Commentary

The Misuse and Abuse of the Five-Day Rule When Submitting QDROs to the Court

by Christopher Rade Musulin

At this very moment, there are likely numerous qualified domestic relations orders (QDROs) sitting on the desks of superior court judges awaiting entry. It is highly likely that many of these QDROs were submitted for entry and filing under Rule 4:42-1(c), which is commonly known as the five-day rule. In the author's opinion, a careful review of the five-day rule should result in the Court declining to sign and enter these QDROs. The author believes such a result is warranted because a court order can only be entered by consent or as a product of judicial determination in either a contested or default proceeding based upon appropriate findings of fact and conclusions of law pursuant to Rule 1:7-4. The author further believes that a party is not permitted to submit an order to the court containing terms or provisions unilaterally selected. However, this is *exactly* what some practitioners do when submitting QDROs to the court for entry under the five-day rule.

When Rule 4:42-1(c) is scrutinized, it becomes apparent that it was not intended to obviate consent or appropriate judicial determination regarding the complex language contained in most QDROs. Submitting QDROs with provisions that have not been agreed upon or otherwise the subject of findings and conclusions by the court is improper and arguably unethical. Though commonplace, the submission of a QDRO under the five-day rule is a practice the author believes all experienced matrimonial attorneys should avoid.

Rule 4:42-1, Origins and Purpose

Rule 4:42-1 (c) provides as follows:

> Settlement on Notice. In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising that unless the judge and the proponent of the judgment or order are notified in writing of specific objections thereto within 5 days after such service, the judgment or order may be signed in the judge's discretion. If no such objection is timely made, the judge may forthwith sign the judgment or order. If objection is made, the matter may be listed for hearing in the discretion of the court.

Rule 4:42-1(c) was adopted to address the situation, by neglect or design, where an order or judgment is submitted to opposing counsel and languishes with no response or reply.[1] This often occurs at the conclusion of trials, plenary hearings or, prior to modern motion practice with tentative dispositions or court-prepared orders, after oral argument on motion applications. Prior to the adoption of Rule 4:42-1(c), it was necessary to file another application, typically including a copy of the transcript, for the court to settle the form of judgment or order. This additional application constituted a waste of judicial resources and was viewed as a disservice to both the bench and the public at large.[2]

The five-day rule was added to Rule 4:42-1 as paragraph (c) to address the languishing order phenomenon. Given the existence of findings of fact and conclusions of law made by the court, an order prepared consistent with the record and thereafter submitted pursuant to the new rule provision created a logical, pragmatic approach to resolving the languishing order phenomenon. By virtue of the rationale underlying the adoption of the five-day rule, it is clear that an order should never be submitted or signed unless it accurately memorializes a judicial determination and correlates to Rule 1:7-4 findings of fact and conclusions of law.[3]

The Complexity of QDROs

QDROs or other specialized court orders providing for the division of retirement accounts represent an additional and often complicated step in the divorce process. The preparation and finalization of QDROs often follows lengthy and expensive litigation. Many times, litigants are emotionally and financially exhausted by the time the QDRO is to be drafted. The attorneys are often eager to bring the file to a conclusion. Unfortunately, it can take weeks or months for experts to draft the form, effectuate the preapproval process, and for counsel thereafter to review the work, approve it, and provide the final form to opposing counsel for review and consent.

In these situations, it is tempting to simply submit what one attorney believes is the correct form of QDRO to the court under the five-day rule, especially when adverse counsel ignores the proposed form of order. However, the utilization of Rule 4:42-1(c) under these circumstances is highly problematic. This is true because QDROs often contain critical provisions not specifically bargained for or otherwise included in settlement agreements or judgments.

For example, QDROs may need to address qualified joint and survivorship annuity designations, qualified preretirement survivorship annuity designations, costs related to survivorship elections, the divisibility of post-judgment enhancements to benefits, entitlement to cost of living adjustments, subsequent modifications or conversions of pensions to disability status, the impact of early retirement elections, reversions upon death of the alternate payee, in future elections and other provisions frequently not included in the marital settlement agreement. In fact, most plan administrators will not accept the form of order absent clarity and agreement as to these provisions.

An alternative is to confer with an expert prior to drafting the provisions of the marital settlement agreement and agree upon the specific language to be included in the QDRO, which can even be executed concurrently with the marital settlement agreement. If this is not possible, a notice of motion to settle the form of QDRO or the scheduling of a conference with the court represent other viable options in lieu of the five-day rule in the absence of consent and cooperation.

Ethical Considerations

RPC 3.3 addresses candor toward the tribunal. It specifically prohibits the affirmative disclosure of false or misleading information to the court, or omission of material facts to the court. Submitting a QDRO to the court containing unilaterally imposed terms or omitting material provisions appears to directly violate this RPC.[4]

Conclusion

QDROs, domestic relations orders (DROs), court orders acceptable for processing (COAPs), and other similar forms of order for the division of retirement accounts can be among the most complicated and technical documents attorneys prepare. Unfortunately, some of the plan requirements or technicalities might not be evident until expert involvement during the preparation of the initial draft of QDRO or at a later time upon review by the plan administrator during the approval process. If either party submits a proposed form of QDRO under the five-day rule that includes language not specifically agreed to between the parties or otherwise the subject of judicial determination, the author believes that such a submission constitutes an improper utilization of Rule 4:42-1. A careful review of the history of the rule, as well as the conduct it was drafted to resolve, informs the author's belief. ■

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Endnotes

1. *See* Rule 4:42-1 and the comments contained therein.
2. *Elliot v. Elliot*, 97 N.J. Super. 10 (Ch. Div. 1967).
3. *City of Jersey City v. Roosevelt Stadium*, 210 N.J. Super. 315, 331 (App. Div. 1986). a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.