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## FAMILY LAW

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### The New Secret Weapon: Retroactive Counsel Fees

Court grants fees on prior motion where they were previously denied

It is boiler-plate for nearly every motion filed in Family Court to include the request that the opposing party pay counsel fees. The theory for such requests is that the other side is not only wrong, but he should be punished for his conduct by being ordered to pay counsel fees. Occasionally, the prevailing party on a motion is rewarded with that most coveted award sought by all divorce attorneys, the granting of counsel fees. However, by far the norm is for the court to simply deny counsel fees without prejudice. Nevertheless, divorce lawyers continue to request counsel fees — and why not? An award of counsel fees represents to our clients and to ourselves, vindication. It connotes the idea that our client is the one who is “right,” and “good.” It gives our client the psychological edge in the battle and reinforces the idea to our client that they have a “great lawyer.”

Yet in the majority of cases, the court is unimpressed or otherwise unmoved with the latest “bad deed” to be denounced. The court routinely moves past the behavior, chalking it up to equally bitter spouses or simply different points of view or just what is to

be expected in a divorce case. But when the bad behavior continues and a litigant is confronted with having to file motion after motion, the divorce lawyer now has a newly approved weapon in his arsenal: retroactive counsel fees.

The Appellate Division recently decided the case of *Miljenovic v. Miljenovic*, 2007 WL 3239157 (N.J. Super. A.D.). In *Miljenovic*, the Appellate Division approved the trial court’s granting of legal fees, not only on a motion before the court, but also with regard to a prior motion for which legal fees had previously been denied. Judge Pogarsky of Ocean County had denied counsel fees to the plaintiff-wife on the first application because he found insufficient bad faith on the part of the defendant-husband. On the next motion, however, the court expressly found that the defendant acted in bad faith, causing the plaintiff to incur counsel fees needlessly. The court directed that plaintiff’s counsel submit a certification of services for the legal fees incurred on both the prior motion and the pending motion.

It is black-letter law that a court has discretion to award counsel fees on an

application upon a finding of bad faith. N.J.S.A. 2A:34-23; R. 5:3-5(c)(3); *Williams v. Williams*, 59 N.J. 229, 233 (1971). In *Miljenovic*, however, the defendant made a somewhat technical argument that appears to be justified by the Court Rules. Defendant appealed on the grounds that an order for counsel fees must be issued at the time of the entry of the court’s substantive order. Defendant argued that R. 4:42-9, which authorizes the granting of counsel fees in a family action pursuant to R. 5:3-5(c), specifically prohibits the granting of counsel fees for a motion at a subsequent time by a separate order. R. 4:42-9(d) reads as follows:

(d) Prohibiting Separate Orders for Allowance of Fees. An allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination.

It would seem that a reading of the plain language of the Rule supports defendant’s technical argument. The Appellate Division, however, affirmed the trial court’s decision, pointing to the trial court’s discretion to grant counsel fees and citing *Williams*, 59 N.J. at 233. The appellate court also cited R. 5:3-7, which recites the court’s authority to order economic sanctions, as well as “any other appropriate equitable remedy.”

There is now no question that a court may grant retroactive counsel fees and, therefore, we as practitioners have a new tool, a “new secret weapon.” Perhaps the court you are before gave the benefit of the doubt to the opposing

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party on the previous application, just as Judge Pogarsky seemed to do in *Miljenovic*. Perhaps, repeated motions are just what it takes to demonstrate a

pattern of bad faith. Once you are able to give the court an understanding of “what is really going on,” and the court comes to the conclusion that prior conduct was

unjustified, the court may grant the counsel fee request previously denied.

So I say to my adversary, Mr. X (you know who you are), “Watch out!” ■