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Chair's Column

At Long Last—My Year as Chair Begins

by Jeralyn L. Lawrence

On May 15, 2014, one of my dreams came true. I was sworn in as chair of the New Jersey State Bar Association Family Law Section. Ever since I became involved in the Young Lawyers Subcommittee of the Family Law Executive Committee nearly 15 years ago, I have hoped for the day I would lead this dynamic section. We are a section that works tirelessly. We are active, vibrant and talented. I look forward to working for you, on behalf of you, and with you in the year ahead.

At my swearing-in ceremony, I conveyed my deepest gratitude to the host of people on whom I have leaned and who enabled me to achieve this incredible honor. I will not repeat the names here, but I wish to warmly express my gratitude again. I also wish to express my gratitude again to those who volunteer time to promote the betterment of our practice, whether by serving as an early settlement panelist, as a member of a local county bar family law committee, or in some other capacity. Thank you for what you do to help families, especially the children of our clients.

I have some lofty and ambitious goals for the upcoming year. I am confident that, with the tireless work of our section members and the continued commitment of my fellow officers, these goals will come to fruition.

First, I want our section to remain visible, vigilant, and involved in the legislative process. I want every member to become a legislative guru so that collectively our section will become an even stronger legislative force. We must work to ensure good laws are enacted and to thwart bad bills before they become law. We must remain mindful that our practice is under the constant threat of abrupt change through the legislative process. We have seen firsthand how many of these changes adversely affect the most vulnerable parties. Recent examples are the amendment to the statute of frauds that has impacted palimony claims and the change

to the statute governing prenuptial agreements that has altered the standard for enforceability.

The lengthy debate over various pieces of legislation pertaining to alimony has successfully come to a compromised conclusion. My fellow officers and I dealt with this issue on almost a daily basis. For more than two years, our section lobbied in support of a commission to study alimony. Likewise, we had lobbied to oppose baseless and arbitrary alimony guidelines. While we waited for the formation of the commission, we worked on an alternate bill. This bill (A-1649/S-1808), was sponsored by Assemblywoman Pamela R. Lampitt, Assemblyman Thomas P. Giblin, and Senator Anthony R. Bucco, and represented a fair compromise to the alimony debate. Among other things, the bill provided for the codification of existing case law relative to various changes in circumstances that may warrant a modification or termination of an alimony obligation. We remained steadfast in our commitment to ensure that any statutory change to alimony is reasonable, fair, and balanced to both the payor and the payee. With this commitment in mind, during the latter part of May and all of June 2014, intense negotiations with the alimony reformers and various members of the Legislature commenced, which resulted in an agreement to support a compromised bill. The bill, Assembly Committee Substitute for Assembly Nos. 845, 971 and 1649, has passed both the Assembly and the Senate and was recently signed into law on Sept. 10, 2014.

We are fortunate as a section that countless members of the Legislature were willing to spend the time and effort to broker and foster a compromise between the Family Law Section and our 24 other coalition members totaling over 160,000 people and the alimony reformers.

The enactment of the alimony bill marked a historic and momentous end to our three-year journey to revise New Jersey's alimony laws. We worked just as diligently to ensure the enactment of the New Jersey Family Collaborative Law Act (S-1224/A-1477), which was signed Sept. 10, 2014, as well. While most of us do not shy away from litigation, we wholeheartedly embrace alternate dispute mechanisms. We have seen how mediation and arbitration, and now the collaborative process, help parties resolve their disputes with dignity. In the collaborative process, clients enter into a contract committing to settle their disputes without litigation. It is often a 'team' approach, with other professionals brought in to help facilitate a settlement. For example, the parties may enlist the help of a child specialist to assist with the parenting time issues, or the help of a financial expert to assist with the economic issues. Generally, final resolution is reached far more quickly than if the matter had been litigated. As a result, not only do parties create solutions to their immediate problems, but the emotional and economic damage to the family is also minimized.

I had the honor and privilege to testify before both the Senate and Assembly Judiciary Committees on behalf of the NJSBA in support of this legislation. I am not sure if in the history of this section there has ever been a chair fortunate enough to have two such significant pieces of legislation enacted into law. It is certainly an exciting time for all of us, and reemphasizes the crucial need for all of us, individually and collectively, to become masters of the legislative process.

We thank the members of the Legislature who have helped us advance our causes. If you have a personal relationship with a member of the Legislature or a member of the governor's counsel, please let me know; we rely on our personal relationships in order to remain relevant in the halls of the State House.

My second goal is to take a hard look at our law that sets the standard for the relocation of children outside the state of New Jersey. I have formed a subcommittee to review the social sciences underpinning the *Baures v. Lewis* decision to determine if these studies are still valid. It is hard to believe that it is in a child's best interest to be relocated away from an active, involved parent.

I have given the Children's Rights Committee the task of researching and reviewing the law and the psychological literature relative to parenting time schedules for infants. Resolving custody and parenting time is often approached in the same manner as equitable distribution—we need to resist the temptation to simply equally divide the parenting time for an infant. According to mental health experts, new studies are available that can assist us in crafting consistent and stable schedules that are in the best interest of these very young children.

I also intend to review any recent trends in respect to parents' contributions to their children's college expenses. Not only are college costs skyrocketing, but they often far exceed the parents' incomes. I have appointed a subcommittee to review relevant statistics and literature, and to offer recommendations to consider when addressing this issue.

Another goal is to review the area of legal malpractice. Unlike other professions, we do not have commonsense requirements and thresholds regarding who is

qualified to sign an affidavit of merit or testify at trial. I look forward to working with our section to address this important issue that can potentially impact any of us.

Lastly, I am hopeful that during my tenure I can help foster an attitude and environment of practitioners being respectful to each other. I would like us to treat each other better. We have an important, difficult job. We deal with so many substantive areas of the law. It pains me when our colleagues make our job even harder.

There are many ways we can treat each other better. If asked for an adjournment, absent extreme, emergent circumstances, give consent. When it comes to counsel fees, work together to make sure both attorneys are paid, not just one side. Let's talk more and refrain from the letter-writing campaigns and the barrage of emails that are often meaningless and counterproductive, and only serve to inflame the case. Pick up the phone or have a face-to-face meeting with the other side. Don't talk over each other—advocating a position in a disrespectful manner doesn't make it any more valid.

Let's better serve our clients by becoming problem solvers and by taking consistent positions regardless of which party we represent. Gladiator-type tactics, a scorched-earth approach, and a win-at-all-costs mentality only prolong the litigation and may likely cause further economic and emotional damage to the very families we had set out to help.

Unchecked egos and engaging in power struggles also damage the reputation of our profession. Our reputation is everything, and it is always on the line. It should be guarded as if the practice depends on it, because it does. I am not suggesting we become doormats or pushovers. After all, most of us went to law school because we are over-achieving alpha dogs. I *am* suggesting we continue to zealously advocate for our clients, but in a kinder, gentler way. There is good and bad in every profession. Let's be the good in ours. Let's embrace the basic rules we learned in kindergarten: Be nice and play fair.

I always wanted to be a lawyer. Even as a young child, I loved discussing the law with my father, who was a detective in the Juvenile Division. I love the law. I love family law. I love what I do. I am sure you do, too. Let's all work together to make the practice we love a little more civil, a little more enjoyable and a little more rewarding. You have my commitment to do my part.

I am so honored and thrilled to be chair of the Family Law Section, and I am here to help you. Please do not hesitate to call. ■

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Editor-in-Chief's Column
Proposed ESP Guidelines

by Charles F. Vuotto Jr.

This edition of the *New Jersey Family Lawyer* contains an excellent article by Christopher Musulin celebrating the 35th year that divorcing parties in the state of New Jersey have had the benefit of the Mandatory Early Settlement Program (MESP). As correctly noted by Musulin, the MESP has substantially assisted the Judiciary in resolving matrimonial and other family part matters. However, there is always room for improvement. The author commends the MESP and all of the lawyers who volunteer their time. Nevertheless, the author believes the program would benefit from a clear set of guidelines, which do not presently exist. This column proposes such guidelines.

Before addressing the proposed guidelines, however, it bears repeating that the Rules of Court provide that, "Complementary Dispute Resolution Programs ("CDR") provided for by these rules are available in the Superior Court and Municipal Courts and constitute an integral part of the judicial process, intended to enhance its quality and efficacy. Attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them."[1]

The New Jersey Rules of Court provide specifically for MESP under Rule 5:5-5, which provides as follows:

> All vicinages shall establish an Early Settlement Program (ESP), in conjunction with the County Bar Associations, and the Presiding Judges, or designee, shall refer appropriate cases including post-judgment applications to the program based upon review of the pleadings and case information statements submitted by the parties. Parties to cases that have been so referred shall participate in the program as scheduled. The failure of a party to participate in the program or to provide a case information statement or such other required information may result in the assessment of counsel fees and/or dismissal of the non-cooperating party's pleadings. Not later than five days prior to the scheduled panel session, each party shall be required to provide a submission to the ESP coordinator in the county of venue, with a copy to the designated panelists, if known.

With the exception of the foregoing, there is no concise and clear list of guidelines applicable to ESP practice. The author suggests that a clear list of ESP guidelines be established, as follows:

1. The procedures for each county's ESP should operate in a uniform and consistent manner.
2. The function of an early settlement panel is threefold:
   - **A.** Whenever possible, the panel should effectuate a full settlement of the controversy, including all financial and non-financial issues (*i.e.*, the panel should be permitted to make recommendations regarding children, custody and timesharing, whereas in the past they have been precluded from doing so). If a panel fully resolves all issues, the case should proceed expeditiously to final uncontested hearing and judgment, even before judges not normally assigned to matrimonial matters.
   - **B.** Where full resolution is not practical, the panel should narrow the issues in dispute as much as possible. Stipulations of fact should be employed liberally to preserve judicial resources.
   - **C.** The panel should mediate discussions to obtain reasonable stipulations regarding discovery and other material matters, not only for purposes of trial but also to further settlement discussions. Where agreement is not possible, the panel should also recommend an appropriate discovery order to the court. The matrimonial judge should then consider the recommendation and the parties' responses and enter an appropriate order, thereby avoiding the necessity of a formal motion.

3. Each ESP panel should consist of no less than two panelists (individual counties may expand the number of attorneys on a panel, but may not reduce the number below two).[2]
4. The selection of ESP panelists should be a joint undertaking of the county bar association and the court. An ESP panelist must have one of the following qualifications:
   A. Have practiced primarily in the area of family law for at least 10 years; or
   B. Have one of the following qualifications: 1) be a certified matrimonial law attorney; 2) be a past or present member of the executive committee of the Family Law Section of the New Jersey State Bar Association; or 3) be a fellow of the New Jersey Chapter of the American Academy of Matrimonial Lawyers.
5. Written ESP submissions shall be required of any party participating in an ESP. ESP submissions should consist of a proposal/position letter regarding all financial and non-financial issues in dispute and should be accompanied by an updated case information statement, including but not limited to a child support guidelines worksheet, when applicable. The ESP submissions shall be submitted to the ESP coordinator in the county of venue with a copy to each of the designated panelists in hard copy (not by fax or email unless permitted by the panelist) at least five days in advance of the panel date.
6. Attorneys or self-represented litigants who fail to comply with the submission requirement may be subject to sanctions in the discretion of the court.
7. All communications incident to participation in the ESP, including but not limited to the submissions or any other writings submitted to the panel, all oral presentations made by counsel or self-represented litigants at the time of the panel and all statements or recommendations made by the panelists, shall be deemed absolutely confidential and not disclosed to any third party, mediator, arbitrator or jurist, except with the written consent of all parties and the panelists. In other words, the recommendations of the panelists cannot be used at a later time to argue that an individual has proceeded in bad faith with regard to that party's positions in the case unless the parties and panelists agree in writing to the disclosure of the panelists' recommendations.
8. It is the policy of the court that an ESP occur after the time discovery has expired pursuant to the rules of court or the last relevant case management order.
9. Cases that are appropriate for an ESP panel include all matters before the family part, either pre- or post-judgment, with the exception of domestic violence matters (if either or both parties are self-represented), juvenile matters, Child Protection and Permanency (CP&P) (formerly the Division of Youth and Family Services) matters and children in court matters.
10. ESP panelists who handle a particular case may not thereafter serve in any capacity with regard to the matter they paneled, including but not limited to representation of either party as the attorney of record; or acting as the mediator, arbitrator, or guardian *ad litem*. However, an attorney who served on a panel for a particular matter may thereafter serve as a blue ribbon panelist (*i.e.*, a panel retained and paid for by the parties) or as a panelist on a post-judgment matter.
11. An early settlement panel coordinator shall be designated to ensure the program runs efficiently.
12. Absent agreement to the contrary, all ESPs should occur at the courthouse, so the coordinator, the court rules, child support calculators and private meeting facilities are available. Each county should assure the panelists, attorneys and the litigants involved in the ESP have adequate physical space to convene.
13. The ESP should be utilized as an integral part of a comprehensive case management process.
14. After the early settlement panel, non-settled matters shall be scheduled for mandatory economic mediation in accordance with Rule 1:40.
15. All who participate in the ESP process should treat the panel hearing as they would a trial appearance in terms of promptness and courtesy.
16. The number of cases presented to an ESP on a particular day should be limited so all cases receive meaningful consideration.
17. The Administrative Office of the Courts (AOC) should maintain certain statistics, such as:
   A. Number of cases assigned to the panel;
   B. Number of cases settled;
   C. Number of cases settled post-hearing and prior to beginning trial;
   D. Which matters are pre- or post-judgment; and
   E. The time lapsed from the filing of the complaint to early settlement panels.

18. Uniform and standard forms should be encouraged, such as notices of the schedule and submission requirements. A central registry should be established regarding these forms, or the forms should be added to the New Jersey Judiciary's website.
19. Complicated matters should be referred to mandatory mediation pursuant to Rule 1:40, or to a blue ribbon panel. At the conclusion of the ESP, where the case is not fully settled, the court should encourage the parties to select and retain a blue ribbon panel to address their matter. All issues pertaining to the use of a blue ribbon panel should be driven by the unique requirements of each individual matter. The trial judge may also educate the parties on the benefits of arbitration of their disputes.
20. On the day of the scheduled appearance for participation in the ESP, the presiding judge of the family part, or his or her designee responsible for the call of cases to be paneled, shall appear on the record with all of the litigants to explain the ESP and the importance of the parties and their counsel, making every good faith effort to resolve the disputes. In addition to, but not instead of, the speech by the judge at the beginning of the day, the litigants should be encouraged to view the video that is currently shown to litigants in the Hudson County vicinage. This should be done prior to the date of the panel. The parties and attorneys may be directed to the video through an Internet link contained within the ESP notice.
21. The attorneys who volunteer their time for the ESP should be publically recognized and should be given preference on lists for their ESPs and on motion days.
22. ESP coordinators should send panelists a list of matters to be paneled at least 30 days in advance of the assigned date, so the panelists may perform appropriate conflict checks. If a panelist is restricted from handling a certain case due to a conflict, that panelist must advise the ESP coordinator immediately, so the case may be transferred to another panel.
23. In the event a panelist is unable to serve on an assigned date, that panelist is responsible for obtaining a substitute panelist from the ESP roster and providing the substitute panelist with all ESP submissions received to date.
24. Recognizing that an attorney should never attempt to handle multiple ESPs on the same date and time, the court should implement a 'one attorney/one panel' protocol.
25. Where both parties are represented, it is permissible for the panel to meet with both attorneys before meeting with the litigants. However, the panel must, at some point, meet with the actual litigants to convey their recommendations.

If these guidelines are implemented, it is the author's belief that the ESP process will be improved for the benefit of the citizens of the state of New Jersey, as well as the professionals who assist them. ■

The author wishes to thank Christopher Musulin for his assistance with this column.

Endnotes

1. Rule 1:40-1.
2. Typically, panels throughout the state should be composed of two attorneys. It has been recognized that panels of two attorneys are sufficient to accomplish the purposes of an ESP. Individually counties should recognize, however, that the addition of a third attorney may unduly increase administrative costs and tend to limit the number of available volunteers.

Executive Editor's Column

Arbitration of Legal Malpractice Claims: Permissible, But Practical?

by Ronald G. Lieberman

Earlier this year, in *Smith v. Lindemann*,[1] United States District Judge Dickson Debevoise permitted a New Jersey attorney to include an arbitration clause regarding any allegations of legal malpractice in his retainer agreement. This ruling raises issues about whether an attorney should include such a clause in his or her retainer agreement and, if the attorney does so, the attorney is adversely impacting the public's confidence in the bar.

In *Smith*, Judge Debevoise held that the arbitration clause was permissible because it was clear and unambiguous, and reflected the client's agreement to arbitrate any allegations of legal malpractice.[2] The provision was clearly captioned as "Arbitration of Differences Between the Client and the Law Firm," and further stated that "[s]hould any differences, disagreements, or dispute between you and the Law Firm arise as to its representation of you, or on account of any other matter, you agree to submit such disagreement in binding arbitration."[3] The retainer agreement stated that if a fee arbitration committee did not agree to handle issues other than a dispute over fees, the client and the law firm agreed to submit disputes (other than those relating to fees) to binding arbitration governed by the New Jersey Uniform Arbitration Act.[4] The final paragraph of the retainer agreement made it clear to the client that by signing the agreement, the client understood a dispute over any fee or other dispute would be handled by binding arbitration instead of resolution by a court, with the signature being deemed the client's consent to methods of alternative dispute resolution and a waiver of any right by the client to seek to have the matter resolved by a court.[5]

Judge Debevoise found that New Jersey law did not prevent the arbitration of legal malpractice, and instead that the state's general public policy was to favor alternative dispute resolutions.[6] Judge Debevoise further found that the arbitration clause was not oppressive, one-sided, or inconsistent with public policy.[7] Additionally, the client's signature on the retainer agreement immediately followed the section indicating the rights the client was waiving by agreeing to arbitrate, and the client did not allege he or she had not read the agreement in its entirety.[8]

But, as is often the case, just because an attorney *can* do something regarding his or her relationship with a client does not automatically mean he or she *should*.

Including an Arbitration Clause Does Not Implicate an Attorney's Ethics

Judge Debevoise did not find that an attorney was acting unethically by adding a clear and unambiguous arbitration clause in his or her retainer agreement. Notably, a dozen years ago the American Bar Association Formal Ethics Opinion (Op. 02-425 (2002)) allowed retainer agreements to include provisions referring allegations of legal malpractice to arbitration. In the attorney-client relationship, the client trusts his or her attorney to act as a fiduciary in his or her best interests. As a fiduciary, the attorney is expected to act with the utmost candor and fairness, even if the attorney has to put his or her own interests secondary to those of the client. As such, the relationship mandates a full explanation of the arbitration process.

In New Jersey, an attorney can represent a client without giving the client the opportunity to seek independent counsel, although the right to seek independent counsel was specifically stated by ABA Formal Op. 02-425 as one of the reasons why an arbitration clause would be ethical.

Even if there was concern about arbitration, New Jersey laws cannot impose limitations "which are special to arbitral clauses," per Section 2 of the Federal Arbitration Act.[9]

New Jersey RPC 1.8(h)(1) states that an attorney may not make an agreement prospectively limiting liability for malpractice. According to *Smith*, there is no limitation on liability when an attorney obligates a client to arbitrate an issue regarding legal malpractice because an attorney's

liability can be fully explored in an arbitration proceeding taking place pursuant to the New Jersey Uniform Arbitration Act.[10]

Thus, the attorney is left with guidance that he or she can create an arbitration clause in a retainer agreement as long as the clause does not limit the ability of the client to file a disciplinary complaint or cooperate with disciplinary proceedings or an investigation. As long as there is informed consent under *Smith*, a clause compelling arbitration for legal malpractice disputes would be enforceable. The contents of such a clause should clearly inform the client that he or she is waiving his or her right to a jury trial, an appeal, and to broad discovery; that the client has been told which claims are being subject to arbitration; and that the client may seek independent counsel before signing the retainer agreement.

Thus, the pause an attorney has in deciding whether to include an arbitration clause in his or her retainer agreement would not be premised on a fear that a properly drafted clause would be unethical. There are, however, other policy considerations that come into play.

Policy Implications That Do Exist When Including an Arbitration Clause

Even though there is support for the proposition that an arbitration provision in a retainer agreement is enforceable, an attorney must determine whether to include a provision. Providing the prospective client with the right to seek independent counsel appears to be strongly favored, even if not specifically mandated. Without doing so, the general public may conclude that an attorney is merely trying to take advantage of his or her client. A client can argue that the retainer agreement with the arbitration clause is an adhesion contract and that because he or she was in a vulnerable state, was susceptible to being taken advantage of by a cunning attorney.

But, allowing a prospective client the opportunity to consult with independent counsel before signing a retainer agreement with such a clause creates a matter open for negotiation between the lawyer and the prospective client. This may be unwise, as an attorney is now making his or her retainer agreement truly 'negotiable.'

There are other policy implications involved in having a malpractice arbitration clause in a retainer agreement. For example, does the attorney's professional negligence insurance carrier wish to be bound by such a provision? Would the insurance carrier be permitted to seek to have a jury trial, the right to discovery, or a right to appeal in legal malpractice matters? Would an insurance carrier assert that an arbitration provision provides a policy defense or obviates coverage altogether? Any law firm desiring to use a mandatory arbitration provision for legal malpractice claims in a retainer agreement would be well advised to confer with its professional negligence insurance carrier prior to including the provision in its retainer agreement.

There are also questions about the arbitration process itself. A client can argue that arbitrators are more likely to side with the attorney because arbitration is usually conducted by attorneys or retired judges. This perception of a pro-attorney bias can lead a client to lack confidence in the overall proceedings in arbitration, or believe the attorney is breaching his or her fiduciary duty. Can an arbitrator actually report any ethical violations? It is not clear that a client would be confident that such a reporting would take place.

Final Thoughts Before Modifying a Retainer Agreement

An attorney considering modifying his or her retainer agreement to mandate the arbitration of legal malpractice claims should proceed carefully. The attorney should fully explain to the client the potential benefits of arbitration, as well as the rights the client is being asked to waive. The attorney must make the disclosure of the waiver of rights in writing. Proper practice would seem to mandate the prospective client be encouraged to seek independent counsel before making an informed decision, and make it clear in the language of the arbitration clause that the attorney is not limiting his or her liability but merely creating an alternate process under which the claim will be handled. Only by following proper and stringent procedures can the attorney ensure the public's faith in the bar will not be eroded by an arbitration clause in a retainer agreement. ■

Endnotes

1. 214 N.J. Dist. LEXIS 727065 (2014).
2. *Id.* at 27.
3. *Id.* at 25.
4. *Ibid.*
5. *Id.* at 26.
6. *Id.* at 19.
7. *Id.* at 27.
8. *Ibid.*
9. 9 U.S.C.A. §1, *et. seq.*
10. 214 N.J. Dist. LEXIS at 25-26.

Commentary:
Arbitration in the Family Part—Groundhog Day Must End

by John E. Finnerty Jr.

For five years now, opposition from complementary dispute resolution (CDR) practitioners to recommendations of the Supreme Court Family Part Practice Committee has delayed approval of a protocol and rule that would facilitate recognition of arbitration as an alternative dispute resolution tool in the family part .

This turf war dispute started following the 1999 New Jersey Supreme Court's decision in *Fawzy v. Fawzy.*[1] At that time, the Court unanimously determined that parents had a constitutionally protected sphere of autonomy that enabled them to choose the forum in which their disputes over all child-related issues could be resolved. It ruled that arbitration was an appropriate forum so long as certain procedural protocol were in place that enabled the court to execute its *parens patriae* jurisdiction in the event that a party contended the arbitrator's ruling "threatened harm to the child."[2]

The Court noted only that agreements to arbitrate child-related issues "must be in writing or recorded" and must clearly establish the parties are aware of their rights to judicial determinations and have knowingly and voluntarily waived them.[3] To facilitate this goal, the Court in *Fawzy* mandated that a record of documentary evidence produced during the arbitrations be kept, that testimony be recorded, and that findings of fact and conclusions of law be issued. In an apparent attempt to better institutionalize these requirements, the Court referred to the Family Part Practice Committee "the development of form agreements and scripts for use by lawyers and judges in cases in which the parties seek to bind themselves to arbitration in Family Law matters."[4] The next year, in *Johnson v. Johnson,*[5] the Court expounded further on what it intended in connection with the nature of the record that was required.

Since that time, two separate family part practice committees, over two separate two-year terms, between 2009 and 2013, painstakingly drafted, re-drafted, and then re-drafted yet again, proposed model consent order forms and a questionnaire for use when parties opted for arbitration of any family law-related issue, including custody/parenting issues. Each time CDR practitioners opposed the proposals made by the Family Part Practice Committee, and each time their opposition was successful in blocking adoption of the proposed model forms and questionnaires. Last term, an actual arbitration rule for family part matters was proposed, but it, too, was opposed by CDR practitioners. The result has been the appointment of yet another committee—the Ad Hoc Committee on the Arbitration of Family Matters. It is meeting now, and it, too, is charged with making recommendations to the Court in connection with the assignment made five years ago to the Family Part Practice Committee.

Resolution of Disputes

The policy of the law—in all forums, civil, family or otherwise—is to encourage litigants to settle disputes, which if left unresolved ultimately would be introduced into the increasingly overwhelmed court system. This policy is longstanding.[6]

This strong public policy of encouraging settlements is paralleled by the policy that encourages use of alternative dispute resolution methodologies. This involves removing cases that cannot be settled from the courts, and introducing them to a variety of extra judicial alternative dispute protocols. Arbitration has been one such favored dispute resolution method that has been encouraged as an alternative forum.[7]

Arbitration Protocol

Arbitration is a method of dispute resolution involving one or more neutral third parties who are agreed to by disputing parties. At its core, arbitration has always

been a creature of contract, which cannot be imposed by judicial fiat.[8] The authority for arbitration—and its scope, rules, protocol, and procedures to be followed when arbitration is employed—comes from the protagonists who are involved in the dispute. They must agree to the rules and procedures to be employed during the arbitration, and must scriven an agreement that will bind them in how the arbitration is to be conducted.[9] Historically, the authority of arbitrators is derived solely from the mutual assent of the parties by the terms of the arbitration submission, and the parties are bound only to the extent, manner and under the circumstances that they agree to be bound as defined in their agreement to arbitrate.[10]

Although the traditional policy behind arbitration has been to promote a "speedy, inexpensive, expeditious and perhaps less formal manner"[11] of resolving disputes, arbitration is *not* limited by case or statutory law to be used solely for such purposes. *The primary theoretical underpinning of all arbitration is that it can and should be what the parties intend and agree it should be*. Therefore, both at common law and under the current statutory alternatives in N.J.S.A 2A:23A, *et. seq.* and N.J.S.A. 2A:23B, *et. seq.*, the parties are free to expand the scope of judicial review by providing for such expansion in their arbitration agreement contracts.[12]

As noted by Chief Justice Robert Wilentz in his concurring opinion in *Perini v. Great Bay Hotel & Casino, Inc.*:[13]

> …the parties are free to expand the scope of judicial review by providing for such expansion in their contract;….they may for example specifically provide their Arbitrator should render the decision only in conformance with New Jersey law and such awards may be reversed either for mere errors of New Jersey law or for substantial errors, or gross errors and define them as they will.

That standard was adopted by the Supreme Court as the controlling principle of New Jersey law in 1994 in *Tretina Printing, Inc. v. Fitzpatrick and Associates, Inc.*[14]

Arbitration and Family Law Practice

Family lawyers frequently wish to utilize arbitration for a variety of reasons, some of which have nothing to do with time or cost savings, or formality efficiencies. Unlike non-family law CDR proponents, who perceive and use arbitration as an alternative to litigation, family lawyers frequently use arbitration as an adjective litigation process to resolve cases by fact finding and decisions—in other words to try cases someplace other than the New Jersey Superior Court, Family Part.

A decision to submit a contested case to the jurisdiction of an arbitrator rather than a family part judge may occur for any number of reasons: 1) *Sheridan*[15] issues regarding unreported income or inappropriate deduction patterns; 2) choice of a specific individual to adjudicate rather than, or perhaps because of, the luck of the judicial draw; and/or 3) maintenance of control of the process, rather than being exposed to arbitrary case processing timetables set by judicial officers that may not be realistic or are otherwise contrary to the litigants' needs. This may occur because of sophisticated and complex financial valuation or discovery issues that must be dealt with in large assets cases, which cannot be processed within best practice time periods. It may occur in parenting disputes where people are not yet ready to deal with the court system's directive that parenting issues must be resolved no later than six months after the last responsive pleading is filed.[16] Emotions may be too raw for people rationally to process what is best for their children, and they may be too involved in their own needs to make wise decisions. The compulsion to do so quickly does not always effectuate the best result, and sometimes promotes more intense litigation. Litigants, therefore, may wish to avoid the commands of these timetables.

Moreover, many family lawyers used arbitration long before the enactment of either N.J.S.A. 2A:23A-1 *et. seq.* or N.J.S.A. 2A:23B-1 *et. seq.* They crafted agreements in which they chose "to negotiate a complete set of dispute resolution procedures."[17] They created authority and protocol for arbitrators based upon the authority and protocol their clients wished the arbitrator to have. There is no proscription in case law or statute that precludes family lawyers from continuing this course. In fact, the reasoning of arbitration cases over the last 50 to 100 years stands for the proposition that litigants have the right to employ whatever dispute resolution protocol they rely upon, subject only to the proscriptions articulated in *Fawzy v. Fawzy*[18] and *Johnson v. Johnson*[19] pertaining to child-related issues.[20]

Although there are specific provisions of N.J.S.A. 2A:23B-1 *et. seq.* that do not allow waiver of some of its sections,[21] there are no similar statutory prohibitions in the event one chooses to use N.J.S.A. 2A:23A-1 *et. seq.*

Moreover, two litigants can choose to create their own arbitration agreement, which may include a provision that contemplates an appeal to a second set of arbitrators or an individual arbitrator. If people decide to arbitrate, they do not have to do it pursuant to either one of these acts. They can simply craft their own arbitration agreement that suits their own needs. The Supreme Court's referral in *Fawzy* to its Family Part Practice Committee was not intended to create a *mandatory* standard form that would have to be signed by any party who wanted to arbitrate. That would be inconsistent with the statutes and prior case law, and the very essence of arbitration.[22] Decisional law, too, supports this notion, so long as the parties do not attempt to confer subject matter jurisdiction on a court that is not authorized by law.[23]

The Need for Peaceful Co-existence Between Civil Law and Family Law Practitioners

We should not get caught up in turf wars and require all arbitration to be the same, with the attendant use of identical lock-step protocol or forms. The uses of arbitration by civil litigators, as opposed to family law litigators, are uncontrovertedly different. It stands to reason that the forms, scripts, and protocols to be followed also will be different. So long as the actual legal requirements of arbitration methodologies utilized are followed, the forms, scripts and rules do not need to be the same in each instance. The law makes that clear. Parties are free, if they employ either the Alternative Procedure for Dispute Resolution Act (APDRA), at N.J.S.A. 23A-1, *et seq.*, or the Arbitration Act, at N.J.S.A. 2A:23-B-1 *et seq.*, to vary protocol subject to the limitations that may exist in each statute. *They are also free not to use either statute and to negotiate their own set of dispute resolution procedures. They can come to their own agreement about how arbitration should work for them.*

Points of Discord

To avoid 'groundhog day' paralysis in its deliberations the *ad hoc* committee would do well to reflect upon to evaluate the reasons expressed by those CDR practitioners who opposed the Supreme Court's adoption of the practice committee's proposed model forms, *Fawzy* scripts and family part arbitration rule during the spring 2013 Supreme Court rules hearing. Most of the objections and criticisms appeared to ignore the clear language that was present in the Family Part Practice Committee's work product.

First, the forms and scripts were misread as requiring in arbitrated matters complete discovery, application of the rules of evidence, and recording of all testimony. The forms did not require that. The language of the forms on their face made clear that they were not intended to be applied in each and every instance, but rather were to be used solely as models. They were drafted to conform to the purposes of each statute, either APDRA or the arbitration act, if the litigants chose to arbitrate pursuant to one of those acts. The forms were drafted for the apparent reason of providing guidance to lawyers who may not have familiarity with arbitration concepts and protocol. They were suggestions, not mandates, and the forms throughout appear to make that clear, and if not, could easily have been amended rather than rejected so that the process had to start again.

The foundation of the CDR practitioners' criticism of the forms and recommended approaches appears to be their belief that all agreements to arbitrate are governed by the Uniform Arbitration Act (UAA) or APDRA. But litigants are not restricted to the provisions of the UAA or APDRA when selecting arbitration. Case law specifies that APDRA was intended, "as a blueprint for those parties who want their disputes *settled so that they do not have to negotiate a complete set of dispute resolution procedures*." (Emphasis supplied).[24] Those litigants who do wish to "negotiate a complete set of dispute resolution procedures" are not foreclosed or barred from doing so, either by statutory or case law.

As the Court said in *Mt. Hope Dev. Assoc.*:[25]

> Also, because there are *so many other avenues to resolve disputes*, a party who does not choose APDRA suffers no adverse consequences. *In essence, through the enactment of the APDRA, the Legislature has created blueprint for those parties who want their dispute settled by APDRA so that they do not have to negotiate a complete set of dispute resolution procedures.* (emphasis supplied)
>
> Moreover, even the Uniform Arbitration Act, which has limitations on those sections of that Act which can be waived by parties evoking it, makes clear that the parties are entitled to agree to a broader review than provided for by the provisions of that Act.[27]

Second, the forms that were drafted and the proposed rule were not focused necessarily on substi-

tuting arbitration for formal adjudication. Rather, the proposals reflected a different use of arbitration—not as an alternative to litigation, but rather as a different forum in which litigation can proceed for reasons discussed in earlier sections of this article.

Third, the criticisms of some CDR practitioners suggested that those provisions of the forms that allowed arbitrators to confer with the parties about settlement in the midst of or before the arbitration violated legal and ethical principles. Since those objections were submitted to the Court during the rule hearings last summer, the Appellate Division in *Minkowitz v. Israeli*[28] has addressed the issue of boundaries between those acting as mediators and those acting as arbitrators. Although the Appellate Division, in *Minkowitz*, frowned on such "role switching," it did *not* direct that it could not occur. The Court simply made clear that "absent a specific agreement clearly defining and accepting the Complementary Dispute Resolution professional's dual roles, such roles were to be avoided."[29] In so doing, the Court referenced Canon 4H of the code of ethics for arbitrators in commercial disputes, which made clear that an arbitrator should not be present or participate in settlement discussions "*unless requested to do so by all the parties*." In effect, the Court reaffirmed that the parties could make arbitration what they wanted it to be, so long as they clearly defined their intentions and agreed beforehand.

Thus, it is clear there is no ethical proscription on arbitrators acting as settlement facilitators if the parties wish them to do so. Old-fashioned notions of complete separation and isolation of judges from settlement exchanges have grown out of favor in family part litigation for some time. This was noted and referenced more than 30 years ago by the *Supreme Court Committee on Matrimonial Litigation Phase 2, Final Report*. In that report, at pages 2 and 3, the committee, chaired by Justice Morris Pashman, set forth its clear support for the importance of judicial involvement in family part cases in the settlement process from the date of the filing of the complaint to the date of trial. The report said:

> Since the majority of matrimonial cases are settled before trial, the Committee urges greater emphasis on early settlement procedures. This will permit aggressive judicial management of the matrimonial calendar, for settlement procedures facilitate constant monitoring of a case's progress. Litigants, attorneys and judges should be made aware of opportunities for settlement, either with or without the assistance of the court. *The goal of an official settlement process is the direct involvement of the court from the filing of the complaint to the day of trial, to avoid delay, conserve resources and encourage settlement whenever possible.*
>
> **Recommendations**
>
> (I)(A)(10) The Supreme Court should require that all matrimonial calendars be managed on an individual calendar basis, whereby *the judge who is assigned a case when the complaint is filed hears all motions, conducts all settlement conferences, and, if necessary, presides at the trial. The benefits of continuing familiarity with a case outweigh any perceived disadvantages of having a judge present at both settlement conference and the trial.*
>
> *It should be noted that this recommendation is not intended to abrogate or limit the application of Evid. R. 53. which provides that offers to compromise and the like are inadmissible to prove the liability of a person making the offer. Moreover, the settlement discussions themselves are not competent testimony and may not be treated as such. Judges presiding at bench trials frequently hear evidence which they declare inadmissible. The role of a matrimonial judge at trial who has been privy to settlement discussions is substantially the same.* (Emphasis supplied)[30]

Clearly, there was nothing unethical in suggesting and providing in arbitration agreements that arbitrators may engage to facilitate resolution through whatever protocol is agreed upon. It was not unethical 34 years ago, and *Minkowitz* makes clear it is not unethical now, *so long as the parties agree*. The suggestion to the contrary has, at base, a historical antecedent reflecting early times when courts were to not be subject to influences beyond the evidence presented pursuant to the traditional rules. Many family lawyers would prefer arbitrators to be available to facilitate, and to be able to report credibly to their client, with conviction, what might happen if the matter is not resolved providing the proofs go in as they believe they will. But others may not wish to do that. Model forms and protocol that are adopted to facilitate use of arbitration should not preclude either approach to arbitration. It is up to the parties to control the process and the protocol.

Fourth, certain CDR practitioners criticized the specificity of the proposed practice committee forms with reference to inclusion of statutory provisions, but stated inconsistently that a court rule for arbitration should detail in the body of the rule all of the provisions and proscriptions pertaining to *Fawzy* requirements, as set forth in the decisions in *Fawzy* and *Johnson*. It is not necessary to repeat verbatim in a rule the procedural requirements and standards of *Fawzy*. Court rules set forth the protocol to be followed when participating in litigation in the court system. Lawyers, judges and litigants should not depend on a rule reciting and delineating all principles and criteria set out by decisional law. If rules were written in that fashion, one would need to be a weight lifter to bring rulebooks to court.

Some CDR practitioners also complained that the *Fawzy* standards for review were not set forth in the proposed *Fawzy* script. This criticism was incorrect, as there was a separate section of the script that specifically referenced the *Fawzy* standards—seven questions in all. The practice committee's recommendation set forth reference to the instructions of *Fawzy* not only in a separate section of a two-page questionnaire that was to be answered and certified by each litigant when deciding whether to submit their matter to arbitration, but also in paragraph 18 of the model form.

Other CDR practitioners criticized the proposed questionnaire as "repetitive" and "unnecessarily wordy." Although suggesting it should be simple and straightforward and use language approved in *Fawzy*, which the questionnaire did, the representatives provided no suggested revisions.

Fifth, certain CDR practitioners proposed another rule, which would allow a family part court to direct the parties to participate in non-binding arbitrations. It is difficult to understand why people so conflicted that they would consider conducting a trial, would be willing to accept a non-binding decision, knowing that it could be different than a decision made in the event the matter actually were tried by a different person—judge or arbitrator. Practitioners know that different people decide disputed facts in different ways, thereby impeding predictability. Therefore, the opportunity for a non-binding determination/recommendation is likely to have limited appeal to embroiled litigants.

Moreover, the system already provides for non-binding recommendations from early settlement panels. It is hard to understand how the proposed alternative rule would facilitate a resolution. If the case could not be resolved, it would be less expensive and more efficient if there were only one trial that concluded it.

Finally, there were a whole litany of criticisms and accusations about the alleged inconsistencies between the forms and the arbitration statutes. But a careful reading of those sections of the forms criticized, for example paragraphs 43 and 33, makes clear that the criticisms are misplaced. This also becomes resoundingly clear if the other criticized paragraphs in question are carefully read and the statutory and form references cross-checked.

A lot of very experienced and dedicated family law practitioners and judges, over the course of four years, examined and reexamined and drafted and re-drafted appropriate language to be utilized in attempting to fulfill the task assigned to them by the Supreme Court. It would have been better if CDR perspectives were hashed out and debated at the beginning of the process rather than introduced at the end, further delaying formal adoption of a family part rule and protocol, which institutionalized arbitration.

Next Steps

Arguably, anything can be improved by reviewing it again and again—but there comes a time when those involved in the process of drafting and creation must close and move on. If the goal of encouraging the removal of cases from the judicial system is to be facilitated and accomplished, then the system needs to allow it to occur. Those participating in the process need to recognize that different substantive legal practices have different requirements and needs. Both groups need to accept that neither should seek to impose upon the other what each perceives to be the unique requirements of its practice. The goal is to facilitate and encourage the removal of contested cases from an already over-burdened, underfunded judicial system, not perpetual intellectualization and handwringing. Groundhog Day must, at some point, come to an end. ■

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Endnotes

1. *Fawzy v. Fawzy*, 199 N.J. 456 (2009).
2. *Fawzy v. Fawzy*, *supra*, 199 N.J. 461-62.
3. *Fawzy v. Fawzy*, *supra*, 199 N.J. at 482.
4. *Fawzy v. Fawzy*, *supra*, 199 N.J. at 482.
5. *Johnson v. Johnson*, 204 N.J. 529 (2010).
6. *See Peterson v. Peterson*, 85 N.J. 638-642, (1981); *Schlemm v. Schlemm*, 31 N.J. 581, 582 (1960); *Nolan by Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990); *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17, 35 (1957).
7. *See Faherty v. Faherty*, 97 N.J. 99 (1984); *Wein v. Morris*, 194 N.J. 364, 375-76 (2008); *Devini Corp. v. Great Bay Hotel and Casino, Inc.,* 129 N.J. 479, 489 (1992).
8. cf. R. 4:21A.
9. *See Kim v. Blisset, LLC.*, 388 N.J. Super. 14, 25 (App. Div. 2006), *certif. denied* 189 N.J. 428 (2007). *See also McKeeby v. Arthur*, 7 N.J. 174, 181 (1951). *See also Singer v. Commodities Corp.,* 292 N.J. Super. 391, 402 (App. Div. 1996) (*quoting Cohen v. Allstate Insurance Company*, 231 N.J. Super. 97, 100-01 (App. Div.), *certif. denied* 117 N.J. 87 (1989).
10. *See Goerke-Kerch v. Goerke-Kerch Holding Co.*, 118 N.J. Eq. 1, 4 (E&A 1935). *See also Westville Land Co. v. Handle*, 112 N.J. 447 (Supreme Court 1934); *Kimm v. Blisset LLC.*, 388 N.J. Super. 14, 25-26 (App. Div. 2006).
11. *Barkcon Associates, Inc. v. Tri-County Asphalt, Corp.*, 86 N.J. 179, 187 (1981).
12. *See* N.J.S.A. 2A:23B-4; *Mt. Hope Dev. Assoc. v. Mt. Hope Water Power*, 154 N.J. 141, 149-50 (1998).
13. 129 N.J. 4, 548-49 (1992).
14. 135 N.J. 349, 358-359 (1994).
15. *Sheridan v. Sheridan*, 247 N.J. Super. 552 (Ch. Div. 1990).
16. *See* R.5:8-6.
17. *Mt. Hope Dev. Assoc. v. Mt. Hope Water Power*, *supra*, 154 N.J. at 151.
18. 199 N.J. 456.
19. 204 N.J. 529.
20. *See also Goerke-Kerch v. Goerke-Kerch Holding Co.*, 118 N.J. Eq. 1, 4 (E&A 1935); *Westville Land Co. v. Handle*, 112 N.J. Law 447; and *Kimm v. Blisset LLC.*, 388 N.J. Super. 14, 25-26 (App. Div. 2006).
21. *See* N.J.S.A. 2A:23B-4(a), (b) and (c).
22. *See Tretina Printing, Inc. v. Fitzpatrick and Associates, Inc.*, *supra*, 135 N.J. 349.
23. *See Weinstock v. Weinstock*, 377 N.J. Super. 188, 189-90 (App. Div. 2005); *see Fawzy v. Fawzy*, *supra*, 199 N.J. 456, 480, 482 (2009); and *Mt. Hope Dev. Assoc. v. Mt. Hope Water*, *supra*, 154 N.J. at 149-150.
24. *See Mt. Hope Dev. Assoc. v. Mt. Hope Water*, *supra*, 154 N.J. at 151.
25. 154 N.J. at 151; *see also Weinstock v. Weinstock*, 377 N.J. Super., 182, 189 (App.Div. 2005).
26. 377 N.J. Super. at 189.
27. *See* N.J.S.A. 2A:23B-4 and *Fawzy v. Fawzy*, *supra*, 199 N.J. at 480, note 5.
28. 433 N.J. Super. 111 (App. Div. 2013).
29. See *Minkowitz v. Israeli*, *supra*, 433 N.J. Super. at 147.
30. *See Supreme Court Committee on Matrimonial Litigation, Phase Two, Final Report,* pages 2 and 3, (1981).

Commentary:
Celebrate: The MESP is 35

by Christopher R. Musulin

Congratulations are in order: The Matrimonial Early Settlement Panel (MESP) Program recently celebrated its 35th year in the state of New Jersey. When the first MESP took place, Jimmy Carter was in the White House, gasoline was 55 cents a gallon and Hotel California by the Eagles was the number-one record in America. What started during those less-complicated times as an informal process among colleagues "rapidly grew into the most significant tool our Court system now uses to assist matrimonial litigants in resolving their disputes."[1]

Although it has been the subject of examination by various judicial and bar committees over the ensuing years, the MESP Program has remained largely the same as it was in 1977, despite enormous changes in the world and in the practice of law. It is enlightening to review the discussions and conclusions of the numerous committees and working groups over the decades to better understand the historic purpose of the program and further determine whether any changes or modifications are appropriate.

All Things Good about Lawyering

Many practitioners do not remember a world without the MESP Program. It has become a central fixture of the matrimonial practice landscape. Its virtues are both totally unique and abundant.

- The MESP Program represents the ultimate expression of cooperation between the Judiciary and the bar association.
- The MESP Program incorporates alternative dispute resolution into the traditional litigation process.
- The MESP Program forces litigants to come to the courthouse, often for the first time, to experience the stress, expense and formality of court proceedings—the ultimate reality check.
- The MESP Program challenges the legal writing and oral presentation skills of each attorney, forcing counsel to refine often complex information for purposes of effectively advocating positions on behalf of clients.
- The MESP Program is formal, yet more relaxed than a trial or motion practice. It commands a unique mixture of advocacy and camaraderie since the panels are often conducted behind closed doors with long-familiar attorneys from the local bar association.
- The MESP Program is incredibly effective, assisting in the settlement of approximately 75 percent of the cases submitted for consideration.[2]

Genesis of the Program

The MESP Program traces its origins to the year 1977 in Morris County, when a group of attorneys began meeting informally in an attempt to assist each other in settling the financial aspects of divorce matters. The meetings took place at both the offices of the private attorneys and at the courthouse. The concept was then introduced to the neighboring counties, and by 1981 over half of the county bar associations in New Jersey began implementing the MESP Program with greater formality, including the adoption of specific program criteria.[3]

It is fair to conclude that the MESP Program was created as an indirect reaction to the 1971 adoption of a version of the Uniform Divorce and Marriage Act by the New Jersey State Legislature, which, among other things, formalized the introduction of no-fault divorce. With a significant explosion of divorce filings, the family court system developed massive backlogs, to the point where some counties required up to four or five years to resolve even simple pre-judgment matters. If necessity is the mother of invention, matrimonial backlog invented the MESP Program, creating an avenue of alternative dispute resolution in a world of judicial gridlock.

The Supreme Court Committee on Matrimonial Litigation

While well intended, problems developed almost immediately with the program. There were extreme

differences from county to county regarding the composition of the panels, the varying credentials of the serving attorneys, the degree of formality/informality, the requirement and extent of written submissions, the relevance of the recommendations, and other ongoing issues.[4]

Sensing the importance and potential of the program, and in an attempt to address perceived problems, the Supreme Court Committee on Matrimonial Litigation, Phase II, investigated the program, issuing its final report on June 10, 1981, with the following observations and recommendations:

> "Early settlement programs" have been established by 11 county bar associations for the purpose of facilitating the resolution of family law disputes. Typically, the programs have involved panels of either two or three attorneys who meet after the termination of the discovery period. To date, these programs have been primarily the responsibility of the Bar, and participation by litigants has generally been on a voluntary basis. The Committee agrees that the existing programs have been successful. They have saved considerable time for matrimonial judges to devote to other matters. The Committee recognizes that these programs, and the many matrimonial attorneys who serve as panelists, have made valuable contributions as to the administration of matrimonial justice. In particular, the Committee applauds the sacrifice of those attorneys who have borne the cost of administering these programs.
>
> Ideally, the Committee believes that every contested matrimonial case should be sent to a settlement panel. However, it is neither fair nor feasible to expect the private Bar to finance a comprehensive State-wide settlement program.
>
> Recognizing that early settlement programs have greater potential to further the cause of matrimonial justice, the Committee presents the following recommendations…
>
> The Supreme Court should adopt a rule, substantially as set forth in Appendix B to this Report, authorizing matrimonial judges to require participation in early settlement programs.
>
> Referral to an early settlement program should occur approximately four months after the issues are joined. Initially, most cases referred would be of moderate difficulty. These would typically involve moderate spousal assets and income and would lack extensive factual disputes. Once it is determined that the programs can consider and effectively dispose of additional cases, more complex cases should be submitted where feasible.
>
> The Supreme Court should establish the function of early settlement programs as three-fold:
>
> **a.** Wherever possible, the panel should effectuate a full settlement of the controversy. If a panel fully resolves all issues, the case should proceed expeditiously to final uncontested hearing and judgment, even before judges not normally assigned to matrimonial matters.
>
> **b.** Where a full resolution is not practicable, the panel should narrow the issues in dispute as much as possible. Stipulations of record should be employed liberally to prevent waste of judicial resources.
>
> **c.** The panel should mediate discussions to obtain reasonable stipulations as to discovery and other material matters, not only for purposes of trial but as a prelude to further settlement discussions. Where agreement is not possible, the panel may also recommend an appropriate discovery order to the court. The matrimonial judge could then consider the recommendation and the parties' responses and enter an appropriate order, thereby avoiding the necessity of a formal motion.
>
> The Court should acknowledge that fiscal restraints on county and State Governments may prevent allocation of additional funds necessary to expand early settlement programs. The adoption of this recommendation will create a greater demand for attorney volunteers. In turn, routine expenses usually borne by panelists—photocopying, mailing—will increase. However, the time will soon come when that burden will be excessive and unreasonable; then public support will be necessary to ensure the program's success. In the interim, the success of these programs must continue to depend on the generosity of individual attorneys.

Panels throughout the State should be composed of two attorneys. The Committee has concluded that panels of two attorneys are sufficient to accomplish the purposes of an early settlement program. The addition of a third attorney would unduly increase administrative costs and tend to limit the number of available volunteers.

The Supreme Court should urge the family law sections of the various county bar associations to cooperate in expanding this important program. Likewise, the New Jersey State Bar Association should be encouraged to support participation. The Committee feels it is essential that experienced matrimonial practitioners serve as panelists. Not only are their abilities crucial to the program's effectiveness, but their presence will enhance the credibility of the program in the eyes of litigants and their attorneys.

Matrimonial judges in each of the counties should contact the local bar association, especially in those counties where early settlement programs do not exist, to encourage and facilitate their establishment.

Matrimonial judges should refer cases in their informed discretion to early settlement programs. Both Assignment Judges and matrimonial judges should cooperate with the programs by making it possible to place a settlement on the record as soon as practicable. This will give litigants and their attorney's additional incentive to save time and resources through participation.

In particular, matrimonial judges should forward cases involving *pro se* litigants to these panels. The Committee believes that litigants without lawyers should begin to handle their own cases at the earliest possible time. *Pro se* litigants will benefit from referral to these informal panels by receiving assistance from attorney-panelists in settling or narrowing issues for trial.

The report by the Supreme Court Committee on Matrimonial Litigation represented the first significant step toward mandating attendance at the MESP on a statewide basis and creating uniform procedures. By this time, each vicinage adopted more formalized procedures for their MESP Program and the practice became common and, to a certain extent, uniform throughout the state.

ADR Practice Committee

As part of the continued evolution of the MESP Program, Chief Justice Robert Wilentz created a Supreme Court committee on ADR practice in both 1983 and 1987 that directly addressed the MESP Program through two sub-committees: the Supreme Court Committee on Complementary Dispute Resolution and the Supreme Court Task Force on Dispute Resolution.

In 1990, a subsequent version of this committee was instrumental in creating current Court Rule 1:40, the genesis of the Post-MESP Economic Mediation Program.

The Commission to Study the Law of Divorce

As part of its comprehensive review of matrimonial practice, the Commission to Study the Law of Divorce, established April 5, 1993, encouraged the Judiciary to utilize the early settlement program as a protocol for disposing of both pre- and post-judgment motion applications. This was the first committee to recognize the utility of the program to resolve complicated issues raised in a post-judgment setting. Genuine issues of fact frequently resulted in the scheduling of plenary hearings in a system already burdened and lacking significant judicial resources. Post-judgment MESP offered parties a more expeditious and less expensive alternative to testimonial hearings.

The MESP Program also began receiving consistent attention from the Supreme Court Committee on Complementary Dispute Resolution, which eventually issued a report addressing the MESP Program. The committee focused on both the process and dynamics of the MESP Program, concluding it represented a combined mediation and arbitration model.

The MESP Workgroup

In July 1995, the Matrimonial Early Settlement Panel Workgroup issued its final report, offering highly detailed recommendations and guidelines for the program:

1. An Early Settlement Panel Coordinator will be designated to ensure that the program runs efficiently;
2. All Early Settlement Panel programs should occur in the Courthouse, so that the coordi-

nator, the court rules, calculators, and private meeting facilities are available;

3. The Early Settlement Panel program should be utilized as an integral part of a comprehensive case management process;
4. Early Settlement Panels should be scheduled after discovery is completed. After the Early Settlement Panel, non-settled matters should be scheduled for trial;
5. The Selection of Early Settlement Panel panelists should be a joint undertaking of the County Bar Association and the Court. Panelists should have three to five years of experience in Family Law;
6. Written submissions should be required five days in advance consisting of a proposal/position letter as to every financial issue in dispute. These should be accompanied by current financial data and Case Information Statements;
7. All who participate in the process should treat the panel hearing as they would a trial appearance in terms of promptness and courtesy. The number of cases presented to the panel should be limited so that all receive meaningful consideration;
8. The Administrative Office of the Courts should maintain certain statistics, such as: (i) number of cases assigned to the panel; (ii) number of cases settled; (iii) number of cases settled post hearing and prior to beginning trial; (iv) which matters are pre or post judgment; and (v) the time lapsed from filing of Complaint to Early Settlement Panels;
9. Uniform and standard forms should be encouraged, such as notices of the scheduling and submission requirements. A central registry should also be established as to such forms.

A further effort should be made to standardize MESP programs from county to county. Complicated post-judgment matters should more frequently be referred to the MESP Program.

The Committee notes that in its September 15, 1994 Report to Chief Justice Wilentz, the Supreme Court Workgroup on Matrimonial Early Settlement Panels concluded that many MESP procedures then in effect appeared to vary greatly from vicinage to vicinage. Differences then existed concerning the manner of scheduling; the timing of MESP scheduling; and even the designation of actual cases assigned to MESP Panels.

The Workgroup concluded that the MESP process should not be used for initial case management and that most, if not all, contested matrimonial matters should be referred to the MESP program. Recognizing that the MESP program provides litigants with an opportunity to resolve issues themselves rather than requiring resolution of most of those issues by the court, that Committee properly noted that panel hearings "serve as a focal point for parties and counsel in ensuring that the cases are reviewed, analyzed and prepared for trial." Indeed, because of the success MESP had achieved on a statewide basis, the Committee concluded that virtually all contested matters, and not only those dealing with dissolution, would benefit from the MESP process. In addition to basic dissolution cases, the Committee specifically noted with approval submission to MESP panels of post-judgment disputes as well.

The committee endorsed the recommendation and requested that the Supreme Court Family Practice Committee be responsible for monitoring the MESP Program. The committee further suggested that a process of standardization occur to minimize differences in the program from county to county across the state.

Best Practices and the MESP

Further suggested changes to the MESP Program came by way of the New Jersey Supreme Court Best Practices Report. Among other things, the committee recommended that early settlement panels in all of New Jersey's counties need to receive submissions five days prior to each scheduled session.

Most Recent Revision of the Rule

The rule was last amended on July 28, 2009 with the addition of the final sentence requiring the submission of an MESP memorandum five days prior to the scheduled panel session.

Rule 5:5-5

In its current form, Rule 5:5-5 provides as follows:

> All vicinages shall establish an Early Settlement Program (ESP), in conjunction with the County Bar Associations, and the Presiding Judges, or designee, shall refer appropriate cases including post-judgment applications to the program based upon review of the pleadings and case information statements submitted by the parties. Parties to cases that have been so referred shall participate in the program as scheduled. The failure of a party to participate in the program or to provide a case information statement or such other required information may result in the assessment of counsel fees and/or dismissal of the non-cooperating party's pleadings. Not later than five days prior to the scheduled panel session, each party shall be required to provide a submission to the ESP coordinator in the county of venue, with a copy to the designated panelists, if known.

Commentary

While the 1999 best practices report may have marked one of the last tangible changes to the MESP Program, the program has continued to be the subject of occasional published commentary. In Oct. 2003, Lee Hymerling published an article in the *New Jersey Family Lawyer* with the following observations:

- Keep the program truly *early*, (*i.e.*, four to six months after joinder of the action).
- Submit a memo to the panelists at least five days prior to the scheduled panel and prepare a high-quality memorandum for consideration by the panelists.
- Have a superior court judge appear on the record with all of the litigants and deliver an "MESP speech" detailing the program and the importance of the day, etc.
- Require each county to maintain statistics on the performance of the program.
- Publically recognize the attorneys who volunteer their important time.
- Recognize the MESP Program can peacefully co-exist with the use of mediation.[5]

Yvette Alvarez also commented on the MESP Program in the April 2007, issue of the *New Jersey Family Lawyer*, noting:

- The written submissions must be submitted at least five days before the scheduled panel, as many counties continue to experience difficulties with written submissions.
- The inclination toward uniformity should be carefully checked, as each vicinage is unique. Flexibility with regard to creating and administering the programs should be retained as much as possible in each of the counties.[6]

Reflections on the 35th Anniversary

Many observations and concerns with regard to the MESP Program have been raised by both the bench and bar over the years. These include the following, described in no particular order:

Written Submissions and Procedures

Difficulties continue to plague the program with regard to the written submissions to the panel. There is a chronic problem with late submissions. Part of the difficulty relates to different time requirements for the submissions. Eight counties require the submissions five days before the panel; three counties require them an entire week before the panel; two counties require them 10 days before the panel; one county sets the requirement at a single day before the panel; two counties require submissions either the Monday or Friday before the panel; and the remaining counties permit submissions to panels on the day of the hearing.[7] Perhaps all vicinages should adhere to the five-day rule as articulated by the various committees throughout the years.

There is also great variation between the counties regarding the nature and quality of the submissions. While all counties require some form of memorandum, approximately half mandate a case information statement, while at least two counties require significant submissions, including copies of the case management order and completed child support worksheets.[8]

Questions have been raised as to the appropriate response in the event of non-compliance with MESP procedures. This can include blatant non-cooperation or a mistake by the attorney who simply fails to submit a memorandum through mere inadvertence. Another variation on this concern relates to ripeness when a case is simply not ready for the MESP process within the tradi-

tional four- to six-month period from joinder. To address these situations, judges and attorneys have suggested various solutions, including the filing of an affidavit of discovery compliance as a prerequisite to attending the MESP or the scheduling of a phone conference between the MESP coordinator and counsel approximately 14 days before the MESP to ensure the case is prepared for the panel.

Self-represented Litigants

Enormous problems continue with regard to self-represented litigants and their involvement in the MESP Program. Unfortunately, these litigants are often unaware of legal procedures and, despite the best efforts of case managers to provide instruction, they fail to provide adequate written submissions. Some counties have attempted to address this problem proactively. For example, in Burlington County the Bench/Bar Committee, in cooperation with the presiding judge, drafted a statement titled "Uniform MESP Procedures," which contains highly detailed instructions for participation in the program. Burlington County also drafted an outline, which it made available to self-represented litigants, to assist in the preparation of their memoranda.

In some vicinages there are security concerns with self-represented litigants attending the MESP since the panels are conducted near chambers or in areas not staffed by the sheriff's department.

Panel Assignments

Difficulties continue to exist on the day of the panel when, due to conflicts, absenteeism or other circumstances, cases are transferred on the spot to a different panel sitting on the same day. Since the purpose of the five-day submission rule is to permit the panelists to study often-complex information several days ahead of time, shifting cases among the panels last minute creates a disservice to all involved. Perhaps conflict checks should occur at the case management stage when the panelists are specifically identified and included in the body of the case management order. Also, the author believes all participants must extend the appropriate courtesies in the event of uncontrollable absence due to illness or other situations.

The number of cases assigned to each panel varies dramatically throughout the state. In some counties a panel can be assigned four, five or more cases on a single morning or afternoon. But in Ocean County, for example, a panel is rarely given more than one or two cases, so they can spend a substantial amount of time on each matter, rendering the program highly effective.

The number of panelists also varies between counties. While most vicinages have a panel consisting of two attorneys, in three counties the panels consist of three members and in at least two counties the number of panelists varies from one to three.

The process of composing the panels appears to be highly informal and completely different from county to county as well. For example, in some counties the list of panelists has not been reviewed in years. In other counties, the list is reviewed on an annual or bi-annual cycle. Of great concern is the process of a substitute panelist, whereby a highly qualified member will send a younger associate to serve on his or her behalf. To address this problem, some counties have a strict rule that in the event of a conflict or absence, the panelist is responsible to confirm the appearance of a duly qualified substitute. However, in other counties, the panelists leave this to the court or MESP coordinator.

Scheduling

The scheduling of an MESP in multiple cases for one attorney on the same day can create havoc in the courthouse. In general, the author believes an attorney should never attempt to handle multiple MESPs on the same date and time, since this is discourteous to the court, the panel, adversaries and the litigants. In general, the author believes there should be a one attorney/one panel protocol in effect.

Public Opinion

Although the research is limited, there appears to be some level of dissatisfaction with the MESP Program among litigants. While the MESP speech by the assigned trial judge has greatly helped, many litigants feel they are not participating in a significant judicial event, as they most often sit in the hallway for several hours and in some counties are not brought before the panel to announce the decision or they do not receive a written recommendation. In approximately 16 counties the litigants enter the MESP room to hear the decision. In two counties this practice is optional and in three counties it is not done at all. Written recommendations are discretionary, with approximately half of the programs providing detailed written recommendations.

Some litigants have suggested a staggered schedule, similar to motion practice, so that one MESP will be

heard at 9, a second at 9:30, etc. The author believes each vicinage should solicit immediate feedback from the litigants on the day of the panel, if feasible.

The MESP Speech

While virtually all counties adhere to the MESP speech concept, Hudson County has taken the process a step further by having litigants review a helpful video presentation put together by the bench and bar. The author believes this concept should be considered in all counties.

The Use of Settlement Panels Post-judgment

The court rules do not restrict the MESP Program to pre-judgment circumstances. Many judges will use the program in a post-judgment setting. For example, a post-judgment MESP referral represents a viable alternative to a plenary hearing on complicated issues such as applications to modify alimony or for payment of college expenses.

Post-MESP Disposition

Some counties immediately list the matter for trial if the MESP fails. Other counties take seriously Rule 1:40, and aggressively utilize the Post-MESP Economic Mediation Program.

Use of Recommendations with Regard to Award of Attorney Fees

Rule 5:3-5(c) states that in determining an award of attorney fees the court can consider "the reasonableness and good faith of the positions advanced by the parties both during and prior to trial." Based upon this consideration, should a court be made aware of an MESP recommendation after the completion of a trial when assessing good faith and reasonableness of positions? Litigants and attorneys frequently change positions during the course of the litigation. While some trial judges may believe they can discern reasonableness of positions from the presentation of evidence at trial, they have no way of knowing the positions of the parties prior to trial that may have necessitated ongoing and potentially unnecessary litigation. A procedure could be created whereby the MESP recommendation is disclosed to the court after the completion of the trial. If the court determines the trial decision is substantially similar to the recommendation of the panel, this could be considered in determining the reasonableness of positions, good faith and the ultimate assessment of an award of attorney fees. Perhaps this concept could be initially utilized with blue ribbon panels as a method of incentivizing settlement for otherwise recalcitrant litigants.

There appears to be a single reported decision related to this issue, *Kelly v. Kelly*, 262 N.J. Super. 303 (Ch. Div. 1992). In *Kelly*, plaintiff sought an award of counsel fees from a self-represented defendant premised upon the similarity between the ultimate result of a default proceeding and the MESP recommendation. The opinion does not contain specific details regarding whether the trial court reviewed the recommendations, but it can be inferred that Judge Seltzer was aware of the suggestions of the panel.

Process for Appointment of Blue Ribbon Panels

The use of blue ribbon panels continues to be widely divergent throughout the state. In some counties the panels consist of not only attorneys but also financial or custody experts, depending upon the specific issues in the case. In some counties the court chooses the panel, in others the attorneys choose the panel. In some counties a blue ribbon panel meets only once, in others it meets on multiple occasions. The author believes all issues pertaining to the use of a blue ribbon panel should be driven by the unique requirements of each individual matter.

Adequate Facilities for the Panel

Despite the fact that the MESP is a critical event, there is enormous disparity throughout the state regarding the accommodations for the process. In some counties the MESP occurs in a large conference room, in other counties it is impossible to find a private area. In some counties laptops or other computer access exists to run child support calculations or garner access to case law or information relevant to the process. In some counties there is access to private rooms or areas for attorneys to confer with their clients for purposes of reviewing the recommendations. In other counties, however, attorneys are often forced to sit in a public stairwell or open waiting area to discuss confidential legal matters with clients. The author believes this is a breach of attorney/client confidentiality and should be addressed promptly.

Quid Pro Quo for Panelists

The author believes attorneys who volunteer their time should be given preference on lists for their MESPs and on motion days as a matter of simple courtesy.

Conclusion

It is impossible to overestimate the importance of the MESP Program; it is the consummate expression of all things good about the legal profession. Still, there remains room for improvement. To maximize the effectiveness of the program, practitioners need to present quality memoranda and address the issue of chronic late submissions. Practitioners also need to embrace the value of the Court's MESP speech to the litigants and the application of the MESP Program to post-judgment disputes. The author believes effort should also be made to give credit where credit is due to the panelists, providing them with priority on all lists.

Perhaps most importantly, the author believes practitioners need to be on guard against the use of MESP scheduling as a method of case management. What began as a program of the bar has, to a certain extent, become a vehicle of scheduling and managing the disposition of the case, which can present problems to well-intentioned practitioners. Attorneys are in the best position to judge when a case is ripe for the MESP, despite the rigid scheduling protocols typically memorialized within a case management order. While there is great merit to best practices and the rapid disposition of family law matters, a program that the bar created should not be used against us. The MESP has always been a joint venture of cooperation between the bench and the bar, and it should remain that way. It should continue to be the most significant tool that our court system uses to resolve matrimonial disputes. ■

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Endnotes

1. Lee M. Hymerling, MESP Revisited. *New Jersey Family Lawyer* 24.2 (Oct. 2003):6-7.
2. Ivette R. Alvarez, Is it Time to Revisit the Matrimonial Early Settlement Panel Procedures? *New Jersey Family Lawyer* 27.5 (April 2007):109.
3. Skoloff & Cutler, I *New Jersey Family Law Practice*, (14th ed. 2010), §1.8L(1) at p.358.
4. Professor Paul Tractenberg, Rutgers School of Law, Newark, quoting Supreme Court Committee on Complementary Dispute Resolution, Subcommittee on Vicinage Comprehensive Justice Programs, *Master Plan for Vicinage Comprehensive Justice Programs* (May 22, 1991).
5. Lee M. Hymerling, MESP Revisited, *New Jersey Family Lawyer* 24.2 (Oct. 2003):6-7.
6. Ivette R. Alvarez, Is it Time to Revisit the Matrimonial Early Settlement Panel Procedures?, *New Jersey Family Lawyer* 27.5 (April 2007):109-10.
7. Megan M. Murray and Kimber L. Gallo, MESPs Uncovered, *New Jersey Family Lawyer* 33.2 (Oct. 2012):30-37.
8. Megan M. Murray and Kimber L. Gallo, MESPs Uncovered, *New Jersey Family Lawyer* 33.2 (Oct. 2012):30-37.
9. *See Kelly v. Kelly*, 262 N.J. Super. 303 (Ch. Div. 1992).

Commentary:

Helping Parties Mediate Issues that Can be Affected by Possible Changes in the Law

by Derek M. Freed

Over the past several years, numerous parties engaged in mediation with the author have made variations of the following statement: "I heard that the laws regarding alimony (or another topic) are about to change." The party may indicate that their lawyer advised them of the potential change in the law and how it would impact their case. Alternatively, if the mediating party does not have counsel, he or she may indicate that this knowledge was attained through an Internet research or social media.

After one party references that the law may change, the other party in the mediation often interjects with a variation of the following statement: "My lawyer (or friend) told me that the laws haven't changed. My lawyer (or friend) also told me that if the law did change, it wouldn't affect my case because (any number of reasons)."

When the parties make these statements, they will then often look to the mediator to resolve their dispute. They will ask, "Is the law changing? If so, is it going to affect our case?" This article will explore how mediators may answer these questions.

Mediating in a changing legal landscape can often prove challenging. As discussed below, various Court Rules and basic tenets of mediation provide a certain amount of guidance. However, the mediator should ultimately answer the parties' questions candidly and neutrally to preserve the integrity of the mediation process.

Do Not Mediate a Matter Unless You are Competent to Do So

A mediator should not attempt to mediate a matter regarding a subject about which he or she has only limited familiarity. The New Jersey Court Rules require a certain amount of expertise for a person to serve as a mediator "of economic issues in family disputes" in "Court-annexed programs."[1] In addition to being licensed to practice law in New Jersey, an attorney must be admitted "to the bar for at least seven years"[2] and have a "practice that is substantially devoted to matrimonial law."[3] Non-attorneys must also have "seven years experience in the field of expertise"[4] and possess an advanced degree in specific fields as approved by the "credentials committee."[5] Retired superior court judges must have "experience in handling dissolution matters."[6] Any family part mediator must also have completed "a 40 hour training program" that complies with the New Jersey Court Rules.[7]

New Jersey's Supreme Court also requires subject matter competence in order to serve as a mediator in court-connected programs. In Jan. 2000, the New Jersey Supreme Court approved a set of "Standards of Conduct for Mediators in Court-Connected Programs."[8] The Supreme Court standards define competence as follows:

> A mediator shall only mediate when the mediator possesses the necessary and required qualifications to satisfy the reasonable expectations of the parties.
>
> **A.** A mediator appointed by the court shall have training and education in the mediation process, and shall have familiarity with the general principles of the subject matter involved in the case being mediated.
>
> **B.** A mediator shall have information available for the parties regarding the mediator's relevant training, education, and experience.
>
> **C.** A mediator has an obligation to continuously strive to improve upon his or her professional skills, abilities, and knowledge of the mediation process.[9]

While the Court Rules and the Supreme Court standards apply only to court-connected programs, mediators must still be competent in private (*i.e.*, non-court-connected) mediations. Practicing attorneys must abide

by the New Jersey Rules of Professional Conduct, which define competence as requiring a lawyer to refrain from handling "a matter…in such manner that the lawyer's conduct constitutes gross negligence."[10] The Appellate Division, in *Davin, LLC v. Daham,* gave further definition to the concept of competence, stating an attorney is "obligated to exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise."[11]

Thus, whether mediating pursuant to a court-connected program or outside of litigation, a mediator must be competent to accept the engagement. Competence requires the mediator possess *enough* familiarity with the subject matter to effectively assist the parties in attaining a resolution of the issues.

A Mediator's Goal is to Assist the Parties in Making Informed Decisions Regarding Settlement

New Jersey has adopted the Uniform Mediation Act (UMA).[12] As used in the UMA, "'mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[13] The Supreme Court standards indicate that mediators "assist the parties in developing options to make informed decisions that will promote settlement of the dispute."[14] In espousing the "principle of self-determination," the Supreme Court standards state, "The primary role of a mediator is to facilitate a voluntary resolution of the dispute, allowing the parties the opportunity to consider all options for settlement."[15]

In order to facilitate communications (as required by the UMA) and help the parties "develop options" (as required by the Supreme Court standards), a mediator should be prepared to answer the parties' questions regarding the law. If the mediator does not know an answer to a question, he or she can research the matter to provide guidance. Alternatively, the mediator may refer the party to another professional or include additional professionals within the mediation. Indeed, the Supreme Court standards reference a mediator making the parties "aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions."[16]

How Should a Mediator Respond to a Party's Inquiry about a Potential Change in the Law?

When faced with a question about whether a law is in the process of changing and how it may impact the case that is being mediated, it is this author's opinion that the mediator must answer the question honestly. If the mediator knows the status of the debate or the legislative process, he or she should provide that information. However, the mediator must temper his or her response by clearly stating to the parties that until a bill becomes a law, the situation is uncertain.

If the mediator does not know whether the law is in the process of changing, he or she should research the issue. This research can (and likely should) include contacting other professionals who may have more insight into the situation. The mediator should then candidly answer the question based on the research performed.

Often, the mediator's research or inquiry will re-affirm the parties' initial questions and reveal that a change in the law is *possible*, but unclear. In such a circumstance, where a change in the law is being discussed, a mediator can gain credibility with the parties by answering their questions honestly. The mediator can, for example, indicate that there is an ongoing legislative discussion about changing a particular law. The mediator can inform the parties about both sides of the debate and the reasons for the alternate positions being taken.

Integrity and neutrality are hallmarks of mediation. A dialogue about the status of the law (and its potential changes) as known to the mediator promotes these concepts. This dialogue also educates the parties to the mediation. It is with this dialogue that the parties can begin the process of making *informed decisions* about how to amicably resolve their case through mediation. ■

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Endnotes

1. R. 1:40-12(A)(6).
2. R. 1:40-12(a)(6)(i)(b).
3. R. 1:40-12(A)(6)(i)(d).
4. R. 1:40-12(A)(6)(ii)(b).
5. R. 1:40-12(A)(6)(ii)(a).
6. R. 1:40-12-(A)(6)(iii).
7. R. 1:40-12-(b)(1).
8. These standards were published in Feb. 2000. They are available on the New Jersey Judiciary's website, which is www.judiciary.state.nj.us/services/cdr.htm. The specific notice to the bar setting forth these standards is located at http://www.judiciary.state.nj.us/notices/2006/n060313a.htm.
9. *See* Standards of Conduct for Mediators in Court-Connected Programs, adopted by the New Jersey Supreme Court Jan. 4, 2000, §IV. http://www.judiciary.state.nj.us/notices/reports/MediatorStandards.pdf.
10. R.P.C. 1.1.
11. *Davin, LLC v. Daham*, 329 N.J. Super. 54, 72 (App. Div. 2000). *See also* Michels, *New Jersey Attorney Ethics*, §14:201(b), (2009).
12. N.J.S.A. 2A:23C-1 *et. seq.*
13. N.J.S.A. 2A:33C-2.
14. *See* Standards of Conduct for Mediators in Court-Connected Programs, adopted by the New Jersey Supreme Court Jan. 4, 2000.
15. *Id.* at §I(B).
16. *Id.* at §1(C).

The New Jersey Family Collaborative Law Act

by Joseph DiPiazza

The concept of collaborative law has been increasing in popularity since its inception in the late 1980s. According to the website of the International Academy of Collaborative Professionals (IACP), the collaborative process of dispute resolution is now practiced in 39 states and the District of Columbia, and is comprised of more than 235 practice groups.[1] Collaborative law is a voluntary settlement process in which the parties, with the assistance of their attorneys (and sometimes other collaborative professionals) attempt to resolve their differences without going to court.[2] The process is generally less expensive, less adversarial, and quicker than litigation. Additionally, the parties have greater control over the outcome of their divorce.[3] All participants in the collaborative law process recognize and agree that the process is intended to replace litigation.[4] The collaborative process can be used to facilitate settlement of traditional issues raised before the family part, such as spousal support, child support, custody, and division of marital assets.

On Sept. 10, 2014, New Jersey codified collaborative law as it relates to family law. The New Jersey Family Collaborative Law Act (Assembly Bill No. 1477 and Senate Bill No. 1224, hereinafter referred to as the act) unanimously passed both the General Assembly and Senate on June 23, 2014, and June 26, 2014, respectively.[5] The act is modeled after recommendations issued in a July 2013 report of the New Jersey Law Revision Commission (NJLRC) on the New Jersey Family Collaborative Law Act.[6] Sponsored by Senate Majority Leader Loretta Weinberg (D) and Senator Nicholas Scutari (D), the act permits the use of a collaborative law process as an alternative to the judicial resolution of family law disputes.[7]

The Provisions of the Legislation

According to the act, the collaborative law process is initiated when clients and their attorneys sign a "family collaborative participation agreement."[8] The participation agreement sets forth that the attorneys will represent the clients exclusively in the family collaborative law process and are only retained for that limited purpose.[9] If the collaborative law process fails or is terminated, as discussed in further detail below, the collaborative attorneys retained will be disqualified from representing the parties in divorce litigation.[10]

The act also addresses critical issues of disclosure, communication, and how the collaborative law process is concluded/terminated. With respect to disclosure, a party engaged in the collaborative law process is required to "provide timely, full, and candid disclosure of information related to the family law dispute without formal discovery."[11] A party is also required to promptly update any previously disclosed information that has materially changed.[12] Moreover, the act provides a privilege for communications made during the collaborative law process by a party or non-party participant.[13] These communications are not subject to discovery and are not admissible in evidence.[14] In order to make the privilege enforceable, the act defines the parameters of a family collaborative law communication as "a statement, whether oral or in a record, that is made in the course of a family collaborative law process and occurs after the parties sign a family collaborative law participation agreement but before the collaborative family law process is concluded."[15]

The privilege becomes inapplicable if the statement is:

> (1) made during a session of a collaborative family law process that is open, or is required by law to be open, to the public; or (2) sought, obtained, or used to threaten or plan to inflict bodily injury or a crime, or to commit or attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; or (3) in a settlement agreement resulting from the collaborative family law process, evidenced by a record signed by both parties to the agreement; or (4) a disclosure in a report of suspected domestic violence or suspected child abuse to an appropriate agency under the laws of [New Jersey].[16]

Finally, according to the act, a collaborative family law process is concluded by either a resolution of a family law dispute as evidenced by a signed settlement agreement, or by termination of the process.[17] The act defines termination as occurring when one of the following events takes place: 1) a party gives notice to other parties in a record that the process is ended, which a party may do with or without cause; 2) a party files a document without the agreement of all parties that initiates a proceeding related to the family law dispute; 3) either party is subject to, or obtains, a temporary or final restraining order against the other party in accordance with the Prevention of Domestic Violence Act of 1991, P.L.1991, c.261 (C.2C:25-17 *et seq.*); 4) an action is commenced requesting that a tribunal issue emergency relief to protect the health, safety, welfare, or interests of a party, or the defense against such a request is commenced; 5) a party discharges a family collaborative lawyer except as provided in the act; 6) a party fails to provide information that is necessary to address the issues in dispute, and one of the parties chooses to terminate the collaborative process as a result; or 7) a family collaborative lawyer ceases further representation of a party.[18]

Comparing the Collaborative Process with Litigation

The Act's Disqualification Clause

When retained, collaborative attorneys and the parties enter into a participation agreement providing that if adversarial litigation ensues, both parties' attorneys are disqualified from representing the parties in the litigation.[19] The disqualification of the collaborative law attorneys is designed to ostensibly prevent attorneys and their clients from commencing litigation at the first sign of trouble and to keep the participants focused on dispute resolution rather than litigation tactics. This disqualification clause may also add a level of assurance for clients who want their attorney fees to be applied toward resolution rather than litigation.

If the collaborative process breaks down, however, the disqualification clause could pose a significant hardship upon a client who has spent significant amounts of time and money in the process. The collaborative attorneys, their firms, and all collaborative experts would not be able to participate in the adversarial litigation. The parties would be required to retain new attorneys, as well as new professionals and experts, and start over in litigation. The parties and counsel should consider the impact of the disqualification clause when evaluating whether to proceed collaboratively.

Disclosure vs. Discovery

In the collaborative process, the participation agreement provides that the parties must voluntarily disclose all relevant facts.[20] Therefore, cases should result in the free exchange of information at a significantly lower cost. Furthermore, the parties in a collaborative matter may define the scope of disclosure and may gather as much (or as little) information as they wish from one another.

The collaborative approach to disclosure is markedly different than the discovery process in litigation, which allows for written interrogatories, demands for the production of documents, depositions, as well as other discovery methods.[21] During the litigation process, parties are afforded great latitude to discover relevant information that may help prove issues in dispute and shape the theory of a case.[22] Discovery can be the most time-consuming (and expensive) part of litigation. In an effort to address all potential issues, claims, and defenses, attorneys often make extensive discovery requests. This can result in the production of hundreds or thousands of pages of documents, with depositions occurring where the parties are questioned regarding the discovery produced.

Discovery can often be invasive and expensive, but it is also necessary for litigation. When evaluating the collaborative process and litigation, however, it is important for clients to consider that the opportunities for a party to compel complete disclosure appear to be more limited in the collaborative process.[23] In fact, the only apparent ramification for failure to disclose information is termination of the collaborative process.

The Act's Provision for Privileged Communication

The provision for privileged communication is an essential part of the act. In order to facilitate full and fair disclosure by the parties, the act grants an evidentiary privilege to protect the parties from disclosure of any collaborative law communication.[24] The privilege follows the rationale of the attorney-client privilege because it is meant to encourage candor by the parties.[25] Thus, parties are free to make full disclosure to their attorneys, and as a result their attorneys can render the best possible representation while focusing on resolution.

The privilege also extends to non-parties (*i.e.*, non-attorney professionals and experts) to facilitate the candid participation of experts and others who may aid in the

resolution of the dispute. Without the privilege, experts may be hesitant to give informal opinions in the course of the collaborative process, fearing their statements would become evidentiary. Therefore, the privilege allows non-party participants to speak with full candor to the parties, as well as other non-parties. Ultimately, the privilege allows the parties to retain more decision-making authority, while promoting predictability with regard to the collaborative process and the level of confidentiality that can be expected by all participants.

The 'Right' Clients for the Collaborative Process

Although there are benefits to the collaborative process, it is not for every divorcing family. For example, parties who are unwilling to consider one another's viewpoint, parties who are unwilling to reveal all assets and debts, and parties who do not have the emotional capacity to be in one another's presence may be better suited for standard litigation. Moreover, the act does not appear to provide any ramifications (other than termination of the process) in the event that a party decides to end the process or commence a proceeding before a court. Therefore, there would be no repercussions for a party who acts solely in bad faith.

If, for example, a collaborative process was initiated by a party with the sole intention to delay inevitable litigation or to string an unwitting party along without intention of resolution, the unwitting party would have no recourse against the party proceeding in bad faith. As such, it is crucial that both parties are aligned with respect to their desires and willing to focus on dispute resolution, rather than rehashing past issues or problems.

Public Effect and Final Remarks

The fiscal impact of the act on the Judiciary remains to be seen. The act could generate savings for the Judiciary by reducing the number of contested family court proceedings. However, the Judiciary may realize decreased revenue from fewer motion filings in the court system.[26]

The act could ease the burden placed on the already over-taxed family part by presenting an additional method to achieve resolution in a matrimonial matter without court intervention. The New Jersey State Bar Association has issued a statement indicating that it strongly supports this legislation and counts the act as "represent[ing] an important step in bringing uniformity, clarity and the assurance of professional responsibility to the collaborative law process."[27] The act shall take effect on the 90th day after enactment.[28] ■

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Endnotes

1. International Academy of Collaborative Professionals at https://www.collaborativepractice.com/.
2. Stuart G. Webb and Ronald D. Ousky, *The Collaborative Way to Divorce*, xviii (Penguin Books 2007) (2006). Collaborative professionals can include, for example, accountants, appraisers and mental health professionals.
3. *Id.*
4. *Id.* at 31.
5. New Jersey Legislature at http://www.njleg.state.nj.us/.
6. S. 1224, 2014 Leg., 216th Leg. (N.J. 2014).
7. *Id.*
8. *Id.*
9. *Id.*

10. *Id.*; *see also* Opinion 699 of the Advisory Committee on Professional Ethics, 182 N.J.L.J. 1055 (2005) ("If for whatever reason the collaborative process fails and either party resorts to traditional litigation, then the lawyers for both sides are required to withdraw, and any lawyer associated with the same firm as withdrawing counsel would be barred from accepting the representation.").
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. New Jersey Court Rule 4:10-1 and Rule 5:5-1.
22. *See Shanley & Fisher, P.C. v. Sisselman*, 215 N.J. Super. 200, 216 (App. Div. 1987) (holding "...[the] rules of discovery are to be liberally construed and accorded the broadest possible latitude...to insure that the ultimate outcome of litigation will be dependent on the merits of an individual matter in light of all the available facts...[A party should be compelled] to produce all relevant, unprivileged information which may lead to the discovery of relevant evidence concerning the respective positions of [all parties].").
23. S. 1224, 2014 Leg., 216th Leg. (N.J. 2014).
24. *Id.*
25. *See State v. Pavin*, 202 N.J. Super. 255, 263 (App. Div. 1985) (holding that the purpose of the attorney client privilege is "to encourage openness and candor between client and his legal adviser").
26. The act is revenue neutral in one key manner, as the parties who are successful in the collaborative process will still have to file pleadings to complete their divorce.
27. New Jersey State Bar Association at http://www.njsba.com/images/content/1/0/1007524.pdf.
28. New Jersey Legislature at http://www.njleg.state.nj.us/.

Collaborative Divorce: Answers to Frequently Asked Questions

by Amy Zylman Shimalla

Many practitioners are familiar with the general concept of collaborative divorce. It is an alternate dispute resolution (ADR) process, which is defined by the International Association of Collaborative Practitioners (IACP) as follows:

> Collaborative Practice is a voluntary dispute resolution process in which parties settle without resorting to litigation.
>
> In Collaborative Practice:
>
> 1. The parties sign a Collaborative Participation Agreement describing the nature and scope of the matter;
> 2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;
> 3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;
> 4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;
> 5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and
> 6. The parties may jointly engage other experts as needed.[1]

With the recent passage of the New Jersey Family Collaborative Divorce Act, collaborative divorce is likely to become a widely used process in New Jersey. Mediation has become a household term, and hopefully collaborative divorce will follow suit. This article will address many of the frequently asked questions about the specific components of collaborative divorce.

What is the difference between a collaborative divorce and a conventional divorce where the parties make their best efforts to amicably resolve their dispute before trial?

In a conventional divorce, the parties rely upon the court system and judges to resolve their disputes. The parties often come to view each other as adversaries, with conventional divorce pitting one against the other. As a result, their divorce may become a battleground. The resulting conflict can take a tremendous emotional and financial toll on the family and can be especially damaging to the children.

By contrast, collaborative divorce is by definition a non-adversarial approach. The parties and their lawyers agree *in writing* not to go to court to resolve their dispute. They negotiate in good faith and work together to achieve settlement outside the courts. The collaborative process eases the emotional strain of the breakup of the family. Furthermore, it protects the wellbeing of children. Unlike a conventional divorce, collaborative divorce allows the parties the opportunity to address emotional issues and consider more creative financial solutions in a non-adversarial setting.[2]

The fundamentally different experience of a collaborative divorce as compared with a conventional divorce can be felt by all involved at each step of the process. There is a different atmosphere in the four-way conferences attended by the parties and their collaboratively trained attorneys. A party does not have to be concerned that their spouse's lawyer may be evaluating them and cross-examining them in the future. The process is not always pleasant, but the goal of a workable resolution is the focus of everyone in the meeting.

What is the difference between a collaborative process and mediation?

In mediation, an impartial third party (the mediator) assists the negotiations of both parties and helps to settle the case. However, the mediator cannot give legal advice

to either party or be an advocate for either side. If the parties have retained attorneys, those attorneys may or may not be present in the mediation sessions. If the attorneys are not present, then they are typically consulted between mediation sessions. If an agreement is reached in mediation, the mediator prepares a memorandum of understanding setting forth the terms for review and editing by the parties and their lawyers.

In a collaborative process, both parties have lawyers present during the negotiation process. The lawyers, who have mediation training, work with their clients and one another to assure a balanced process that is positive and productive. If an agreement is reached, a document is drafted by the lawyers, and reviewed and edited by the parties until everyone is satisfied with its terms.[3]

Thus, in a collaborative divorce the parties have the benefit of having their lawyers, who are trained mediators as well, in the sessions with them. This results in less back and forth and a more efficient process. This, in turn, reduces the costs and eases the tensions during the process.

Why is it necessary to attend collaborative training in order to represent a client in a collaborative case?

In collaborative training, one learns of the subtle (and not so subtle) differences in a collaborative versus a conventional divorce. A student of the collaborative process learns a different way to approach a case. A shift in thinking occurs, which is frequently referred to as the paradigm shift. In her book *Collaborative Law*, Pauline H. Tesler writes that there are four stages that lawyers go through to become truly collaborative:

Stage 1: Shifting the lawyer's thinking from gladiator to peacemaker and learning to apply perspectives from other professions.

Stage 2: Shifting the lawyer-client relationship to include helping the client improve his or her behavior toward the other party, and to take responsibility for achieving a better divorce.

Stage 3: Shifting the way we think about and communicate with the other party and team members, and using good faith, interest-based negotiation.

Stage 4: Shifting negotiations to learn how to manage the process by following a clear structure (pre-meetings, agendas, minute-taking, etc.) and how to implement conflict resolution strategies.[4]

Why are the lawyers required to withdraw from a case if the collaborative process fails?

The participation agreement is the cornerstone of the collaborative process. It is a contract signed by both parties and their attorneys in which they commit to reaching a settlement outside of court.[5] A key element of the participation agreement is the requirement that neither the lawyers, nor any member of their law firm, can represent the parties in a contested matter. Integral to collaborative divorce is the development of a trusting relationship between the parties and other team members. Such a level of trust and open communication cannot evolve if the parties must be guarded and concerned that their words will be used against them in future litigation.

Do team members have to be used in the collaborative process?

Stu Webb, often called the founding father of collaborative divorce, wrote:

> While some Collaborative lawyers prefer to work alone (which we professionals call the "lawyer-only model"), more and more are becoming open to working with other professionals from different disciplines, such as Collaborative coaches, neutral financial specialists, and neutral child specialists. Each member of a typical Collaborative team plays his or her own individual role.[6]

There is an immense benefit to involving a neutral mental health professional to deal with the emotional aspects of the divorce, a financial expert to help the less financially savvy spouse, or a neutral forensic accountant or professional to value a business interest. The time and money saved is often significant, with the prevention of emotional damage proving to be immeasurable.

If the collaborative process fails and the lawyers have to withdraw from the case, do other team members have to withdraw as well?

The short answer is yes. When the parties and their lawyers bring in other professionals, they are made a part of the collaborative team. This means that all involved work together toward a common goal. Team members work individually with the parties and communicate with each other as needed. The more information each of

the team's members has, the better the chance of reaching a positive outcome.

A level of trust develops within the team with the understanding that information exchanged is protected within the process. To allow any team member to continue into litigation would be extremely detrimental to the process.[7] It would subvert the goal of promoting the unfiltered exchange of information.

What cases are right for the collaborative process?

Cases can benefit from the collaborative process as long as the parties understand the need to provide information voluntarily, rather than being ordered to do so by the court. If someone is so obstinate that they require a court order to provide information to which the other side is entitled, they may not be a good candidate for the collaborative process. Absent that type of inherently difficult or dishonest personality, most parties should consider engaging in the collaborative process.

Experts differ on whether victims of domestic abuse should participate in a collaborative process, mediation, or any method of dispute resolution that is not centered around a court of law. Stu Webb observed that, in many cases, the collaborative process can be a very effective alternative—as long as the parties commit to the collaborative process and acknowledge the past history of violence. The victim must feel safe and the abuser must be sincerely willing to agree to whatever action is necessary to allow his or her spouse to feel safe. The lawyers and mental health professionals must assess the dynamic between the spouses and evaluate whether a collaborative process can work for the parties.[8] The author agrees that a history of domestic violence should not automatically preclude a family from the benefit of alternative dispute resolution processes. Specifically, a collaborative divorce can be much less intimidating than a conventional divorce. The involvement of mental health professionals can address issues between the parties in a way that will actually empower the victim to have a voice.

Many specific types of cases would strongly benefit from the collaborative process. For example, the collaborative process is ideal for a business owner who wants to keep the value and intricate details of his or her business private and ensure that those details would not be part of a court file open to the public. A collaboratively trained forensic accountant will become part of the team and value the business just as the business would be valued in a conventional divorce. The accountant can present their findings to the parties and counsel with worksheets rather than preparing a full-blown report. The cost savings can be considerable.

Likewise, collaborative divorce is a good choice for parties who are approaching retirement or in a family where one party is more financially savvy than the other. Adding a certified financial planner to the team is helpful in allowing the parties to understand the financial implications of various resolutions, and how they can manage their finances to meet their needs following the divorce.

Collaborative divorce is also ideal for a family with difficult emotional issues or with a child with special needs. Collaboratively trained mental health professionals can become part of the team to work in unison to find the best resolution for the family.

By the same token, the author does not believe the collaborative process only works when everyone gets along. The parties are divorcing, so there are certainly going to be differences of opinion and disputes. The benefit to employing the collaborative professionals is to avoid escalating these existing problems and tensions. Instead of being adversarial and exacerbating the problems, the collaborative professionals work together to find an appropriate resolution of the dispute.

Is limiting representation in a collaborative divorce ethical under the Rules of Professional Conduct?

When the collaborative process was introduced in New Jersey, there was a request for a review by the Advisory Committee on Professional Ethics appointed by the Supreme Court of New Jersey. This review resulted in Opinion 699.[9]

Opinion 699 addressed the issue of a lawyer's withdrawal from a case in the event the collaborative process ends. The advisory committee noted that because the limitation on the attorney's representation is known from the outset, it is more of a limitation on the scope of representation than a withdrawal as counsel.[10] The ruling notes that lawyers are permitted to impose some limitations on the nature of their practice pursuant to RPC 1.2(c), as long as the client gives informed consent.

Opinion 699 further noted that the lawyer must assess the client's needs, and whether or not the collaborative process is likely to be successful for the client. They must ensure that the client is aware of the risks of the process, inclusive of the need for the lawyer to withdraw

if the process is unsuccessful and the matter proceeds to litigation. The client must be advised of the waiver of 'traditional' discovery. This waiver of discovery does not mean the exchange of information and documentation does not take place. However, rather than using interrogatories and depositions, the parties share information in an open and transparent manner. The client must also be made aware of all of the alternatives available to him or her, including mediation, arbitration, or conventional litigation. The collaborative lawyer must assist the client in determining what process is best for him or her given his or her specific circumstances.[12]

What happens to advocacy in the collaborative process?

The ultimate goal of the collaborative process is to help the parties achieve a mutually acceptable, durable agreement both parties can accept. Attorneys accomplish this by refraining from using adversarial tactics, focusing on resolution rather than blame, generating realistic expectations, establishing effective communication, and building trust. Nonetheless, a collaborative lawyer continues advocating for his or her client in the process with a view toward reaching an agreement that is acceptable to both parties.[12]

What is the aftermath of a collaborative divorce?

If the parties are able to collaborate and to amicably resolve the issues of their divorce, they are likely to continue in that fashion and successfully communicate in the aftermath of the divorce, likely making their post-divorce life more peaceful and manageable.

Following a conventional divorce, the parties are left to pick up the pieces after the adversarial process has concluded. They must then find a way to move forward with the parenting and financial arrangements the court imposed upon them. In a collaborative divorce, the parties can enlist the aid of their collaborative lawyers and other team members as needed post-divorce. The result can be a much smoother transition for the family into their post-divorce life. Ultimately, a collaborative divorce can be less stressful and less expensive, and the family members may pass through the process with far less damage than those survivors of a conventional divorce. ■

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Mediation and Arbitration with the Same Neutral: The Legal Landscape After *Minkowitz*

by Stacey A. Cozewith

One of the most controversial issues today in alternative dispute resolution (ADR) is whether a neutral party can mediate and subsequently arbitrate the same case. The Appellate Division addressed this issue in its 2013 decision in *Minkowitz v. Israeli,*[1] a case of first impression.

The *Minkowitz* Decision: An Introduction

In *Minkowitz*, after the commencement of litigation, the parties agreed to resolve their matter outside of the court system by submitting to binding arbitration on all financial issues (and non-binding arbitration on custody and parenting time issues).[2] However, "the parties chose to defer commencement of arbitration, pending efforts to settle some disputes."[3] During the next year, several issues were resolved through the entry of consent orders after mediation.[4]

Approximately three years after entering into an agreement to arbitrate, the arbitrator issued decisions regarding all outstanding issues not covered by the consent orders.[5] The trial court then confirmed the arbitration awards.[6] The plaintiff appealed the confirmation of the arbitration awards claiming, among other things, that it was inappropriate for the arbitrator to have also acted as a mediator.[7] The Appellate Division noted, "[t]his case unraveled because the parties agreed to arbitration, then chose to do something else."[8]

In an opinion authored by the Honorable Marie E. Lihotz, J.A.D., the Appellate Division vacated any arbitration awards entered after the mediated consent orders were entered.[9] The court provided, "[a]fter guiding mediation, the arbitrator could no longer proceed, and by doing so here, he exceeded his powers."[10] The court explained:

> Although parties contract to arbitrate, settlement negotiations are not foreclosed by the Act....Nevertheless, we conclude the differences in the roles of these two types of dispute resolution professionals necessitate that a mediator, who may become privy to party confidences in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral fact finder necessary to conduct a binding arbitration proceeding. Consequently, absent the parties' agreement, an arbitrator appointed under the Act may not assume the role of mediator and, thereafter, resume the role of arbitrator.[11]

Looking at both the mediation and arbitration processes in depth, the court added: "[M]ediation encourages confidential disclosures to the mediator, whose training is designed to utilize these confidential positions to aid the parties to evaluate their positions, promote understanding of the other side's position, and reach a consensus."[12] Mediation is a facilitative process, whereas "an arbitrator's role is evaluative, requiring the parties to present their evidence for a final determination.... Arbitrators essentially weigh evidence, assess credibility, and apply the law when determining whether a party has proven his or her request for relief....An arbitrator makes a final decision, which binds the parties."[13]

Mediation and Arbitration: A Brief Overview

The Appellate Division's decision in *Minkowitz* merits a review of how mediation and arbitration are separately treated by the New Jersey Rules of Court and by statute. Rule 4:21A sets forth rules regarding arbitration, as does the Uniform Arbitration Act.[14] The New Jersey Rules of Court define arbitration as "[a] process by which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award."[15]

Likewise, Rule 1:40 dictates the general guidelines regarding mediation, including rules about mediators, confidentiality, disclosure, and evidentiary privilege.[16] The Uniform Mediation Act[17] also dictates rules regarding mediation similar to those covered by the Rules of Court.

The rules do not specifically define mediation, but indicate mediation to be a "facilitative process."[18] A facilitative process is defined as "a process by which a mediator facilitates communication between parties in an effort to promote settlement without imposition of the mediator's own judgment regarding the issues in dispute."[19]

The only rule contained in the Rules of Court addressing the connection between arbitration and mediation is Rule 1:40-2(d)(1), which permits and defines a "Hybrid Process" as "Mediation-arbitration: A process by which, after an initial mediation, unresolved issues are then arbitrated."[20] Nevertheless, Rule 1:40-2(d)(1) gives no insight into the issue of using one individual as both an arbitrator and mediator in the same matter.[21] Consequently, the court in *Minkowitz* was faced with the task of clarifying the role of an individual in a hybrid process.

Prior to *Minkowitz*, practitioners often asked their arbitrator to spend some time prior to the start of arbitration determining if any of the outstanding issues could be amicably resolved through mediation. However, the Appellate Division cautioned parties from engaging in this "routine" practice.[22]

In vacating the arbitration award because of the dual role of the neutral, the Appellate Division addressed how the divergent roles of mediators and arbitrators may prevent one individual from performing both functions in the same case.[23] Specifically, the court provided that during mediation, the parties share confidential information with the mediator they do not expect to be binding.[24] The mediator may also share opinions and advice on potential settlement of disputes.[25] By contrast, an arbitrator must maintain "complete objectivity" in order to protect the "integrity of the arbitration process."[26] Thus, Judge Lihotz noted that just as "[t]hose confidential communications gained in mediation are precluded from being considered in a court contest…[they] would similarly be precluded from consideration in an arbitration hearing."[27]

Can One Neutral Ever Mediate and Arbitrate the Same Matter?

The emotional stressors associated with a matrimonial matter often make it difficult to convince parties to voluntarily attend mediation or arbitration. Persuading parties to do so with separate neutrals for each alternative dispute resolution process may create an even larger barrier. *Minkowitz*, however, does not absolutely preclude one person from serving as an arbitrator and mediator in the same case.

Frequently, when a matter is mediated, the parties divulge to the mediator, among other things, their 'bottom line' settlement position and real concerns pertaining to the facts and issues (which may be different than what they would tell a trial judge or arbitrator). For a mediator to facilitate productive negotiations, the mediator requires information from both sides to determine the best way to reach a resolution. Thus, armed with the knowledge of each party's bottom line, it seems reasonable the mediator should not be able to then serve as an arbitrator.

In response, many will assert that the level of disclosure to a mediator is no different than when a trial judge assists the parties in resolving a case at an intensive settlement conference, (ISC), when that same judge will subsequently preside over a trial. What is the difference between a sitting judge assisting with negotiations and then presiding over a trial in the same matter, and a neutral acting as a mediator and then presiding over an arbitration in the same matter? The answer in *Minkowitz* is that it is all about disclosure and consent.[28]

The trial judge, during ISCs, makes it clear that he or she may assist in negotiations, but has not pre-judged the matter. In addition, the parties must consent *prior to* a trial judge listening to a discussion of any settlement proposals. The judge's thoughts on a case, as presented in chambers, are made with essential disclosures: 1) no testimony has been taken; 2) no conclusion has been reached based on a consideration of existing law; and 3) the thoughts and perceptions discussed are provided only to guide the parties in resolving their matter, and are not meant to be an outline of what the judge may decide after a full and complete trial. It is this extensive disclosure that renders this everyday practice acceptable.

Similarly, one neutral may arbitrate and mediate a matter as long as the parties consent to and execute a document in which any potential conflict is disclosed and waived.[29] *Minkowitz* permits the parties to "contract to the contrary" via written agreement allowing the mediator to serve as an arbitrator in their case.[30] Judge Liholtz's opinion provides:

> In the family law context, we could envision parties agreeing in writing to allow one person to perform these roles regarding separate issues; for example, mediation of custody matters and arbitration of financial issues. However, this should be the parties' choice. Absent a specific agreement clearly defining and accepting the

complementary dispute resolution professional's roles, dual roles are to be avoided.[31]

However, even with the parties' written consent, neutrals or participants may exercise caution and decide not to engage in a scenario in which the neutral mediates and arbitrates the same issues. As parties are engaging a neutral to avoid litigation and reach a binding, final resolution, attorneys may wish to avoid a possible future challenge to the resolution's enforceability/validity based solely on the mediator/arbitrator having served in dual roles. Thus, there are practical considerations to asking a mediator to serve as an arbitrator, even if written consent is obtained. However, if there is "a specific agreement clearly defining and accepting the complementary dispute resolution professional's roles," a challenge to a binding resolution based on a neutral's performance of dual roles will be difficult under *Minkowitz*.[32]

It is critical that attorneys engage in detailed discussions with their clients regarding the positive and negative aspects of one neutral engaging in both mediation and arbitration with the parties. It may be wise for an attorney to have his or her client execute a written acknowledgement that he or she has been advised regarding *Minkowitz* and the potential pitfalls surrounding its holding. This will help avoid any future claims and avoid any future confusion or challenge under *Minkowitz*.

Minkowitz: A Question of Retroactive Application

One of the most significant issues arising from the *Minkowitz* decision is whether its holding applies retroactively. The question poses great concern, as any litigant unhappy with an arbitrated outcome could seek to re-open a matter that *Miknowitz* would have otherwise prohibited. This author understands there have been many motions filed invoking the *Minkowitz* decision, seeking the decision's application to previously concluded matters. While plenary hearings are likely to be scheduled to determine the extent of consent and disclosure on a case-by-case basis under *Minkowitz*, there is little decisional authority, as of now, on the issue.

For example, in the unpublished decision of *N.L. v. V.M.*,[33] the Appellate Division vacated the arbitration awards in a case arbitrated prior to the decision in *Minkowitz*. In its *per curiam* decision, the Appellate Division noted the parties had no written document consenting to the arbitrator performing the additional role of a mediator. Furthermore, the Appellate Division stated, "there is nothing in [*Minkowitz*] indicating that its holdings would have only prospective effect."[34]

Similarly, in *Walker v. Walker*,[35] an unpublished Chancery Division decision, Mr. Walker (the plaintiff) filed an application with the trial court—subsequent to the *Minkowitz* decision—seeking to vacate the arbitrator's award because the arbitrator had also served in the role of mediator.[36] Although the interlocutory decision primarily dealt with the details of calling counsel as witnesses and sequestration of co-counsel for depositions, the court noted, "plaintiff is requesting that the court afford him a *Minkowitz* remedy and begin arbitration anew with a new arbitrator after the parties have been in arbitration for more than two years. This Court's ruling could have significant financial consequences for the parties."[37] It is this author's understanding that the issue was never adjudicated on its merits, as the parties settled their dispute prior to a final ruling.

At present, there is no binding precedent delineating whether *Minkowitz* would apply retroactively to cases that were already finalized when *Minkowitz* was decided.

It is this author's opinion that *Minkowitz* should not be applied retroactively. Applying *Minkowitz* only prospectively would comport with the public policy goals expressed in the Appellate Division's decision. In *Minkowitz*, Judge Lihotz pointed out that matrimonial proceedings have traditionally burdened state court dockets.[38] To avoid overwhelming already strained courts, public policy dictates that "fair and equitable" settlement agreements reached voluntarily should be considered conclusive to the extent possible.[39]

Moreover, *Minkowitz* reiterates New Jersey's long-standing preference for settlement of legal disputes through arbitration, rather than litigation.[40] The author believes it would be somewhat ironic to have cases resolved by the preferred arbitration method, only to have them challenged through the disfavored litigation method. The entire purpose of arbitration is to resolve a dispute "in a speedy, inexpensive, expeditious, and perhaps less formal manner."[41] Thus, allowing *Minkowitz* to apply retroactively and, consequently, allowing courts to re-open finalized cases, would contravene New Jersey's public policy goals by increasing dispute duration, expense and formality. Thus, the author believes *Minkowitz* must be clarified as a guidepost for matters that are prospectively resolved via ADR, and not an excuse to re-open matters previously resolved.

Conclusion

Despite potential *Minkowitz*-related pitfalls, ADR is the best route in many cases, regardless of whether mediation, arbitration, or a hybrid of both is chosen. With written consent and proper disclosure, an attorney could choose mediation for certain issues and arbitration for others. With informed consent as outlined by the *Minkowitz* court, one person may potentially serve in the dual roles of mediator and arbitrator. However, attorneys should be careful to ensure that their clients are aware of the concerns raised by the *Minkowitz* decision and steps are taken to address the understandable concerns articulated by Judge Lihotz in her decision. ■

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3. *Id.* at 122.
4. *Id.*
5. *Id.* at 130.
6. *Id.*
7. *Id.* at 137.
8. *Id.*
9. *Id.* at 148.
10. *Id.*
11. *Id.* at 138, 142.
12. *Id.* at 143.
13. *Id.* at 144 (internal citations omitted).
14. N.J.S.A. § 2A:23B (2014).
15. R. 1:40-2(a)(1).
16. R. 1:40.
17. N.J.S.A. § 2A:23C (2014).
18. *See Id.*
19. R. 1:40-2(c).
20. R. 1:40-2(d)(1).
21. *See Id.*
22. *See* 433 N.J. Super. at 142.
23. *Id.*
24. *Id.* at 143.
25. *Id.*
26. *Id.* at 147.
27. *Id.* at 145.
28. *See Id.* at 147.
29. *See Id.*
30. *See Id.*
31. *Id.*
32. *See Id.*
33. 2013 N.J. Super., Docket No. A-1043-11T2, 2013 LEXIS 2811, at *1 (App. Div. Nov. 21, 2013).
34. *Id.* at *32.
35. 2014 N.J. Super. Docket No. FM-13-950-09, LEXIS 379, at *4 (Ch. Div. Feb. 26, 2014).
36. *Id.*
37. *Id.*
38. 433 N.J. Super. at 128.
39. *See Id.*
40. *See Id.* at 131.
41. *Id.* at 132 (*quoting Carpenter v. Bloomer*, 54 N.J. Super. 157, 162 (App. Div. 1959)).