By Vesselin Mitev

With the summer fast approaching, and a busy first half of the year whisked by (and admittedly suffering a bit of writer's fatigue), I stared blankly at the screen debating what to write about for this column without appearing to the dear reader as if I were just mailing it in (and as far as you know, I have not been for the last three years).

When inspiration unfortunately did not strike, I therefore decided to tackle three different issues that have come up recently in practice, Cindy Adams — like, i.e., non sequiturs strung along by the mere vestigial tendril of my column, buoyed along the swaying currents abutting those warm climes of the matrimonial tropics by the sheer upthrust of my indomitable ego.

Does Adultery Get My Client Extra Dough?

A client comes to you, red-faced, having just discovered the silkiest pair of black lace underwear in his wife's purse. He tells you that he's never seen them before — certainly not worn at his behest — and that he therefore wishes to commence a divorce action . . . immediately. He's been told, numerous times, between the time he made this clandestine discovery and the time he got to your office, that he will have to pay less in maintenance, and maybe even less in e.d. (no, not that type) if he can prove adultery. There's no one in the office left, just you, pouring over one of your associate's dismal billables, so you decide to clack out a summons with notice, of course, taking care to specify that it is an action for a divorce pursuant to, let's say 170.7, because you've been practicing law in the State of New York for more than 5 minutes, and to appease the client, under 170.4 (adultery).

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Of course, contrary to what your client's mother's second cousin's girlfriend's nephew, Dale, has told him, in between dips of chew, is that adultery is very hard to prove and not, under any cursory or in-depth review of the applicable law, any more likely to result in a windfall for him in the distribution of the marital pie.

This news, of course, stings, and while you assure your client you will urgently press his cause at the first available preliminary conference, you remind yourself that CPLR 4502 (a) renders each spouse mute with respect to the other on a cause of action for adultery "except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense" and that most courts will tune out the minute someone mentions this ground, while reminding you that this was the reason the legislature chose to amend the law and introduce "no-fault" divorce. In short, in today's day and age, the moral choices one spouse makes on whether they are faithful are nigh irrelevant to the court's distribution of the marital estate.

Call your first witness at 2 p.m.

Many a stentorian edict has been sternly issued from the relative safety of the high blacked chair draped with the black robe, directing a "trial on all issues" at 2 p.m. (well, really, more like 3:30 p.m.) after two haggling adversaries have failed to harangue their clients into a settlement on a stip-or-appear date.

The ill-informed lawyer, upon hearing this ukase, panics and this panic mushrooms — even to a less favorable settlement, hastily scrawled out in the cafeteria over lunch. The well-informed counterpart stifles a yawn and flips to the bevy of case law that holds that, absent a note of issue, there is no jurisdiction for a Supreme Court Justice or County Court Judge to try a case and any dismissal that a court may issue is subject to restoration to the calendar by the mere expedient of a letter. Unless the court has directed that a note of issue be filed, see 22 NYCRR 202.16 (i) (and same has not been done) and/or there has been no 90-day demand to serve and file a note of issue, the court is essentially powerless to dismiss the case, see Arroyo v. Board of Education of the City of New York (2d Dept. 2013) for a lucid discussion of the three statutes/rules that govern the dismissal of cases.

To summarize, a defendant who has not made a 90-day demand will never get the proverbial vampire stake through the heart of a plaintiff's case. So, unless a note of issue has been filed by either party, there is a jurisdictional hurdle to the court proceeding to try any case, no matter how loudly a court proclaims it will take testimony at 2 p.m.

A PC order binds your case

Here's a stunt pulled on me some years ago. An adversary signed the preliminary conference order, along with his client, resolving the issue of grounds; following the due execution by both parties and counsel of same and the court having so-ordered same, learned counsel moved to dismiss the cause of action. I cross-moved for sanctions, of course, and sought that my colleague be directed to attend remedial CLE courses on matrimonial practice.

A recent decision in the New York Law Journal cogently explores a very closely related topic: seeking to "voluntarily" discontinue an action post-PC order. The decision in *Verdi v. Verdi*, NYLJ, 5/6/19, is definitely worth a read, but to sum it up, as one may infer from its very name, the very purpose of a PC order is to resolve those issues that can be resolved (such as grounds, for instance), especially in those cases where someone does not serve a summons and complaint but the aforementioned summons with notice (in my opinion, a summons and complaint with a CSSA chart and a notice of guideline maintenance should always be served together to avoid precisely such problems). Failure to abide by the PC order, as in Verdi, can and did spell trouble for the skittish spouse.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.