new jersey
FAMILY LAWYER

VOLUME I, NO. 6

FEBRUARY 1982

LEE M. HYMERLING
Section Chairman

Chairman's Report

At its meeting on February 10, 1982, our Section's Executive Committee considered at great length R. 1:21-7(a), the rule that had been proposed by the Supreme Court mandating written retainer agreements in matrimonial matters. You will recall that shortly after the proposed rule was originally announced, I appointed a blue ribbon committee chaired by Gary Skoloff and consisting of Monmouth County State Bar Trustee Sidney Sawyer, Burlington County State Bar Trustee Don Gaydos, Past Section Vice-Chairman Charles De Fuccio and myself. The committee was charged with the responsibility of very carefully reviewing the proposed rule, determining whether on the basis of hard statistics the rule was needed, and further determining whether the rule was in the public interest. Over the past two months, the committee has worked very hard not only in analyzing the proposed rule in depth, but also in collating the statistics that have been made available to the committee by the Administrative Office of the Courts.

As a result of its study, the committee resoundingly concluded that the rule as proposed could not be justified on the basis of statistics available and similarly that the specific rule that has been proposed should not be adopted. The committee report continued as follows: "Nonetheless, although the objective facts suggest that no need exists for the rule, we endorse the Supreme Court's desire to assure clients that they are aware of the fee basis between the client and the attorney. We observe, however, that in adopting such a rule, the Court must be mindful of the inherent costs the rule will entail and the risk that the rule itself will spawn more fee disputes than now exist. Notwithstanding these concerns, the committee does endorse the adoption of such a rule."

In formulating its own proposed rule, the committee recognized that it is utterly impossible for a matrimonial attorney to estimate the total fee because of the inability of the attorney or the client

(continued on page 82)

March Dinner to Feature Best Selling Author

Author Mary Higgins Clark will be the guest speaker at the Family Law Section's upcoming annual dinner to be held on Wednesday, March 10, 1982 at Mayfair Farms in West Orange. For those members who have not already registered, it is strongly urged they do so promptly due to the limited number of remaining seats. A reservation form was included in last month's issue for convenience.

While always an enjoyable social event, the selection of Mary Higgins Clark as guest speaker enhances this year's dinner and all members are urged to register their spouses or guests.

Judged by her success, Mary Higgins Clark is a first rate author of thriller and suspense. Her first novel, *Where Are the Children?* won her a place on the best seller list in 1975 and 1976, which was followed by two others, *A Stranger Is Watching,* in 1977, also a best seller, and her most recent novel, *The Cradle Will Fall,* which is steadily climbing the charts.

In addition to her literary talents, Ms. Clark is no newcomer to the legal profession. Three years ago, she spoke at an American Bar Association meeting on the subject of single-parenting as the result of her own firsthand experience.

Whatever the topic, Ms. Clark should prove to be a lively and entertaining speaker at this year's dinner, which will give all Section members and their guests a chance to renew old friendships and make new acquaintances as well.

As announced in the January issue of the *Family Lawyer,* also to be dedicated at the Annual Dinner will be the Saul Tischman Family Law Section award. Offering his reminescences of former Standing Master Tischman will be the Hon. Sidney Goldmann, retired Presiding Judge of the Appellate Division.

1982-NJFL-81

Chairman's Report *(continued)*

at the commencement of an action to project whether or not the other side will be "reasonable." Similarly, the committee was critical of the reference in the proposed rule to a billing rate for types of legal services, since the majority of attorneys in this state charge one hourly rate for matrimonial actions and do not distinguish between various types of services. The committee was unable to conclude that a particular type of service was worth more or less money than another type of service. Thus, the committee was concerned that if a higher premium were paid for appearances in court, it would encourage exactly that which the Pashman Committee worked so hard to discourage; namely, many court appearances which might have been avoided had more concerted effort at early settlement been made.

The committee also disagreed with the aspect of the proposed rule which requires specific definition as to what services would *not* be covered by the agreement. All too frequently it is very difficult for a matrimonial lawyer to define what services will not be covered in a particular representation. Matrimonial representations frequently branch into other areas of the law, such as real estate closings, municipal court appearances, defense of collection suits, etc.

In its wisdom, the committee concluded that brevity should be the watchword in the promulgation of a substitute rule. Rather than specificity, the committee concluded that it would be far preferable for the rule to leave to the discretion of the individual attorney the precise parameters of the agreement to be used. Thus the committee recommended a rule with striking simplicity: "In all matrimonial representations in Juvenile & Domestic Relations Court and matrimonial actions as defined in R. 4:75, there shall be a written fee agreement signed by the attorney and by the client who shall be given a copy."

It is evident that the committee felt that its proposed rule said all that had to be said. Yes, there should be a requirement that attorneys accord their clients a written statement of the fee basis upon which a given representation is undertaken. Yes, the client should be given a copy of that written statement. By the same token, it is not critical that the agreement assume a particular form and certainly not critical that the agreement estimate the total fee.

I am reminded of the parallel between the committee's proposed rule and New Jersey's unique alimony, child support and equitable distribution statute, N.J.S.A. 2A:34-23. In a few short paragraphs, that statute says all that has to be said. It requires that awards of spousal and child support be ". . . fit, reasonable and just." In a few short clauses, it confers upon the Courts of our state the power to equitably distribute property. The laws of other states have unnecessarily taken pages and pages to do the very same thing. A long retainer agreement rule is not needed; a shorter rule, leaving discretion to our matrimonial bar, accomplishes the very same result.

The committee has also specifically recommended that a gloss or commentary be attached to the proposed rule indicating the rule's purpose —to accord a "means of clarifying the scope of the attorney/client relationship and in order to define the fee arrangements that are to apply to a given representation." The gloss encourages complete communication between attorneys and clients with regard to the scope of the attorney's involvement, as well as the method by which the representation will be billed. The gloss sets forth nonmandatory suggestions as to what such retainer agreements might include, but also clearly indicates that the agreement itself, although it must always be in writing, ". . . need not follow a specific form." The gloss further indicates that the agreement may be styled as a formal agreement or, when appropriate, ". . . as a letter endorsed by the client."

Now that our Section's Executive Committee has approved the report, the report will proceed to the Board of Trustees of the State Bar where it will be considered on February 26. I am hopeful that at that time the committee's report will be endorsed by the full bar and become the formal position of our State Bar Association.

Many attorneys have expressed disappointment that the proposed rule came about as it did. Certainly, the specific form of the proposed rule came as a surprise at the Acapulco Convention. Certainly, when the officers of our Section flew down to Acapulco we had no idea of what was coming. By the same token, to its credit, the Supreme Court did not by fiat simply adopt a rule. Obviously, the Court within its province could have done so. To its credit, it did not. Instead, it merely propounded a proposed rule seeking comment not only from the organized bar, but also from individual practitioners. The Court probably did not anticipate the flood of comment that followed.

We in New Jersey all too frequently take for granted the close relationship that has historically existed between the bench and bar. Notwithstanding the disputes that have arisen surrounding the proposed retainer agreement rule as well as the funding of our state's disciplinary system, that relationship continues strong and healthy. The bench and bar will certainly not always agree on all issues. From time to time, the bar will have to respectfully disagree with the bench.

I am hopeful that if the State Bar Trustees approve the position that has now been adopted by our Section with regard to the rule, the Supreme Court will closely review the position taken recognizing that our Section's position is not taken lightly and certainly not intended to be a criticism of the Court. Instead, the position should be regarded as the result of our Section's careful consideration of a very difficult problem.

In addition to the proposed retainer agreement rule, a number of other important items have

(continued on page 92)

Some Thoughts on Recent Amendments to the Matrimonial Rules

by Harold M. Nitto

In response to the ever-increasing volume and complexity of matrimonial litigation, our Supreme Court established a committee comprised of members of the bench and bar to study the problems and provide prompt and efficient solutions.

The project to which this committee addressed itself was formidable. Its members were obliged to take a good, hard look at the rules of civil procedure as they relate to matrimonial matters and revise these rules as required to produce a more effective modality for the practice of matrimonial law. This goal was to be attained, bearing in mind the public's demand for a more efficient system, to resolve their particular problems expeditiously and with a reasonable degree of finality.

As you know, the changes in these rules became effective September 14 and it is imperative that you become familiar with them if you expect to fulfill your professional responsibility.

These rules are the culmination of much dialogue, research, thought, soul-searching and study on the part of the members of the committee. The entire committee consisted of 23 individuals. Subcommittees were formed, with either four or five members of the committee serving on each subcommittee. Each subcommittee submitted a preliminary report, which was made available to the entire panel. Then each preliminary report was read, analyzed, discussed, modified and eventually finalized. Pervasive throughout this process was the committee's unanimous and wholehearted awareness that the determination and resolution of matrimonial-related issues was a matter of increasingly grave public concern, both for the litigant and for the system. The committee's report was then submitted to the Supreme Court, and the rule changes that have evolved are to a large extent the result of that report.

I have been asked to address myself to the effect that these rule changes will have upon Passaic County, and particularly the matrimonial part. I would like to offer a summary of some of the new matrimonial rules, together with a discussion of the reasons for the changes (as I understand the reasons) and finally to consider the impact and significance to be expected from each change. In the course of doing this, it must be borne in mind that while family structures and the family unit have in recent times undergone tremendous social, economic and philosophic changes, the laws, rules and methods of resolving matrimonial-related controversies have simply failed to keep step. The new rules are an attempt to have the law keep pace with these critical changes.

Rule 4:79-2

Rule 4:79-2 in effect abolishes Rule 4:79-11. Rule 4:79-11 was the rule which essentially required that prior to the listing for trial of a matter, either the plaintiff or counterclaimant must notify the county clerk in writing as to whether the action is contested, uncontested, or if the issues of equitable distribution have been agreed upon by the parties. Section (b) of the rule, "Contents of Notice of Application for Equitable Distribution" was the subject of numerous interpretations by members of the bench and bar as to when and what was required under this rule. Some judges interpreted the rule narrowly to be consistent with the comment to the rule which stated that its major purpose was to assure that the court had full subject matter jurisdiction to support its equitable distribution judgment despite the defendant's default or non-appearance at trial. Other judges saw the rules as a vehicle, or a tool, for obtaining detailed information concerning the parties and their assets for use in every contested case. Those of you who have appeared before me realize that I subscribed to the latter view. The more information supplied to me, by the earliest possible date, the more I would be able to contribute in settlement conferences. By reviewing the pretrial statements as submitted by the attorneys, I would be in a position to aid the attorneys in solving the problems in the case. Whatever the correct interpretation, it is clear that the wording of the rule was less than precise and that the comment did not correct the extremely broad language of the rule. The matrimonial litigation committee recognized this gap in the former requirements for pretrial information and dealt with it.

The newly adopted Rule 4:79-2 creates a new pleading and a formal uniform vehicle to supply the court with the necessary information to aid the attorneys and litigants in settling the matter, or for the court in making its ultimate decisions. The new rule imposes an additional obligation on

Hon. Harold M. Nitto

The Hon. Harold M. Nitto is a Superior Court Judge assigned to the Matrimonial Division in Passaic County, and is a member of the Supreme Court Committee on Matrimonial Litigation, Phase Two.

Some Thoughts on Recent Amendments *(continued)*

attorneys to provide information within a relatively brief time (45 days after issue is joined or default entered) of the filing of the complaint for divorce. The information to be provided now shall be in the form of a "Preliminary Disclosure Statement" and essentially is an informational form which in a concise and clear manner will reveal the substantiative effects of the respective parties' financial predicament. It is expected that in the judicial enforcement of this rule with its time requirements unnecessary motions will be eliminated. The obligation on counsel and the parties to provide the court with relevant, timely information has always existed. This new rule finally formalizes that obligation, both as to the time, substance and form of the information to be disclosed to the court. Additionally there exists a continuing obligation to update the disclosure statement, within 20 days of the final hearing, or later as directed by the court. Obviously, this will provide the court with that information which reflects any changes that might have transpired between the filing of the preliminary disclosure statement and the date of trial.

The successful implementation of this rule requires that the court enforce the strict time requirements and that the consequences for failure to comply with this rule be applied. The obligation is not that of the client, but rather the responsibility of the bar. The intended benefit of this rule is both to promote uniformity within the state and to impose an obligation to have accurate, complete and current information exchanged by and between the parties and the court as soon as practicable. Many matrimonial disputes lend themselves to resolution by agreement, however, no one can be prepared to, nor expected to negotiate, or discuss the particular merits of a proposal without being assured that "all of the relevant information is on the table." If full disclosure of assets and income is made early in the controversy, it will be less difficult for attorneys, with the aid of the court, to bring the matter to settlement. **The cooperation of the bar is essential to derive the full benefit of this rule.**

Rule 4:79-5

Following extensive discussion within the matrimonial litigation committee pertaining to the extent to which discovery should be expanded in matrimonial cases, the committee adopted a middle ground, which has received the endorsement of the Supreme Court. Under Rule 4:79-5, as amended, depositions of parties with respect to all issues not related to the underlying grounds for divorce is permitted without leave of court. My experience, as well as that of my colleagues, is that these motions were routinely granted. The expansion of discovery as a matter of right as to non-parties was rejected. The committee recognized that the potential for harassment of non-parties was great, particularly in a matrimonial situation. Accordingly, deposition of non-parties may be granted at the discretion of the trial court. Unless deposing a non-party will reveal something which has a potential for significantly disclosing or revealing information that is *not* obtainable by one party directly from the other party, then to allow such deposition would clearly serve no useful purpose.

Rule 4:79-8

Rule 4:79-8 as amended, gives trial judges that discretion to order investigations in disputed custody cases. Prior to the amended rule, many judges would refrain from routinely granting these requests, but rather would order them only when they believed that there was a genuine and substantial issue as to custody. Now, all judges have this discretion formally. As a result of this the members of the bar have a responsibility both to the court and to their clients, to make sure that custody is *truly* an issue prior to pleading such, either in the complaint, or in the counterclaim, or appearance. Once pleaded, the court will move quickly to order these reports.

To assure that comprehensive information is gathered on both parties, a custody investigation should be and now will be prepared by one probation department, notwithstanding that the parties may reside in different counties. Now, the investigation will be conducted by the probation department in the county of venue.

The rule as amended, imposes several time requirements:

- it requires that the probation office files its report no later than 45 days after the order requiring the investigation is received.
- it requires that the court set a hearing date no later than three months after issue has been joined.

This rule was proposed and adopted to underscore the importance of an expeditious decision concerning custody of children, thereby avoiding the use of the custody issue by either party as a weapon of negotiation.

Obviously, the time requirements are heavily dependent on the existing resources of the probation department.

Members of the bar should not rely upon the court to assure that custody is in fact an issue. Immediately after issue has been joined counsel should do whatever is necessary to bring to the court's attention that custody is in fact a genuine contested issue, that the necessary reports are ordered and that a trial date is established within three months. Frequently, it is not until a matter receives trial approval, sometimes months after issue has been joined, depending upon the particular county, that a judge would be made aware of the custody dispute. This is particularly so where no pre-judgment motions have been filed. Suffice it to say—when custody is genuinely a contested issue, be sure that the court is made aware of it as soon as possible.

Rule 4:79-9

Rule 4:79-9 deals with the enforcement of alimony and support payments. The rule, as amended, now requires that interest charges be made for late payments, both those made through the probation department and for those payments made directly. It also requires that the probation department take the initiative quickly to involve this function in a timely fashion. The interest charge portion of the amendment is designed to provide an additional incentive to make timely payments. The time requirement imposed on the probation department to file non-support actions with the court has been imposed to foster uniformity and to provide the public with reasonable expectations for action.

If there is one theme which characterizes these amendments, it is this: The time has come for the judiciary and the members of the bar to respond to the demand of the public. The complexity of family relations necessitates nothing less than complete expertise. By no means will these rule amendments cure all the difficulties which result from dissolution of the domestic unit, but these changes do improve the means for timely action by members of the bar and by members of the judiciary.

Pet Peeves from the Matrimonial Bench

by Edward F. Menneti

Lawyers who are scheduled to appear in court at 9:00 a.m. and show up an hour later. Excuse: car trouble—even those whose offices are across the street from the courthouse!

Lawyers who appear without the litigant on the trial date advising that their client is "out of town." The truth is that the client hasn't been farther than Asbury Park since 1968!

Lawyers who fail to have the final judgment at the hearing in a simple uncontested case. No children, no alimony, no equitable distribution, etc., explaining that the office typewriter is being repaired. The truth is that their secretary misplaced Skoloff's form book!

Lawyers who make "Roberts" applications because after 32 years of marriage, husband stepped on his wife's foot at a recent Bar Mitzvah ceremony!

Lawyers and/or their secretaries who can't spell.

Examples:

a. "H" is "Payed" 250 "Weakly."
b. "W" committed "Adultree."
c. "H" is residing with his "paramoor."

Lawyers who talk too long during oral argument —especially when their clients are not present in court and unable to be impressed.

Lawyers who make applications to terminate child support on the day following high school graduation!

Lawyers who request psychiatric evaluations of the children—particularly since the spouses are the ones who *really* require them.

Lawyers who classify Preliminary Disclosure Statements as nonfiction!

Lawyers who submit the final judgment 6 months after the trial even though they have already been paid in full!

Lawyers who advise the court that *everything* is settled—except for equitable distribution, custody, visitation, support and counsel fees.

Lawyers who make application for change of custody 17 years after final judgment. "Child" is now 6 feet 5 inches tall, 235 lbs. and plays middle linebacker for Camden High!

Lawyers who request a Judge to disqualify himself because in 1973 the Judge was seated at the same table with their adversary at a bar association dinner!

Lawyers who advise their clients that interspousal gifts are *not* marital assets and that military pensions *are* marital assets. Also, that visitation is *not* dependent on child support.

Lawyers who *really* understand *U.S. v. Davis!*
Lawyers who *really* understand *Lepis v. Lepis!*

Lawyers who request the court to equitably distribute kitchen utensils!

Lawyers who make visitation motions on whether the 16 year old child should be picked up outside or inside the custodial parent's home . . . and if outside, on the second or third step!

Lawyers who file responsive certifications on Thursday at 4 p.m. for a motion the following day.

(continued on page 96)

Hon. Edward F. Menneti

The Hon. Edward F. Menneti is a Superior Court Judge assigned to the Matrimonial Division in Camden County.

Recent Cases
by Bonnie M.S. Reiss

CHILD SUPPORT — Where husband initially consented to wife's artificial insemination (aid) his consent is presumed to continue unless it is shown by clear and convincing evidence that such consent has been withdrawn or revoked.

Plaintiff wife moved for *pendente lite* support for child conceived by artificial insemination. The husband conceded that he had given his consent to the initial procedure which resulted in pregnancy and subsequent miscarriage, but claimed that he had withdrawn his consent to further procedures because of the economic burden that the treatment was placing on the family. The court held that consent, once given, is deemed to continue unless the husband proves, by clear and convincing evidence that it has been revoked or rescinded.

In arriving at its holding, the court reviewed the law of other states and focused particularly on the public policy in favor of artificial insemination, analogizing it to that favoring legitimacy of children conceived outside of the marital relationship. In both cases, the state has an interest in preventing the child from becoming a public charge and in favor of the establishment of the family unit. While conceding that the husband's view of a child conceived by artificial insemination is more akin to that of an adopted parent, while the wife's view is more like that of a natural parent, the court nonetheless relied on the need to maintain the family unit articulating the "clear and convincing evidence" standard. The court found that the husband's testimony that he told the plaintiff to stop the treatments because of the cost was not credible in light of the fact that he continued to accompany the plaintiff for the artificial insemination treatments and in fact would have been insufficient to meet his burden of proof.

[Comment: While not saying so directly, the court appears to have articulated a slightly lesser standard of proof where the issue is continued consent in an artifical insemination case than where the issue is non-access in a legitimacy case. In legitimacy cases it has been held that a standard is "clear and convincing, strong and irresistible or something just short of absolute certainty." Jackson v. Prudential Insurance Company of America, *106, N.J. Super. 61 at 77 (L. Div. 1969). While recognizing that it is more difficult to prove consent or lack of consent in the artificial insemination context, the court left the standard at "clear and convincing." Presumably, courts will be called upon to determine on a case by case basis whether, under the totality of the circumstances, consent was withdrawn. Indeed, where an initial consent form is signed, perhaps nothing short of a form memorializing a revocation of consent will be sufficient to rebut the presumption.]*

K.S. v. G.S., Docket No. M-3050-80 (Decided October 20, 1981).

Professional license or degree does not constitute a property interest subject to equitable distribution, nor are financial contributions of one spouse to the other spouse obtaining such degree entitled to specific monetary consideration.

In companion cases, the Appellate Division rejected the notion that a professional degree or license constitutes an asset or property which can be distributed upon the dissolution of a marriage. After making such a determination, the court went a step further to hold that the financial contribution of one spouse to the attainment of the other spouse's degree is not itself specifically recompensable, absent an agreement to the contrary. Where the detriment incurred by one party creates a need for support and the other party has the ability to pay, alimony, whether permanent or rehabilitative is the proper remedy.

In the first of the two cases, both parties were employed when the marriage began. The husband left his first employment in the U.S. Air Force and pursued a masters degree in business administration. While his schooling was paid for by Veterans' Administration benefits and additional money from the Air Force, the parties were primarily supported by the wife's earnings. After the husband obtained his degree, he secured employment at substantially the same salary as the wife was earning. At the time of trial, the husband was earning approximately $4,000 more. While there was no claim for alimony in the complaint, the wife requested compensation for 50 percent of the expenses paid by her while the husband attended school. An equitable distribution award of $5,000 was made by the trial court, which was grounded on a "reimbursement theory."

The Appellate Division, criticizing this logic, found it necessary to draw a clear distinction between the issue of a license or degree as a distributable marital asset and the question of an equitable remedy which might be afforded to a spouse who has financially contributed to the other spouse's attainment of a degree. Reasoning that enhanced earning ability is not distributable under *Stern v. Stern*, a degree is equally exempt since it is merely a memorialization of the attainment of skill and education. In other states where a professional license has been found non-distributable, the courts con-

(continued on page 91)

The Retainer Letter: A Protection for Attorney and Client

by Willard H. DaSilva

Years ago when I was in law school, a professor said: "The greatest source of danger in the practice of law is from your own clients." Although I was skeptical of the wisdom of that caution for a period of years, I have since come to recognize its truth. I have learned that when I serve the clients conscientiously, I have also insulated myself from discontent and criticism. This is particularly true in my field of matrimonial law.

The Consultation Fee

Preventive law is for the practitioner as well as for the client. It begins with the first inquiry from a prospective client. I make it a practice to advise the client *before* an appointment is made that there is a consultation fee in a specific flat amount, which can be applied against a retainer. If the person balks, then I know that if I am retained, receiving payment for my services will be a problem. So I am better off without that person as a client.

The Retainer Letter—A Must

It has long been my practice never to undertake a case unless: (a) the client has paid my retainer in full; (b) there is a written retainer letter signed by the client and by me in advance; and (c) the client thoroughly understands my role in the case—what is expected of me (and even more important, what is *not* expected) and what expenses may be incurred.

Accompanying this article is a form retainer letter. It is simply that—a form. Forms are designed to be *changed* from case to case and not (as is the usual practice) blindly followed.

Person-to-Person

I never mail a retainer letter to a client. I want an eyeball-to-eyeball meeting when I review—line by line, aloud—every word of the retainer letter, with full explanations in the process. This may take as long as thirty minutes, but the time will be well spent in having a clear understanding with the client of the attorney's role in the case.

Dual Representation—Always

Initially, the retainer letter states the authority of the attorney to act in a specific matter. Be careful that it is not too general and that the client will not be deceived into assuming that you will handle all legal matters of every nature on the basis of the retainer. I emphasize that my aim is to settle cases —the only sensible approach—if that is reasonably possible. Emphatic is my position that under *no* circumstances will I see, talk or deal with the other spouse except through an attorney. To deal directly with the other spouse, in my opinion, is unethical and invites a subsequent attack upon any agreement. If such an attack is made, I have exposed myself to criticism or, perhaps, worse consequences.

No Flat Fees

Next, the amount of the retainer is set forth in the letter and the time rate against which it is applied. Any attorney who handles a matrimonial case (especially under equitable distribution) will commit an injustice either to the client or to himself or herself if only a flat fee is charged. Flat fees are unfair to both client and attorney.

If the flat fee is made sufficiently high to cover various contingencies, and the contingencies do not occur, then the attorney has been overpaid (which may be the source of discontent for the client and criticism of the attorney). On the other hand, if the flat fee does not cover all of the contingencies of the case, then the attorney is not adequately compensated.

There is yet a worse consequence. Suppose the attorney (working on a flat fee basis) recommends to the client what is believed to be a fair settlement. The client, who no doubt is being asked to consider less than what had been dreamt possible, now has reason to attack the attorney, saying: "You are recommending this settlement because you want to get out of the case. You have your fee and don't want to try the case." The attorney has lost credibility in effecting a settlement believed to be in the best interests of the client. The client loses by pursuing litigation, and so does the attorney.

Time Fees Help Settle Cases

The client, who has a financial responsibility for the cost of litigation, will carefully listen to the attorney who compares the offer of settlement against the risks *and expenses* of litigation. Thus, the attorneys' fees—based upon a time rate—together with the other expenses of a trial and its preparation may well be, and often are, the catalyst which produces a settled case instead of a litigated case.

Where an attorney has an office staff to assist a client, the lower time rates of the other persons—associates and paralegals—help keep overall expenses of the case to a reasonable minimum. If explained in advance, the client appreciates the concern of the attorney not to have an explosion

Willard H. DaSilva

Willard H. DaSilva of Garden City, New York, is president of the New York chapter, American Academy of Matrimonial Lawyers, author of *New York Matrimonial Practice*, and an editor of *Family Advocate*, the ABA Family Law Section publication.

The Retainer Letter *(continued)*

of fees and will readily work with other personnel without the feeling of being shunted away from the attorney in charge. Ironically, I now have some clients who prefer to call others in my office to avoid my higher time rate. The benefit to me is obvious.

Telephone Time—Billable

Be absolutely certain from the outset to explain that telephone time is nevertheless time and is billable as such. Failure to emphasize this may lead to a gross (and otherwise avoidable) misunderstanding with the client when the final bill for fees is presented—and challenged. Also, a client's knowledge that each telephone call represents additional cost will help minimize the unnecessary calls which often glut an office.

Time Records—Absolutely Indispensable

Accurate time records are an indispensable ingredient in every case. Failure to keep them properly and contemporaneously will prejudice not just the attorney, but even more important, the substantial rights of the client.

If a client may be entitled to recover counsel fees from the other spouse, the attorney has an obligation to maintain accurate time records to substantiate that claim. Failure to have that documentation will impair the client's claim for fees.

Time records are extremely easy to maintain with a minimum of bother. I keep a clipboard full of paper handy. Every time I talk—on the telephone or in a conference—I jot down on a sheet of that paper: (a) the date; (b) the file name; (c) the gist of what took place; and (d) in the upper right-hand corner of the page—the time spent in tenths of an hour.

The sheet is then placed, chronologically, in an Acco fastener in the client's file. I have now documented: (a) the date of the service; (b) the nature of the service; and (c) the time spent. The file itself now contains a documentary of what took place in the matter and a log of the time spent. To produce a summary, the numbers in the upper right-hand corners of the pages are easily added by a secretary to total the time on the case. I have fulfilled my responsibility to the client—and to me—of maintaining time records contemporaneously. As one judge in New York said only recently in reducing attorneys' fees:

> While the court finds that continuing time expenditures were made by Bergreen and Warren, they are unable to reconstruct substantially accurate time records which were not kept contemporaneously. *** The absence of appropriate time records is a basis for reducing fees . . . .

Disbursements: In-Pocket Money

My fees do not include any disbursements. I so advise the client before I am retained. My experience formerly was that I absorbed many of the out-of-pocket expenses, particularly where the client later expressed a belief that they were included in the fee. All of that is now changed.

I tell the client that my fee does not include any disbursements and that there are two kinds of out-of-pocket expenses. The basic disbursements are usually under $200 in the aggregate, and often less. The clients readily accept the fact that the case will cost that extra $200. Basic disbursements include the process server, court filing fees and—don't forget to charge—photocopies. Bills for disbursements rendered periodically are invariably paid; bills for disbursements after the case has ended are often resented and remain unpaid.

The second kind of disbursement, which I call a "special disbursement," should properly require discussion with and the approval of the client. These expenses are for appraisers, actuaries, accountants, investigators, psychiatrists and other types of experts. The need or desirability of these persons will vary from case to case and often must be weighted during the course of settlement negotiations or litigation.

The "Bonus" Clause

Some attorneys feel that the value of their services, especially in a matrimonial case, cannot be properly measured by time alone. They, therefore add what I call a "bonus clause." This provision is to afford additional compensation based upon "results achieved"—in addition to the fee based upon time. A fixed percentage clause is generally considered to be unethical and unenforceable. However, the indefinite "bonus clause" has been used by many firms in various versions. The one illustrated in the retainer letter leaves the additional fee subject to mutual agreement, which in essence means that the client has the ultimate determination. Other clauses, not illustrated, may require arbitration or litigation in the event of a disagreement between attorney and client.

High Risks; High Costs; No Guarantees

My retainer letter emphasizes what I have told the client: that litigation is costly and speculative at best. I do not guarantee any results, nor can I. Too many factors are not within my control.

Above all, I want the client to realize that I am not a miracle-worker, that I can deal only with tools which are available to me and that I can do no more than any experienced attorney in the field. I do not engage in "spite work" but deal realistically with the serious problems which confront the client. The views and advice which I express will be realistic and objective, far removed from the emotionalism from which no client can escape.

My experience is that the client appreciates an attorney's sincerity and honesty rather than false optimism which will lead to utter disappointment for which the client is unprepared.

After the client and I have both signed the retainer letter and a copy is given to the client, the client has been realistically advised of what lies ahead and of the costs which may reasonably be anticipated. We are both ready to face the arduous task of bringing about a kind of order to the crumbling marital relationship.

Sample Retainer Letter

WILLARD H. DASILVA
ATTORNEY AT LAW
585 STEWART AVENUE
GARDEN CITY, NEW YORK 11530
(516) 222-0700

January 4, 1982

Mrs. Mary Jones
123 Main Street
Garden City, New York 11530

Re: Jones v. Jones

Dear Mrs. Jones:

This letter confirms that you have retained me to negotiate a settlement agreement with your husband (through his attorney), if that is reasonably possible; if not, to commence or defend a matrimonial action on your behalf.

You agree to pay to me promptly a retainer of $_____, which is my minimum fee in this matter. This retainer will cover my time at my present standard rate of $___ per hour up to a total of ___ hours based upon my time records (computed in units of 6 minutes) commencing with the initial interview on _____, 1982. Time of associate attorneys is at the present standard rate of $___ per hour and that of paralegals is $__ per hour. Telephone calls are included in computing time.

If the time exceeds the retainer paid, you will be liable for an additional fee based upon the then standard time rates for each additional hour; in that event or in the event of earlier contested litigation, I may request additional retainers from you in increments of $_____ to be applied against my fee. You understand that the present time rates may change from time to time; however; no change will be effective as to the time covered by the initial retainer, and you will be advised of any change in advance.

If you should decide to discontinue my services for you in this matter prior to its resolution or in the event of a reconciliation, then you shall be liable for time computed as above.

The retainers do not include any work in appellate courts, any other actions or proceedings or out-of-pocket disbursements. Out-of-pocket disbursements include but are not limited to costs of filing papers, court fees, expert witnesses, consultants, accountants, actuaries, appraisers, postage, calendar service, process servers, witness fees,

INITIAL HERE

court reporters, long distance telephone calls, travel, parking and photocopies normally made by me or requested by you, which disbursements shall be paid for or reimbursed to me upon my request.

You understand that under present law you may request that your husband pay for your legal expenses in connection with this matter and that you may also have a liability for his legal expenses. If you so desire, efforts will be made to recover those expenses from your husband either by way of negotiation, or court application in the event of contested litigation. In the event that I actually receive more than my entire fee from both you by way of retainers and from your husband by way of his contributions, then I shall return the excess to you. If said sums from both you and your husband are less than my entire fee, then you will be liable for the difference. You are aware that despite efforts to recover my fee from your husband, there is no certainty that any recovery may actually occur and there is no assurance that you will receive any refund.

You acknowledge that under the New York Equitable Distribution statute there is a possibility that any part or all of your husband's interest in marital property may be transferred to you and that any part or all of your interest in marital property may be transferred to your husband and that there may be a question in defining what is marital property subject to transfer and separate property which is not. Because it is presently unknown what transfers may occur or may be deterred, it is impossible to place a value upon those results. My time rate does not contemplate the results achieved with regard to obtaining or deterring the transfer of property or any other aspect of the outcome of this matter. You will, therefore, be liable for an additional fee which cannot now be ascertained and which is in addition to that part of my fee based upon time. This will be left to our future discussions after the results are reviewed and our further agreement of what is fair and reasonable based upon those results. This further fee is in addition to the fee based upon time.

If you do not pay the sums of retainers, fees or disbursements to me as contemplated by this agreement within 10 days after my request to you, then I may treat your failure to do so as your decision to terminate my services for you, and I may withdraw as your attorney upon written notice to you by mail at your above address without relieving you of any obligations for my services and disbursements to the time of my withdrawal.

You are aware of the hazards and of the high costs of litigation and that despite my efforts on your behalf there is no assurance or guarantee of the outcome of this matter.

Kindly indicate your understanding and acceptance of the above by signing the letter below where indicated. I look forward to serving you.

Sincerely yours,

WILLARD H. DaSILVA

I have read and understand the above letter, have received a copy and accept all of its terms:

_____

Mary Jones

Recent Cases *(continued from page 86)*

sider the wife's efforts in the attainment of the license in the distribution of other assets, or by making an award of alimony. The New Jersey Court similarly refused to create a rule setting a distinct value for the license in the limited situation where a professional degree has enhanced the earning ability of one party but as yet, where parties have acquired no substantial assets. The mere fact that no other assets exist does not permit a professional license to take on the character of property. The difficulty of projecting future income to arrive at a value for the license was likewise considered.

The court also refused to sanction monetary repayment for the efforts of one spouse in contributing to the attainment of a professional license for the other. Since marriage is a shared enterprise where spouses impose on themselves the mutual obligation for support of one another, financially and nonfinancially, it is improper to put economic values in their respective contributions. To award such compensation, the court opined, would cast the dissolution of the marriage in the same light as a commerical investment loss.

Thus, the only remedy available to supporting spouse is alimony, where the earning abilities of the parties are unequivalent. In light of the substantial equality in earning abilities, the court found alimony unwarranted. *Mahoney v. Mahoney*, A-491-80-T2, decided February 3, 1982.

In the companion case, both parties started the marriage with careers. First the wife enrolled in medical school and withdrew and later the husband enrolled in dental school. At the time the complaint was filed, the husband was in his last year of dental school and the wife was unemployed and not in school. At the time of trial, the husband was in a residency and his wife had entered dental school in Boston.

Relying on *Mahoney*, the court refused to distribute his dental degree, but instead found that rehabilitative alimony was appropriate. The court declined to condition the payment on the amount of financial support which the wife provided to the husband while he was in dental school. Rather, on remand, the trial court was instructed to consider the conventional factors of the needs of the wife and the abilities of both parties to provide for those needs. *Hill v. Hill*, A-1572-80-T4.

[Comment: The language of the court rejected the argument that there is inherent inequity to the spouses who suffer the detriment of a reduced standard of living while his/her spouse is in school with the expectation of a brighter future. However, the court in these cases seems inclined to be more generous in awarding rehabilitative alimony to such spouse who later wishes to embark on a more lucrative career which requires additional education.]

Chairman's Report

(continued from page 82)

occurred over the past month that deserve comment.

First, on Monday, January 25, a memorable meeting occurred at the Forsgate Country Club. That meeting involved representatives of our Section and of the Matrimonial Judges Conference of New Jersey. I had the privilege of chairing that meeting, which was attended by Judge Harvey Sorkow of Bergen County, the chairman of the Matrimonial Judges Conference; Judge Herbert Glickman of Essex County; Judge Joseph Cann of Passaic County; Judge Virginia Long of Union County; Judge Eugene Serpentelli of Ocean County; Judge Dominick Ferrelli of Burlington County; Judge George Farrell III of Salem County and Judge Frank Testa of Cumberland County. Representatives of our Section in addition to myself were Section Vice-Chairman Jeff Weinstein; Section Secretary Dave Wildstein; David Ansell; Gary Skoloff; Barry Croland, Don Gaydos and Tom Zampino. The meeting was marked by a candid exchange of views. On a number of points, consensus was reached. Although pursuant to the ground rules established for the meeting no formal resolutions were adopted, all who attended concluded that the meeting served a salutory purpose and encouraged future meetings of this sort. Indeed, agreement has now been reached that additional meetings of this sort will take place twice annually, in all likelihood in the months of January and June. My thanks go to all who participated in the January 25 meeting. I feel that a very real contribution was made for fostering the type of bench/bar relations which should in the public interest continue to exist.

Second, let me here publicly congratulate two of our Section members who have recently ascended to the bench. The Hon. Stephen Schaeffer now graces the bench in Hudson County. The Hon. Bernard Rudd graces the bench in Essex County. My congratulations and those of our Section to both of these new judges. Both have served our Section in leadership capacities in the past. I am certain you join with me in wishing Steve and Bernie many happy and fulfilling years of public service.

Finally, I take this opportunity to announce a number of new appointments. During the past month, I have appointed Miriam Span of Westfield to serve as a member of our Section's Executive Committee and as our Section's membership chair. Additionally, I have appointed John Eory of Cherry Hill to serve as a member of our Executive Committee and as news editor of the *Family Lawyer*. Replacing Judge Schaeffer as chairman of our Section's Custody Committee will be Past Section Chair Anne Elwell. Additionally, I have appointed a committee to be chaired by Section Vice-Chairman Jeff Weinstein, to deal with the thorny problem of mediation.

I am certain that all of these individuals will serve in their respective capacities with distinction.

Report of Section Executive Committee Meeting

A meeting of the Family Law Section Executive Committee was held on February 10, 1982 at Forsgate Country Club. A number of important and timely topics were raised and discussed at the meeting as follows:

Legislation. The recently signed bill on domestic violence (Senate Bill 3127) shall take effect April 7, 1982 and adds new and expanded powers to the Municipal, Juvenile & Domestic Relations and Superior Courts, including injunctive and damages provisions. In short, an entire new level of activity in this area is likely to occur as the result of this legislation, which is independent of the changes fostered by the Pashman Report.

Early Settlement Program. The Committee agreed that due to the large variety of early settlement programs which exist in the 21 counties, it would be best to simply monitor such activities to determine the benefits and shortcomings of any particular program and that it would be premature to advocate uniformity or statewide guidelines at this point in time.

Specialization. It was agreed that the Committee shall present a statement of position at the next Executive Committee meeting cataloging the pro's and con's of matrimonial specialization, following which the Family Law Section as a body would be called upon to participate in this topic.

Written Retainers. With regard to the proposed rule change requiring written retainer agreement, a select committee chaired by Gary Skoloff circulated a report which endorsed the adoption of a mandatory rule; although in substantially altered form from the proposed draft advanced by the Supreme Court for comment. In this regard, please see the comments of our Section Chairman as contained in the lead article of this issue.

Other areas of discussion consisted of a report by the Family Court Committee concerning the status of the proposed statewide family court system and the creation of a committee to examine and report upon the increasingly visible topic of divorce mediation.

New Executive Committee members are Miriam Span, who will also serve as membership chair and John Eory, who will also serve as news editor of the *New Jersey Family Lawyer.*

The next Executive Committee meeting will take place in April, 1982 and will be the subject of a similar article in the following issue.

New Jersey Family Lawyer

Alan M. Grosman . . . . . .Editor
Barry I. Croland . . . . . .Editor
Bonnie M. S. Reiss. . . . Case Comment Editor
Myra T. Peterson. . . . . Case Comment Editor
John S. Eory . . . . . .News Editor
Christine Fahey. .NJSBA Production Manager

Ramifications of *Tevis* in Matrimonial Practice

by Robert E. Goldstein

In the case of *Tevis v. Tevis*[1] the Supreme Court of New Jersey held that for purposes of the statute of limitations,[2] a cause of action accrues for personal injuries suffered by a spouse as a result of an intentional or grossly negligent tort by the other spouse at the time the injury is suffered. The Court further held that, under the "single controversy" doctrine, such a claim should be presented in conjunction with any matrimonial action which might have been pending between the spouses at the time of the tort or by implication, an action which is commenced within two years of the tort. As to this second point, the Court reasoned that a spouse's claim for money damages against the other spouse, and the offending spouse's contingent liability therefore, were relevant to the financial issues brought forth in matrimonial litigation. Moreover, joining the personal injury action with the matrimonial action would serve the beneficial purpose of allowing the parties to adjudicate all their legal differences in one proceeding.

The *Tevis* case obviously has substantial ramifications for the matrimonial practitioner who is frequently faced with representing a client who alleges that his or her spouse has engaged in physical violence during the course of the marriage which resulted in injury to the client. The prudent attorney should obtain the following crucial information from the client at the initial interview or as soon thereafter as possible:

1. The date of the alleged tort;
2. The details of the tort;
3. Whether any witnesses were present and/or whether certain persons observed the physical evidence of the client's injury;
4. The names and addresses of all potential witnesses;
5. The names and addresses of all treating physicians and hospitals;
6. Whether any photographs exist showing evidence of injury.

After obtaining all necessary information, it is incumbent upon the attorney to advise the client as to his or her right to sue. Failure to do so may constitute malpractice. It is suggested that the advice so given be memorialized in writing so as to avoid any future problems or misunderstandings between the attorney and client. The attorney should even consider and discuss with the client any possible cause of action for intentional infliction of mental distress[3] which may be assertable.

Once it has been established that the client wishes to assert a personal injury claim against the other spouse, the attorney should properly set forth the client's cause of action as an independent count in the complaint or counterclaim. Medical reports and bills for medical expenses incurred as a result of the tort should be obtained as expeditiously as possible. Interrogatories, and, if necessary, depositions[4] should be directed to the adverse party as to all issues related to the tort cause of action.

For the attorney whose client must defend a personal injury claim, it is suggested that a demand be made in writing upon the homeowners insurance carrier to defend such action, if such insurance exists or was in existence at the time the cause of action allegedly arose. It has been held that even if the tortious act was intentional, if the resulting harm was unintended, liability insurance coverage should be afforded.[5] If the insurance company disclaims a declaratory judgment action may have to be started.

The "Pashman II" Report leaves open the question as to when the marital tort issue should be decided, i.e. before, during or after final hearing. If insurance coverage is not available to the accused spouse, it is obvious that the damage claims will likely have a strong bearing on the ability of the parties to reach an overall settlement even though technically, the tort issue should not have any bearing on what is fair in terms of equitable distribution or support. Accordingly, as a matter of judicial economy and practicability, the marital tort issue should be decided at the final hearing in keeping with the policy behind the "single controversy" doctrine to lay all disputes between the parties to rest and to avoid a fractionalization of litigation. Only where insurance coverage is available should the court consider a bifurcation of the marital tort issue since the tort damages claims will, in that case, have little, if anything, to do with settlement of the divorce action.

One other issue left open at this juncture is whether a jury trial must be afforded in an action based upon intentional marital tort. Article I, Section 9 of the New Jersey Constitution preserves the common law right to a trial by jury. The "Pashman II" Report recommends that as a matter of judicial administration, no jury trial for a marital tort should be provided in an action for divorce, citing the rule that the inherent jurisdictional power of a court of equity permits it to dispose of legal issues which are incidental and ancillary to the main dispute without the need to provide a jury trial. However, there is nothing to prevent a jury trial as to issues so triable even in the Chancery Division.[5] Since the right to damages by reason of a tort by one spouse against the other should not affect an equitable distribution decision, a case can be made that the right jury trial in such a case still exists. Certainly, if a jury trial is demanded it can later be waived. This decision might properly be left to the client, assuming such a right is found to exist. The practicalities of the situation probably will militate in favor of a waiver.

The law in the area of the marital tort will undoubtedly be crystallized in the future. In this

Robert E. Goldstein is a member of the firm of Heilbrunn, Finkelstein, Garruto & Galex in Old Bridge.

Ramifications of *Tevis* *(continued)*

time of "defensive" practice of the law, the diligent attorney should be kept abreast of all developments while recognizing the ramifications of *Tevis* in terms of the increasing divorce rate and the wish to minimize matrimonial hostility in order to reach a just result.

Footnotes

1. 79 N.J. 422, 400 A.2d 1189 (1979)
2. N.J.S. 2A:14-2
3. New Jersey recognizes a cause of action for willful and malicious infliction of severe mental anguish. *Morris v. McNab,* 25 N.J. 271, 135 A.2d 657 (1957); *Kuzma v. Military Workers, etc., Local 24,* 27 N.J. Super 579, 99 A.2d 833, (App. Div. 1953) However, there is no specific case law in this State dealing with such a cause of action in a matrimonial situation. Nevertheless, in a particularly egregious case, there is no reason why the courts should not consider such a claim where properly documented.
4. *R.* 4:79-5, as amended effective September 14, 1981, permits depositions of parties to a matrimonial action as of right with regard to all issues except grounds for divorce, separate maintenance or nullity.
5. See, e.g. *Ambassador Ins. Co. v Montes,* 147 N.J. Super. 286, 371 A.2d 292 (App. Div. 1977); affirmed 76 N.J. 477, 388 A.2d 603 (1978); *Angelone v. Union Mert. Ins. Co. of Providence,* 113 R.I. 230, 319 A.2d 344 (1974).
6. O'Neill v. Vreeland, 6 N.J. 58, 77 A.2d 899 (1951).

Trial Strategy

by Alan M. Grosman and Arthur M. Schwartzstein

Equitable distribution has brought with it complicated problems of proving elusive financial facts as well as a need for greater sophistication in dealing with problems of trial strategy. Serious consideration of trial strategy and evidentiary problems is required when undertaking a complex equitable distribution case. This article deals with two such issues that may be important in your next case.

The first is how to overcome the hearsay evidence barrier to admission of important statements regarding equitable distribution facts made by a person who is unavailable because of death.

Such statements may be important in the effort to trace assets to determine whether they are separate or marital property. Also, a decedent's hearsay statement may enable you to prove that certain property acquired during the marriage is a gift and thus not subject to equitable distribution.

The second has to do with the right of the trial attorney to call the adverse party as his witness in his case-in-chief. This may be helpful in instances where there is concern that the defendant who, as a party, cannot be sequestered, will change his story to adapt to the testimony he hears from the preceding witnesses; in cases where discovery has not been adequate; or where the attorney seeks the advantage of surprise.

Trustworthy Statements of a Decedent

Evid. R. 63(32) provides for admission into evidence of a trustworthy statement made in good faith by a declarant unavailable because of death. Such a statement must have been made upon the personal knowledge of the decedent and under such circumstances that there is a probability that the statement is trustworthy. Such statements may be admissible even if made to a person who clearly is an interested witness.

Alan M. Grosman, a member of the firm of Grosman & Grosman, Short Hills, is an Editor of the New Jersey Family Lawyer.
Arthur M. Schwartzstein, a sole practitioner in Washington, D.C., is also a member of the New Jersey and New York bars.

Since the rule was adopted in 1967 only a few cases have been reported construing it. None have arisen in a family law context thus far.

The basic policy thrust of the New Jersey *Rules of Evidence* is that *all* relevant evidence is admissible, except as otherwise provided in the rules or by law.[1] Of course, the Court has the power in its discretion to exclude admissible evidence if it finds that its probative value is substantially outweighed by creating a substantial danger of confusing the issues.[2]

When it comes to hearsay evidence the rules are more restrictive. Hearsay is defined as evidence of a statement offered to prove the truth of the matter stated, which is made other than by a witness while testifying at the hearing and is excluded, unless it falls within one of the 32 exceptions.[3] But even in the exclusionary hearsay evidence area the tendency is to expand the exceptions and to permit an increasingly wide range of relevant material evidence to be admitted, particularly where there is no jury. This is especially important in the field of family law.

The hearsay exception here under consideration should be understood as being part of the general trend in civil litigation towards broadening the types of credible evidence that will be considered.[4] There have only been three significant reported decisions under *Evid. R.* 63(32). These are *Ayala v. Lincoln,*[5] *Woll v. Dugas,*[6] and *Jastremski v. General Motors Corp.*[7]

Ayala was an accident case in which the decedent who made the statement was both a defendant and an insured. More than a year after the accident a representative of his insurance company telephoned him and obtained statements which the company representative sought to introduce at the trial. The Court excluded the statement, finding that it might well not have been made in good faith. It set forth the four requirements necessary for admission of such a hearsay statement under *Evid. R.* 63(32), as follows: (1) the declarant is dead; (2) his statement was made in good faith; (3) upon personal knowledge; and (4) with a probability from the circumstances that the statement is trustworthy.

Trial Strategy *(continued)*

A different result was reached in *Woll,* which was an action by sons against their mother's estate for specific performance of an alleged agreement by their parents that the survivor would leave his or her estate to the two sons. The father died leaving everything to the mother. When the mother died she failed to leave everything to the sons. The trial court permitted a son to testify to what his late father had told him about the agreement, finding that the father's explanation to his son of the reason for the apparent disinheritance attested to its trustworthiness and met the probability requirement set forth in *Evid. R.* 63(32).

The *Jastremski* case was a wrongful death action. The death was attributed to a defect in a steering wheel assembly. A no less interested person than the decedent's brother-in-law was permitted to testify to a statement made by the decedent in the hospital 22 hours after the accident.

The *Woll* and *Jastremski* decisions provide guidance as to when statements made by a decedent may properly be admitted into evidence and the *Ayala* case provides a good example of when they will not be admitted. It all depends upon the facts. Of course, it is up to the trial attorney to develop the facts where possible to satisfy the requirements of the rule.

Since there is no jury in a divorce case, the witness generally should be permitted to testify regarding the statement of the decedent. Following his testimony the judge can decide whether the evidence is admissible, and, if so, what weight to ascribe to it. Even if the judge feels that the evidence is inadmissible, the testimony should be permitted, so as to preserve it in case of appeal. The attorney should ask that this be done, citing as authority *R.* 1:7-3.[8]

Any number of circumstances may arise where the other side alone has access to information that may be important to your case and makes it unavailable. In such circumstances statements made by a decedent to witnesses you can call may be essential to the proper presentation of your case. *Evid. R.* 63(32) makes this possible and should be kept in mind.

Calling the Adverse Party as Your Witness

Calling the adverse party as your witness is a long-established and well-recognized practice under N.J.S.A. 2A:81-11, which provides:

> Except as otherwise provided by law, when any party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses.

Most states and the Federal Rules of Civil Procedure permit the calling of the adverse party as a witness.[9] The New Jersey statute giving a party the right to call the adverse party as a witness dates back to at least 1850.[10] The right to compel the testimony of the adverse party in a divorce case (except on grounds of adultery) has long been recognized by the New Jersey Courts.[11]

Calling the adverse party early in a plaintiff's case is recognized as a legitimate trial tactic. The New Jersey statute specifically provides that the treatment of the adverse party as a witness should be the same as any other witness.

Courts generally do not and should not interfere with a party's decision as to the order of witnesses.[12] There is good reason for the Court not to interfere with the order in which a party presents evidence:

> The judge must bear in mind that counsel know far more about the case than he does. What appears trivial at the moment may loom very large when the evidence takes its full shape. What seems innocuous may be a witness killing trap. Thus a ruling on the mode and order of presentation of witnesses rather than expediting the search for truth may actually have the opposite effect.[13]

In view of the fact that the defendant cannot be sequestered, plaintiff may desire that defendant be required to testify first, particularly where the defendant has demonstrated his readiness to ". . . adapt his testimony, when offered later, to victory rather than veracity, so as to meet the necessities as laid open by prior witnesses . . .[14]

In such circumstances the need of a party to call the adverse party is well-recognized. Professor Robert E. Keeton of the Harvard Law School has observed:

> If you suspect that the defendant is willing to adapt his story to suit the occasion, your calling him to the stand as the first witness deprives him of the advantage of knowing before he is called upon to give his testimony what contentions he will have to meet . . .[15]

A plaintiff may also wish to simply take advantage of the surprise to defendant of his being called first,[16] or may seek to avoid being later limited in the scope of his cross-examination to what was testified to on direct. In addition, plaintiff's attorney might need to call the adversary as part of his case-in-chief to establish an essential element of his proof.[17]

It should be kept in mind that in the wrong case, calling the adverse party could result in giving the adverse party an early and unnecessary opportunity to present his version of the facts which could be detrimental to your presentation of the case.

One final point to bear in mind is that when one calls a witness, including the adverse party as a witness, he may examine him and introduce extrinsic evidence relevant upon the issue of credibility.[18] The party calling a witness may neutralize his testimony by confronting him with prior inconsistent statements which are admissible in evidence. This would, of course, include prior inconsistent statements made by the adverse party in depositions and in answers to interrogatories.

While every equitable distribution case will not

Trial Strategy *(continued)*

present the need to introduce into evidence trustworthy statements made by a decedent or the desirability of calling the adverse party as your witness, it is important to keep these litigation instruments in readiness, when the appropriate case does arise and these trial strategies do become important.

Footnotes

1. *Evid. R.* 7(f).
2. *Evid. R.* 4.
3. *Evid. R.* 63.
4. *Evid. R.* 63(32)
5. 147 N.J. Super. 304 (App. Div. 1977).
6. 104 N.J. Super. 586 (Chan. Div. 1969), aff'd 112 N.J. Super. 366 (App. Div. 1970).
7. 109 N.J. Super. 31 (App. Div. 1970).
8. R. 1:7-3, "Record of Excluded Evidence," provides in relevant part, as follows: "In actions tried without a jury the court shall upon request permit the evidence and cross-examination relating thereto or evidence in rebuttal thereof to be taken down by the court reporter in full, or otherwise preserved, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged or unless the interest of justice so requires."
9. See Goldstein, *Trial Techniques,* 2d Ed. §11.26; Keeton, *Trial Tactics & Methods,* 2d Ed. (1973) at 21; and Cutler, *Successful Trial Tactics,* (1949) at 112.
10. *Grinnell v. Lester,* 24 N.J.L. 632, Reporter's Note (1854); and *Teel v. Byrne,* 24 N.J.L. 631 (1854).
11. See *Schaab v. Schaab,* 66 N.J. Eq. 334, 337 (1904); and *McCauley v. McCauley,* 88 N.J. Eq. 392, 394-95 (1918).
12. 53 *Am. Jur.* §155 provides: [A]s a general rule [the court] will not interfere to control a party as to the order in which he shall introduce his evidence but will allow him to do so in the order in which he prefers. Thus, it is said that the order in which witnesses shall be examined rests largely in the discretion of the party, and by failing or refusing to examine a witness out of the order selected by him he does not lose the right to complain of the absence of the witness when he desires to call him. The court cannot dictate to him the order of calling witnesses to prove a particular fact." [Footnotes omitted]
13. *Weinstein's Evidence* §611-01, 611-20.
14. VI *Wigmore on Evidence* §1869 (Chadbourne Revision, 1976).
15. Keeton, *supra,* fn. 9 at 21; see also, Goldstein, *supra,* fn. 9 at §11.26 (1981 Pocket Part).
16. See Cutler, *supra,* fn. 9.
17. See Goldstein, *supra,* fn. 9 at §11.26 (1981 Pocket Part).
18. *Evid. R.* 20, "Evidence Generally Affecting Credibility."

Pet Peeves

(continued from page 85)

Lawyers who are unable to predict judges' rulings.

Lawyers who cite 1938 cases from North Dakota!

Property Settlement Agreements that rival Tolstoy's *War and Peace* for brevity!

Court interpreters who need interpreters!

Christian custodial parent who wants to send child to summer camp. Jewish non-custodial parent who won't pay for summer camp because camp does not have an Indian name!

Lawyers who fail to realize that matrimonial judges were once normal, healthy human beings!

Of course, there are always two sides. Accordingly, the editorial staff has invited any responsible member of the bar to respond in a future edition as to his or her pet peeves concerning the bench. If any one in Camden County responds, I would suggest that he or she ***not*** *sign his or her name!*