The majority of judges each acted on no more than 10 requests from self-represented litigants and no more than 10 requests from lawyers.[7] No judge reported acting on more than 25 requests from self-represented litigants, and only three reported acting on more than 25 requests from lawyers. Seven judges (18%) reported acting on zero requests from self-represented litigants. We infer from these answers that judges review requests for fees *pendente lite* in no more than three percent of divorce cases.[8] The number may be far lower.

In the practitioner survey, we again asked two questions about the number of motions for fees *pendente lite* seen by each respondent in the preceding twelve months. The first asked the

[6] There were 188 responses from 187 respondents.

[7] We realize that the ranges offered in the survey create a wide range of uncertainty, particularly when responses from the two relevant questions in the judicial survey are combined. Consider the majority responses: in each of the two questions, 22 judges (56%) responded in the 1-10 range. This could mean that each of the 22 judges acted on as few as two requests, or as many as twenty requests, or any number in between. When multiplied by 22, the total number of requests reviewed by this majority could be anywhere from 44 – 440. Nonetheless, even at the high end, the total number represents a small fraction of total divorce cases filed.

[8] The majority of judges reviewed a total of no more than 20 motions for fees *pendente lite* (ten from self-presented litigants and ten from lawyers) among the nearly 600 litigants who appeared before them in newly-filed divorce actions in 2018.

number of motions the respondent filed, and the second asked the number filed by an opposing party. A majority of participants reported filing no more than five requests in the preceding twelve-month period, and nearly all reported no more than five motions filed by an opposing party. The breakdown among the 186 respondents to these two questions was as follows:

- Filed zero 44%
- Filed 1-5 51%
- Filed 5-10 5%
- Filed 10+ 0%
- Opposing party filed zero 53%
- Opposing party filed 1-5 43%
- Opposing party file 5-10 3%
- Opposing party filed 10+ .5%

We also asked practitioners if they sought fees in ways other than filing a motion for fees *pendente lite*. The response to this question was open-ended and elicited informative responses. Several attorneys noted they often spoke directly with an opposing counsel to reach an agreement about fees, a few reported no success with motions for fees *pendente lite* in the past and a resulting drop of the practice of asking and, among the latter group, a couple reported asking clients for an advance on their share of the marital estate instead.

Our surveys appear to confirm our starting presumption—motions for fees *pendente lite* are infrequently filed—and support our belief that fees *pendente lite* are underutilized. Still, we cannot yet draw definitive conclusions. As noted in the introduction, we do not know how many divorce litigants lack representation by a lawyer. Additionally, the surveys did not capture quantitative data on cases in which parties agree to allocate marital funds to allow both parties to obtain a lawyer. The surveys also did not capture data on the number of cases in which neither party had representation and marital funds were insufficient by any measure to secure private counsel for either party. While not conclusive, we hope that the information contained in the survey results is compelling enough to spur greater data collection by the Probate and Family Court and continued training of both judges and practitioners. When considering the content of such trainings, it is helpful to review responses to all open-ended questions contained in the two surveys. A summary of those sections follows.

In addition to learning about the number of requests made and reviewed, we also wanted to better understand when lawyers choose to make a request and how judges review such requests: what factors are used and what concerns, if any, do practitioners and judges have when approaching the issue of fees *pendente lite*. To probe these issues, we asked questions in both surveys in which we provided factors to choose among, and we asked open-ended questions in

order to invite responses that would broaden our understanding of relevant factors. A majority of both judges and lawyers reported consideration of each of the following factors:

- available assets;
- the incomes of the litigants; and
- where the opposing side is represented, the source of funds used for that attorney.

A smaller number of judges and lawyers reported considering the length of the marriage.

In the practitioner survey, we also inquired about the financial status of parties in cases in which fees *pendente lite* were allowed or denied. It seems noteworthy that lawyers reported seeing fees awarded in every variety of case: two low-income/asset parties, two moderate-income/asset parties, two high-income/asset parties, and each possible combination within these three income/asset groupings. The highest number of attorneys reported seeing awards in one low- and one high-income/asset scenarios; one low- and one moderate-income/asset combination was second most-often checked. We intentionally did not define "low," "moderate," and "high," and so we must allow for variation of respondents' interpretations of those terms. Also, we did not ask the number of fee awards in each category, and so we do not know how to extrapolate the frequency of awards from the frequency of an award category being checked by respondents. After reviewing responses to the judicial survey, we decided to add an additional, clarifying question in the practitioner survey. Most judges considered an award an advance on the party's share of the marital estate and most reduced the recipient party's share by an amount equal to the amount of the fees *pendente lite* award. Responses from the practitioner surveys appear consistent.

The comments sections of the judicial survey revealed a range of approaches to achieve what several described as a goal of "leveling the playing field." The following is a sampling of responses to the prompt, "Describe the disparity in incomes or available assets necessary for you to award fees *pendente lite* (please write the dollar amount in your response and add further comments if you wish)":

- I focus more on assets than income unless the income disparity is very large and the higher earner clearly has excess income each week. On the asset side, I typically see these motions when the moving party has no access to any of the marital assets and the other side has hired an attorney, using marital assets.
- disparity in income per year, and assets of 100K
- I like to level the playing field as it were. If one party has significant income and the other has a substantially lower, or no, income, I find that the one with the lesser income will not be able to prosecute/defend the action on an equal basis.
- There have to be some assets. Often try to get parties to agree to each take a comparable amount from a joint asset. Most litigants are indigent in Suffolk County so it rarely arises.

- If one party is working and the other is a stay-at-home parent, I consider the income of the working party to be available to both for legal fees. I consider the liquid assets of both parties to be available to both for fees. If one party has secured counsel by using a credit card, I will order the use of credit card funds for legal fees for the other party. If one party has received family funds to pay for his/her lawyer, I will order half of any further amount that the party receives from family to be paid to the other party for attorney's fees.

The survey also asked participants to provide open answers to the prompt: "Please describe any concerns you have about awarding fees *pendente lite*." Twenty-three of the 39 participating judges responded to this prompt. Of the 23 responses, five articulated having no concerns. A few samples of the remaining 18 responses are:

- rocket fuel for litigation sometimes

- Sometimes that award of fees *pendente lite*, and the attorney's fees in general deplete way far too much of the marital estate especially in cases where the marital estate is modest to begin with

- It can be difficult given the case is usually in its early phase- especially in cases where there are not significant assets

- It will result in over-litigation and unnecessary discovery.

- Attorneys over-litigating and using awards to continue to litigate instead of trying to settle. If there is significant property to be divided at the end of a case, I hesitate to award PL fees if there has already been some pre-division or award; counsel has some security of getting paid at the end of the case. For many families, even an award of modest fees is a stretch but can make a difference in getting the case ready for the court to hear. Finally, in all candor, some of us are truly shocked by the high hourly rates charged by attorneys in general, especially in light of the product delivered. There are luckily several attorneys in our court who represent folks for reduced fee/partial payment/ no payment. If all attorneys were required and/or incentivized to take a one-half hourly rate case for a middle-class litigant once per year, everyone would benefit. The Court system is working hard to reduce wait times in order to make it more affordable to have an atty in a family law case; private attorneys need to do their part, too, in increasing access to justice.

We are curious about repeated reference to excessive litigation and undesirable depletion of the marital estate among the judicial responses. These concerns raise new questions, including whether or not uniform guidance to judges on this set of concerns would be helpful. What is the court's role when assessing a motion for fees *pendente lite*? Is it to "level the playing field" of litigation? Is it to equitably distribute marital resources during the divorce process so as to ensure equitable division of the remaining resources upon entry of judgment? Does it extend into assessing the *value* of spending marital funds on legal representation? Are there ways to

structure *how* an award of fees *pendente lite* is spent so that it does not become "rocket fuel for litigation"? Lawyers do not always increase litigation. Lawyers can help litigants reach settlement, saving time and resources for all involved, including the court. Should the court explore a standard fee award for a standardized set of tasks: for example, $X to provide client with an overview of the divorce process, relevant laws, and standards of review; complete a financial statement and Rule 410 exchange of documents; review financial statement and Rule 410 documents from the opposing party; and draft a proposed judgment? The fee could be subject to review and upward revision if the opposing side spent substantially above the standard amount prior to a pre-trial conference. Such a model would not address the large number of cases in which even limited representation is not affordable, but it might increase modest awards in cases involving modest marital resources. These questions are more easily asked than answered and are intended to spark further discussion rather than to propose a particular approach.

A sampling of comments from the practitioners' survey reveal inconsistency and uncertainty about fees *pendente lite* practice:

- I used to file a Motion for Fees Pendente Lite but it was never allowed. I no longer bother.

- conference with opposing counsel, an agreement for an advance was negotiated in an effort to minimize legal fees of the parties

- I've asked the other attorney first and more often than not, the request is granted if it [is] reasonable. Bottom line is both parties to a marriage should have equal access to funds to hire an attorney.

- It is my opinion that Motions for Fees Pendente Lite are not successful and the attorney is out that time too in a situation that becomes unintentional volunteerism. Litigates (*sic*) in the counties I practice generally do not have many assets or cash on hand so, Judges don't see where to get the money from if they did want to award it.

- I have filed a Motion for an Allowance instead of a Motion for Fees Pendente Lite as it seemed like the better course of action at the time as the opposing party had so much wealth that it was more advantageous to seek an Allowance instead of an Advance/Pendente Lite.

- I think often the requests are abusive in nature and have influenced the Court in a negative way. More often than not, the factors that I see influencing the judge, the complexity of the case and the magnitude of the estate.

- Due to the rarity of such motions being granted, I do not take on a case if the only resource for the potential client is to file and win such a motion. I filed such a motion years ago in this situation and in the face of heavy litigation (opposing counsel had 3 attorneys who would quite often go into court on "emergencies" several times a week). I

was not paid for a year and a half of working on the case which was an extreme hardship. I will not put myself and my solo practice in that position again.

- I take a lot of pro bono cases as well as cases that I tell my client that I intend on filing a Motion for Attorney's Fees Pendente Lite. Put simply, I take more cases that I know my client has no ability to pay simply for the fact that in some cases, I know I can most likely get paid by the other side. If not abused, I do not believe that filing such a motion impacts the Court's impression of the case, client, or attorney. Rather, it's treated as a device so that an indigent client can obtain legal counsel.

- I generally don't ask for fees pendente lite unless there are sufficient non-retirement assets to access, and I find judges generally are reluctant to award fees without such assets.

- I just feel strongly that there needs to be clarity …. The Judge should decide on the motion when it is filed and not defer it because otherwise it leaves clients and their attorneys in a difficult position.

- As a clinical program, we have wished to develop a panel of attorneys who would take cases on condition of fees pendente lite; we would either bring the motion LAR or have the private attorney do so. We've found little interest.

- I will not take a case where I need to depend on winning fees pendente lite. Whether old school or not, I have followed (*sic*) a judge's statement made at a seminar more than 20 years ago that if you take a case and need fees pendente lite, you shouldn't take the case as he won't award the fees.

The range of responses reflects a range of interpretations of what an award of fees *pendente lite* is, when it is likely to be awarded, and who or what is responsible for the infrequency of requests and/or awards. Again, it seems that regular training through annual CLE's, bench-bar meetings, and Flaschner Institute events would be beneficial for all.

Specifically, we suggest the following:

- Incorporate a module regarding fees in the judicial training as soon as possible and repeating that module every three years.

- Videotape the training so new judges could watch in between trainings (or include it in new judge training).

- Create a parallel CLE segment for attorneys.

- Encourage roll out of the trainings through bench-bar meetings, and regional and affinity bar association meetings featuring one or more judge panelists to field questions.

Fee Awards in Contempt Actions

The second half of the two surveys focused on contempt actions under G.L. 215, s.34A. Results from this section were more varied and, thus, more difficult to summarize. We did not seek to quantify the frequency of fee awards. Instead, we focused on understanding the range of factors impacting a judge's decision and explored whether or not creation of protocols or other guidance would lead to more frequent and/or large fee awards. The range of factors was broad and, interestingly, among the 32 judges who responded to this portion of the survey, there was no single factor that judges unanimously reported either using or not using. A majority of judges reported considering each of the following factors:

- Whether or not there is a Finding of Contempt
- The defendant's income
- The defendant's assets
- Whether or not the defendant is a "Repeat Offender"
- The efforts, if any, the Plaintiff took to address the issue outside of court
- The defendant's available income
- The hourly rate of the attorney.

A significant number of judges and lawyers also reported considering:

- Whether or not the requesting party's attorney has a signed affidavit ready for submission at the time of the request
- Whether or not the Finding of Contempt was in relation to failure to make a monetary payment
- The amount due to the plaintiff.

Responses to analogous questions in the practitioner survey were similar. A majority of the 184 lawyers responding to this portion of the survey reported considering each of the following factors:

- The defendant's income
- Whether or not the defendant is a "Repeat Offender"
- The efforts, if any, the plaintiff took to address the issue outside of court

- The amount due to the plaintiff in relation to the defendant's available income

- Whether or not there is a finding of contempt.

A significant number of lawyers also reported considering:

- The defendant's assets

- Whether or not the finding of contempt was in relation to failure to make a monetary payment

In response to the prompt, "When I find a Defendant in contempt on a financial matter, I award attorney's fees and /or costs without a formal request for fees from an attorney on behalf of a client or from an unrepresented litigant…", the most common response was "never" followed by "sometimes" and one participant responded "always." A sampling from the comments section includes:

- I would likely not award attorney fees and costs without notice to the opposing party of the request. Costs (such as the summons fee and service of process fee) would be awarded to a self-represented litigant without a motion.

- If no formal request I ask if seeking cost/fees if an unrepresented litigant

- I award fees when they are requested. Many times neither the plaintiff nor the plaintiff's lawyer ask for fees.

- Without the formal request, I do not have the information about hourly rate, work performed, etc., that I believe is necessary to determine the amount of the fees.

- There is a presumption that there will be an order for attorney's fees in a monetary contempt. I start with this presumption, but expect an affidavit from the plaintiff in order to determine the reasonableness of the fees. I carefully review whether fees were charged for unnecessary legal work or whether they are excessive.

- On the rare occasion that I do not assess attorney's fees on a monetary issue as the statute requires, I must and do make findings.

- Most pro se litigants don't know to ask and if the return of service has documentation of the service fee, I tend to award the out of pocket fees if asked and there is documentation.

- I may award costs but not fees unless I receive a Motion and supporting affidavit.

Practitioners were also asked a series of questions about the frequency with which fees were requested and awarded and the frequency of awards that were less than what was requested (and the percent reduction). The majority of respondents reported "always" requesting fees, "sometimes" receiving full payment, and "sometimes" being willing to forego some or all of a

fee if an award from the court did not result in full compensation of the attorney's fees or if the case settled. Comments suggested most respondents did not view awards of attorney's fees in financial contempt actions predictable enough to rely on when deciding whether or not to represent a plaintiff in a contempt action. For example:

- I believe it is critical that any initiative on obtaining fees in contempt actions be based on attempts made by the plaintiff and, especially, their attorney, to settle the matter before court. If the initiative results in plaintiff's obtaining counsel and going to court without an attempt at settlement, then the initiative will backfire. If a defendant is found to be in contempt but there was no attempt to settle the matter, then I would not award fees. Similarly, if a defendant is found not to be in contempt the defendant should also be able to collect fees and costs.

- There should be relative uniformity in how the Judges handle all matters including contempts.

- It is difficult to explain to litigants that, even if they prevail on a contempt action, they may not be awarded fees.

- The most disheartening area of fee awards, or the lack thereof, is on the contempt matters, especially when one has made good faith efforts to resolve the issues without court intervention. Recently I had a case that required three court appearances and also required defending post judgment motions. The fees amounted to over $10,000.00, and the Plaintiff/Client was awarded about $1,500.00. Not a great outcome, and very disheartening for the client. Failing to award fees can result in further contemptuous behavior and increase litigation, so it not only hurts the litigant seeking relief, it increases the burdens on the court system.

- In private practice I was often frustrated by the hesitancy to award fees and costs; as a clinician we are not charging for services. However, an award of fees to a clinic or Legal Services office is an important opportunity to assist such offices in keeping financially sound and issuing a clear message to the defendant in contempt that there are real consequences to the defendant. Plaintiffs often suffer multiple damages over time and too often the Defendant leaves the proceedings no worse off than when served. This is neither appropriate nor equitable. Sadly, this can lead to repetitive behavior by the defendant and a level of frustration and helplessness that lead plaintiffs to stop pursing relief--something the rules change hoped to fix.

- I have to say that the awards of legal fees in contempt actions is miniscule. I haven't received or seen a judge award more than $1200-1500. I charge on an hourly basis and I have a paralegal and charge for her work (at a much lower rate than mine), even so I never am granted what I ask for. My fees tend to be closer to $2000-2200 for a contempt. That's because I do much more than simply file a complaint and go to court; I obtain documents to support my complaint, organize material, sometimes I prepare a chalk, there are multiple conversations with the client, etc.

- I would be much more likely to take on low income clients if I were confident I would prevail on a motion for fees. I find it to be difficult to get an award of fees, even when one party is clearly in contempt.

With regard to awarding costs in a contempt action, again there was no unanimity in responses, but the vast majority of the 32 respondents to this question agreed that the cost of service of the summons could be included, a large majority would consider the plaintiff's lost wages for time in court, and a majority would also consider interest/fees/penalties paid by the plaintiff on overdue bills and the plaintiff's transportation costs to and from the courthouse. Slightly less than a majority would consider a plaintiff's childcare costs for time in court. Only 4 of the 32 would consider an unrepresented plaintiff's time spent completing, filing and arranging for service of the complaint. Responses to analogous questions in the practitioner survey were in line with judicial responses.

We asked judges whether or not creation of a formula for awarding fees in contempt actions—one that could either include a presumptive rate of reimbursement for attorney's fees or not—would "increase the predictability of contempt outcomes in a beneficial way" and whether or not such a formula would increase the likelihood that the judge would award fees. We did not ask practitioners an analogous set of questions. A majority of responding judges were not in favor of creating a formula for awarding or calculating awarded fees. Comments confirm that judges feel that discretion is needed and appropriately applied. For example:

- The statute is mandatory with regard to the award of fees when a defendant is found to be in contempt.

- The issue frequently is ability to pay by the defendant (particularly after the payment of arrears is addressed). The plaintiff's right to the fees must be balanced against the possibility that the fee order is so large that the defendant does not have the ability to pay it.

- I practiced in this court for many years, so I am cognizant of how fees may determine an attorney/client relationship and a case. I do think that judges should not lose sight of that, even the judges who have not practiced privately as attorneys prior to their appointment.

- Please stop watering down the Probate and Family Court. There are many dedicated and good judges who do not wish to see our Court turned into a combination of the RMV and a counseling agency.

- I have not found the issue of legal fees in contempt actions to be so pronounced that the Court needs to develop a formula. I also question the propriety of the Court inserting itself into arrangements between counsel and clients.

- The statute requires counsel fees in contempt matters. I assess fees after consideration of the affidavit, including the reasonableness of the time spent on each task, and also, on the

> total fees as weighed against the amount in controversy. ... In the event that the fees follow a contempt finding in a nonmonetary case, then I assess the reasonableness of the fees incurred in conjunction with the various tasks set forth in the affidavit.

Conclusion

Responses to both surveys strongly suggest a lack of clear mutual understanding between the bench and the bar regarding when fee shifting is appropriate, how much the award should be, and what factors should be used to make both determinations. In addition, with respect to fees *pendente lite*, the surveys support the impression that awards are infrequently made and reveal a variety of factors weighing on judges' minds. It is imperative that we work collaboratively to increase the understanding and appropriate use of this important access to justice tool. By creating a statutory provision to address fees *pendente lite* in divorce actions, the legislature emphasized the importance of providing divorcing spouses with fair opportunity to present their respective cases. The Supreme Judicial Court reinforced the importance of fees *pendente lite* in its 1989 report on gender bias in the court system.[9] The Committee encourages the Probate and Family Court to consider providing further guidance and training to both judges and the public so that all members of the justice delivery system have a clear and consistent understanding of when and how requests for fees should be made, as well as realistic expectations about the likelihood and amount of a fee award in a given case. A follow up survey similar to the one previously sent should be sent to judges and practitioners a year after implementation of any changes.

[9] Report of the Gender Bias Study of the Supreme Judicial Court, p. 20 (1989).