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Chair's Column

Effectuating Change in the Legislature

by Patrick Judge Jr.

Assembly Joint Resolutions 32 and 36, with floor amendments (which have been consolidated into what is now AJR 32), were adopted by the Assembly on June 21, 2012. That joint resolution seeks to establish an 11-member "Study Commission on Alimony." The commission's charge, if established, would be to study all aspects of alimony law in the state of New Jersey and report its findings to the governor and Legislature. The New Jersey State Bar Association (NJSBA) supports the establishment of a commission in this regard, but only as long as the commission is constituted so that a fair and unbiased review of the current alimony laws takes place.

When proposed Resolutions 32 and 36 were initially consolidated, immediately before going to the Assembly Judiciary Committee in June, 11th hour additions were made, including a provision that the commission would include two members who advocate for reform of the alimony laws. This joint resolution passed the Judiciary Committee, and is counter to the NJSBA's position that the commission should not be predisposed to an outcome when studying the issue.

The joint resolution was scheduled for a vote in the Assembly during the afternoon of June 21, 2012. Early that morning, Family Law Section Chair-Elect Brian Schwartz and I attended the NJSBA's Third Annual Advocacy Town Hall Meeting at the War Memorial in Trenton, an event that brings together legislators, public officials, key staffers, and lawyers to discuss how the legislative and regulatory process works in Trenton. The NJSBA hosts this event in conjunction with NJ Public Strategies/Impact, the NJSBA's lobbyists in Trenton.

Brian and I were there to meet with the legislators to advance the NJSBA's position on AJR 32 and 36. Our Democratic contact there, Bill Maer, who was a prominent campaign advisor for Governor Jon Corzine, checked in to make certain the meeting was running smoothly. D. Todd Sidor, the NJSBA's director of Government Affairs, asked Bill to help us

schedule meetings with important legislators, such as Assembly Speaker Sheila Oliver, in order to further discuss the resolution. In addition, through Brian's research we discovered a contact that led to an important meeting with Troy Singleton, one of the resolution's co-sponsors.

Brian and I also met with two important legislators who are practicing attorneys, Assembly Republican Leader John Bramnick and Deputy Assembly Majority Leader Patrick Diegnan. Both were speaking on the NJSBA's leadership panel at the Town Hall event. Once they finished, Brian spoke with Assemblyman Bramnick, and I was introduced by Todd to Assemblyman Diegnan.

Then, Assemblyman Peter Barnes arrived to speak at his panel regarding how the Assembly Judiciary Committee operates. While Assemblyman Barnes was waiting for his session to begin, he was kind enough to speak with us. We explained our concerns with the commission panel as constituted. We illuminated that adding two members who were "reform-minded" was extremely problematic, since it could predispose the panel to a final result before it even convened. Assemblyman Barnes respected the NJSBA's concerns, and committed to try to arrange a meeting with Assemblyman Singleton between 1 and 1:30 p.m.

As the Town Hall event was concluding, Todd emailed Bill Maer to say we were hoping to meet with Assemblyman Singleton around 1 p.m. near the Democratic caucus room. (Brian had to leave Trenton prior to the meeting, but was able to speak with Assemblyman Craig Coughlin by phone in the early afternoon.)

While Bill, Todd and I waited outside the Democratic caucus room for our meeting to begin, Bill was able to get Assembly Speaker Sheila Oliver's chief of staff to spare some time for us. I explained our concerns, and he said he would relate them to the speaker.

I was then able to meet with the resolution co-sponsor, Assemblyman Singleton. He listened to our concerns, specifically the issue of an unbiased commission; seemed concerned about the amendments to the bill, which I explained could predispose the commission to a final result by adding alimony reformers; and agreed to hold the bill and make amendments.

True to his word, Assemblyman Singleton made floor amendments that afternoon, including eliminating the requirement that the commission include two members who advocate for the reform of alimony. In the end, the joint resolution supported by the NJSBA passed the House; as of this writing, a companion bill is now in the Judiciary Committee of the Senate for consideration.

Effectuating change in our laws is not easy, but it begins and ends with effective communication with those entrusted to make the laws. As set forth above, the legislators we spoke with were very receptive to hearing our concerns. As a result, the joint resolution for the establishment of a Study Commission on Alimony that passed the Assembly contains the establishment of an unbiased commission. Now, on to the Senate.

Inside this issue

Editor-in-Chief's Column

When the Deal Is Too Good

by Charles F. Vuotto Jr.

I am sure that at one point in time we have all encountered the situation where we are representing a client in a dissolution matter whose spouse is a self-represented litigant. This column poses the following question when faced with such a situation: Should we be concerned with overreaching when negotiating and ultimately procuring the best deal for our client?

On the one hand, pursuant to the Rules of Professional Conduct (RPC), "lawyers shall act with reasonable diligence and promptness in representing a client."[1] This obligation was emphasized by our Supreme Court in the 2008 decision of *Brundage v. State of Carambio*,[2] in the concurring opinion by Justice Barry Albin who stated, "Plaintiff's attorney has a duty of zealous advocacy on behalf of his clients within the acceptable bounds of professional behavior."[3] However, how far does that obligation go? Does that obligation permit an attorney representing a divorce litigant to obtain an agreement so one-sided in favor or his or her client that it renders the settlement unconscionable to the self-represented litigant? More importantly, are you ultimately doing a disservice to your client by negotiating 'too good' a deal?

Clearly, litigants have a pre-existing duty to be fair with each other. In the seminal Appellate Division case of *Deegan v. Deegan*,[4] the court stated "The reason for this is that the duty of self-fulfillment must give way to the pre-existing duty, which runs between spouses who have been in a marriage which has failed."[5] This duty was reiterated by our appellate court in *Moore v. Moore*,[6] and most recently in *Kay v. Kay*.[7] The Appellate Division, in *Geffner v. Geffner,*[8] clarified the Supreme Court's pronouncement in *Tannen v. Tannen*[9] when it held that divorcing spouses are required to deal fairly with each other, although that requirement may not rise to the level of a fiduciary duty.[10] How does this duty between spouses, however, impact the duty of counsel?

There is no question that the courts of this state will not enforce unconscionable agreements (whether based upon procedural or substantive unconscionability). "A court of equity will enforce a contract between husband and wife if it is not unconscionable to do so and if the performance to be compelled is not contrary to public policy."[11] A contract will be held unenforceable if it was "procured by fraud or falsehood," or if such enforcement would produce "great hardship or manifest injustice."[12] In fact, courts will only enforce agreements to the extent that they are fair and equitable.[13]

The equitable authority of courts to modify property settlement agreements executed in connection with *divorce* proceedings is well established.[14] The agreement must reflect the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages.[15] Fairness requires that "each party be adequately represented by independent counsel and that both parties completely understand the nature of the agreement."[16]

Any agreement may be set aside when it is the product of fraud or overreaching by a party with power to take advantage of a confidential relationship, or if the agreement is found to be unconscionable.[17] Generally, a settlement agreement may be reformed if found to be unconscionable or overreaching by one of the parties.[18] Any marital agreement that is unconscionable or is the product of fraud or overreaching may be set aside.[19]

Courts possess the equitable authority to modify privately negotiated property settlement agreements, as such agreements must reflect the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages.

When the issue of unconscionability is addressed, the court looks at two factors: the unfairness in the formation of the contract (procedural unconscionability) and excessively disproportionate terms (substantive unconscionability).[20] Procedural unconscionability "can include a variety of inadequacies, such as age; literacy; lack of sophistication; hidden or unduly complex contract terms; bargaining tactics; and the particular setting existing during the contract formation process."[21] Substantive unconscionability "suggests

the exchange of obligations so one-sided as to shock the court's conscience."[22] Applying a "sliding scale" of unconscionability, a claim of unconscionability can succeed when one form of it (*e.g.,* procedural unconscionability) is greatly exceeded, while the other form of it (*e.g.,* substantive unconscionability) is only marginally exceeded.[23] The issue of unconscionability is one of law for resolution by the court, and the burden of proving unconscionability is on the party asserting it.[24]

The natural corollary of the foregoing is that attorneys have a duty to draft agreements that will withstand attack. Therefore, if a divorce agreement is so one-sided in favor of the attorney's client, has that attorney more than met his or her responsibility to zealously advocate, or has he or her created foreseeable problems for that client in attempting to enforce an unconscionable agreement, which case law clearly says cannot be done?

RPC 3.1, titled "Meritorious Claims and Contentions," provides that:

> A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law…[25]

An attorney must question whether an overreaching and unconscionable agreement is in the best interest of the client. Although there are exceptions, the likely result of an excessively one-sided agreement can include, but not be limited to, post-judgment litigation at the trial and appellate court levels; significant attorney, expert and other professional fees; continuation of the emotional and financial stress associated with divorce and the associated negative impact upon children involved in that process.

I cannot help but be reminded of the duties imposed upon criminal prosecutors:

> The prosecuting attorney's primary function is not to convict but 'to see that justice is done' (Cannon 5) and that his duty is as much 'to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' (Citations omitted)[26]

In the end, this conflict between zealous advocacy and the dangers to one's client of procuring overreaching agreements may come down to one's view of the place of 'advocacy' in family law. Do we have a duty to be fair to the unrepresented party? This duty would raise many thorny ethical issues, and probably does not exist. It may be easier to simply conclude that it is not in a client's best interest to procure an agreement that is so one-sided that it will ultimately result in continued ligation, cost and emotional stress for divorcing litigants and their children. At a minimum, however, the attorney's client must be advised of the potential for problems inherent in a lopsided deal.

Further, the self-represented party must be given proper notice that the attorney does not represent him or her, that the attorney is not providing any legal advice to the self-represented party, and that he or she is strongly advised to seek independent legal counsel to thoroughly review the agreement before it is signed. A suggested letter[27] is found at the end of this column, which may be a useful tool in these situations.

It may be wise, when faced with this situation, to remember the old adage, "Bulls make money. Bears make money. Pigs get slaughtered." ■

Special thanks to Brian Schwartz, Amanda Trigg, Frank Louis, John Paone, Jeralyn Lawrence and Lizanne Ceconi for their thoughtful and helpful comments regarding this column.

Endnotes

1. RPC 1.3.
2. 195 N.J. 575 (2008).
3. *See* State Ex Rel. S.G., 175 N.J. 132, 138, 814A.2d 612 (2003) (discussing attorney's "'duty of loyalty to his or her clients'" *quoting In re: Opinion No. 653 of the Advisory Comm. on Prof'l Ethics* 132 N.J. 124, 129 623A2d. 241 (1993)).
4. 254 N.J. Super. 350 (App. Div. 1992).
5. *Id.* at 359.
6. *Moore v. Moore* 376 N.J. Super. 246, 306 (App. Div. 2005).

7. 405 N.J. Super. 278 (App. Div. 2009). The court stated that "on the same principles and the presumption that parties [intend] to deal fairly with one another, quasi contractual obligations are imposed to prevent unjust enrichment." (Citations omitted) *Id*. at 285.
8. A-2896-08T2.
9. 416 N.J. Super. 248 (App. Div. 2010).
10. *Id*. at 20.
11. *Minkin v. Minkin*, 180 N.J. Super. 260, 262 (Ch. Div. 1981) (Citations omitted).
12. *Schiff v. Schiff*, 116 N.J. Super. 546 (App. Div. 1971); *see also Guglielmo v. Guglielmo* 253 N.J. Super. 531, 542, 549 (Holding a property settlement agreement unconscionable where the wife was represented by an attorney who was a relative of her husband, and the resulting agreement did not include "substantial assets" and mandated "support payments which [were] dreadfully inadequate"). *See also* the unpublished decision in *C.L.H. v. C.B.* 2012 N.J. Super. Unpub. LEXIS 293 at 12-13.
13. *Peterson v. Peterson*, 85 N.J. 638, 642 (1981); *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995) ("Marital agreements…are enforceable only if they are fair and equitable."); *Carlsen v. Carlsen*, 72 N.J. 363, 370-71 (1977) ("Separation agreements between spouses have long been considered to fall within the category of contracts enforceable in equity, but only to the extent they are fair and equitable".) (citation omitted); *Smith v. Smith*, 72 N.J. 350 (1977); *Schlemm v. Schlemm*, 31 N.J. 557 (1960); *Capanear v. Salzano*, 222 N.J. Super. 403, 407 (App. Div. 1988).
14. *Conforti v. Guliadis*, 128 N.J. 318, 323, 608 A.2d 225 (1992); *Carr v. Carr*, 120 N.J. 336, 346-49, 576 A.2d 872 (1990); *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974).
15. *Petersen v. Petersen*, 85 N.J. 638, 644, 428 A.2d 1301 (1981).
16. *Guglielmo v. Guglielmo,* 253 N.J. Super. 531, 602 A.2d 741 (App. Div. 1992).
17. *Schiff v. Schiff*, 116 N.J. Super. 546, 561 (App. Div. 1971) *certif. den*. 60 N.J. 139 (1972); *Petruccio v. Petruccio*, 205 N.J. Super. 577, 581 (App. Div. 1985).
18. *Addesa v. Addesa*, 392 N.J. Super. 58, 919 A.2d 885 (App. Div. 2007).
19. *Guglielmo v. Guglielmo*, 253 N.J. Super. 531, 541, 602 A.2d 741 (App. Div. 1992); *Capanear v. Salzano*, 222 N.J. Super. 403, 407, 537 A.2d 306 (App. Div. 1988).
20. *Sitogum Holdings, Inc. v. Ropes,* 352 N.J. Super. 555, 564 (Ch. Div. 2002).
21. *Id*.
22. *Id.* at 565.
23. *Id.* at 565-67.
24. *Gladden v. Cadillac Motor Car Div., Gen. Motors Corp,* 83 N.J. 320, 337 (1980), *Howard, supra,* 241 N.J. Super. at 230.
25. RPS 3.1.
26. *State v. Orecchio*, 16 N.J. 125, 140 (1954).
27. Courtesy of Brian Schwartz, Esq.

FORM LETTER

As you are aware, this firm represents your spouse, _____, in a pending matrimonial action. According to _____, you have reached an agreement as to all issues concerning the dissolution of your marriage, including, but not limited to, alimony, child support, equitable distribution of assets and liabilities, and counsel fees. Based upon my discussions with your _____ concerning the terms of that agreement, I have prepared a draft property settlement agreement consistent with your agreement, as recited to me by your spouse. Enclosed is a copy of that agreement.

Please be advised that I strongly urge you to seek counsel of your own choosing to review this agreement with you before you execute same. There are significant rights and responsibilities set forth in and established by this agreement which will be explained to you by an attorney. Please also note that this firm represents your spouse only. As such, no one at this firm can or will give you any advice with regard to this agreement or the pending litigation. Please also note that, if you seek to communicate with this firm about this matter, any communication between you and this firm must be in writing.

If you elect not to obtain the advice of an attorney, thereby waiving your right to have an attorney review the agreement, and if you agree with the terms of the property settlement agreement and wish to execute the agreement without the advice of an attorney, you must have your signature notarized. Once the agreement is executed, I will forward it to your spouse for execution.

Again, I strongly urge you to obtain the advice of independent counsel of your own choosing before executing this agreement.

The Enforcement of Agreements Reached in Mediation Post-*Harrington*

by Michele E. D'Onofrio

Parties participate in mediation for a variety of reasons. Sometimes, they simply wish to be amicable or avert a costly trial and resolve their differences through mediation, and at other times they may have been required to attend through court-ordered mediation. Whatever brought the parties to the mediator's table, the hope is that they have a genuine desire to settle their differences and end this difficult chapter of their lives.

By the conclusion of a single mediation session, or possibly after several sessions, if the parties appear to be in agreement, the mediator praises their hard work and effort in settling, everyone shakes hands, and they leave the mediation table satisfied that negotiations are over.

Prior to dispersing, the mediator, or perhaps the attorney for one of the parties, outlines the terms of the agreement, either verbally or in writing. Perhaps it is signed by the parties; perhaps not. Either way, the verbal recitation of the terms reached in the mediator's office or the written outline contains a basic understanding of the parties' agreement, which is to be incorporated into a settlement agreement or other form of consent order.

But what if one of the parties changes their mind or states they didn't understand they were bound by the resolution, and opposing counsel replies by threatening to file a motion for a *Harrington* hearing? Is there a binding agreement or not? When is a settled case truly settled? Can the mediator be called upon to testify? Are the settlement discussions in mediation admissible into testimony? How has the law evolved in the years since the appellate court's 1995 decision in *Harrington v. Harrington*, enforcing a purported settlement reached during a court-ordered mediation session after a plenary hearing?[1]

In *Lehr v. Afflitto*,[2] the court addresses the confidentiality of settlement discussions in the context of mediation. Further, *Lehr* discusses the Uniform Mediation Act (UMA),[3] effective Nov. 22, 2004, which was not in effect at the time the *Harrington* case was settled.[4]

As stated in *Lehr*:

> N.J.S.A. 2A:23C-4a provides that unless one of the exceptions outlined in N.J.S.A. 2A:23C-6 are applicable, or unless waived pursuant to N.J.S.A. 2A:23C-5, a "mediation communication" is privileged and "shall not be subject to discovery or admissible in evidence in a proceeding." A party to mediation "may refuse to disclose, and may prevent any other person for disclosing, a mediation communication." N.J.S.A. 2A:23C-4b(1), and a "mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator."
>
> Further, these privileges contained in N.J.S.A. 2A:23C-4 "may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and: (1) in the case of the privilege of a mediator, it is expressly waived by the mediator."[5]

The *Lehr* case found it was clear and undisputed that an agreement had not been reached regarding all issues based on the facts as elicited at trial."In fact, both parties have freely acknowledged that even if there had been an agreement reached on the thirteen issues, three financial issues had not yet been resolved...Therefore, even if the findings of the judge were to be accepted, by the admission of both parties and from the testimony of Kahan, there was no final binding settlement as to all outstanding issues in this matrimonial matter. We find this fact significant on the issue of whether a binding settlement had been reached, because financial issues in a matrimonial case are, by their nature interrelated."[6]

The court in *Lehr* clearly states: "Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs

the need for confidentiality. The mediation process was not designed to create another layer of litigation in an already overburdened system." Note that N.J.S.A. 2A:23C-6, titled "Exceptions to privilege," outlines the basis under which, in limited circumstances, mediation communications may be admissible.[7] The first exception permits an agreement evidenced by a record signed by all parties to the agreement to be admissible.[8]

In *Hasty v. Hasty*, the plaintiff argued that the trial court erred in failing to hold a hearing on the existence of an agreement between the parties, and in enforcing an incomplete document as final.[9] In *Hasty*, the parties attended mediation, at which the mediator hand wrote a three-page document titled "Christopher Hasty-Olga Hasty Agreement," which set forth the terms to which the parties had agreed.[10] The defendant stated that the mediator read the terms aloud, and that both parties stated they understood and agreed to the terms.[11] Thereafter, the mediator had the parties read and initial each page of the agreement.[12]

Following mediation, the defendant's attorney prepared a formal, typewritten property settlement agreement, incorporating the terms of the mediation agreement and additional "boilerplate" language.[13] The plaintiff did not respond to the property settlement agreement, but appeared to be acting in reliance on the agreement by retaining an appraiser approved by the defendant to value the parties' home.[14] The plaintiff later insisted that the agreement was not final or binding because it was incomplete, unsigned, and inequitable.[15]

The trial court found that there was no issue of material fact warranting a plenary hearing, because: 1) the parties initialed the document; 2) each of the paragraphs was resolved with great specificity, so it could not be viewed as a preliminary list of issues; 3) the plaintiff's conduct following mediation suggested an agreement had been reached; 4) the plaintiff did not indicate in any way, for the two and a half months following mediation, that a binding agreement had not been reached, but rather acted consistently with its terms; and 5) the plaintiff did not respond to the property settlement agreement by denying that an agreement had been reached.[16] Based on the trial court's findings, the Appellate Division affirmed.[17]

In *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC*,[18] the plaintiff appealed from an order enforcing a settlement reached during a mediation session on Nov. 6, 2007, conducted pursuant to Rule 1:40-4.[19] The trial court found that after several hours of mediation, the parties agreed to a settlement.[20] The trial court focused on the fact that counsel for the defendant reduced the terms of the settlement to writing on Nov. 9, 2007, and wrote to the judge to inform him that the parties had reached a settlement.[21] Moreover, on Nov. 20, 2007, counsel for the defendant sent a letter to the court and the plaintiff stating that $100,000 had been placed in escrow to fund the settlement, and that his clients had authorized disbursement of the settlement fund.[22]

The plaintiff did not object or present opposition to the statements made to the court by the defendant, but nonetheless, later refused to consummate the settlement.[23] The plaintiff argued that the terms of the settlement were not reduced to writing at the mediation session, a copy was not provided to each party, and the parties did not affix their signatures to the writing at the mediation session, thereby barring enforcement.[24] The plaintiff also argued that enforcement of a settlement reached at a mediation session is contrary to the non-binding nature of the process.[25]

The defendant filed a motion for what essentially amounts to a *Harrington* hearing.[26] The trial court allowed discovery and conducted the hearing, at which testimony, including that of the mediator, on whether a binding agreement had been reached was admitted.[27] The appellate court affirmed the judgment of the trial court, stating that the terms of an agreement can be reduced to writing shortly after the conclusion of mediation.[28] It does not need to occur at the mediation session.[29] Further, the Supreme Court has established and consistently held that an agreement will be enforced as long as the agreement addresses the principle terms required to resolve the dispute.[30]

The Appellate Division also stated that mediation is "non-binding only in the sense that the process is not designed or intended to impose a result on any party... mediation is also not intended or designed as a meaningless and impotent detour on the way to judgment."[31] The court concluded that the delay of three days in reducing the agreement to writing was not sufficient to vitiate the settlement.[32] The court also seemed to focus on the fact that the plaintiff had not objected to the defendant's writings to the court, and had participated in discovery, which waived the privilege of mediation.[33] Therefore, while *Willingboro* is not a family law case, it is instructive.[34]

In *Galdo v. Hagarty*,[35] the plaintiff argued that the trial judge erred in refusing to enforce an agreement settling the parties' dispute about the payment of a

child's college expenses.[36] The defendant's attorney faxed a proposed settlement agreement to the plaintiff's attorney.[37] The plaintiff's attorney emailed a revised copy the following day, and the defendant's attorney emailed the plaintiff's attorney 12 minutes later, stating: "Agreed...please confirm that we have a settlement."[38] That same day, the plaintiff's counsel emailed this response: "This confirms we have a settlement...Please confirm that you will be withdrawing your motion."[39] The defendant's attorney's office confirmed that the motion would be withdrawn.[40] Later, the defendant argued that no settlement agreement had been formed, as her attorney did not have authority to bind her.[41]

The Appellate Division stated that the appeal "requires our consideration of what it takes for discussions between attorneys to ripen into a binding agreement."[42] The court reaffirmed that agreements need not necessarily be reduced to writing or placed on the record to be enforceable.[43] The Appellate Division stated that, at the very least, the parties and their counsel knew the purpose of the discussion between counsel was to settle the dispute over college expenses.[44] The court also stated that there was no dispute that the communications between the parties' attorneys led to an agreement regarding all disputed terms.[45] However, a plenary hearing was necessary to resolve the matter.[46]

In *Fritze v. Kominksy*,[47] the plaintiff entered into a verbal agreement with the defendant for the replacement of an air conditioning and heating system.[48] After the defendant paid approximately half the sales price and the plaintiff completed the work, a dispute arose between the parties.[49] The plaintiff filed a complaint in the special civil part, but prior to the trial date, counsel for both parties sent separate letters to the trial court stating that the matter had settled.[50] Following these letters, the plaintiff's counsel prepared and forwarded a proposed stipulation of settlement, which included a requirement that the plaintiff obtain a certificate approving the work.[51]

The defendant's counsel requested that the stipulation be revised to mention a 90-day time limit.[52] Although they did agree to a 90-day time period, they did not agree on when the time period would commence.[53] The parties never signed the stipulation; however, the plaintiff acted in accordance with the other provisions of the agreement.[54] Later, the defendant refused to place funds in escrow, and the plaintiff filed a motion to enforce the settlement.[55]

The trial court, without conducting a plenary hearing, granted the motion, finding that the parties had agreed on the essential terms of the settlement.[56] The Appellate Division stated that the fact that the agreement was oral, instead of written, was of no consequence.[57] The court found that the trial judge correctly determined that not every factual dispute requires a plenary hearing, and here, there was not a factual dispute requiring a plenary hearing.[58] The Appellate Division affirmed, stating that the date was not an essential term, which was evidenced by the defendant's counsel's letter stating that his client was "prepared to pay as we agreed in the event that your client provides certificates of completion."[59] This statement proved that the date was not essential to the bargain, and that the defendant was willing to pay, if he received the certificates, which he did.[60] Therefore, no *Harrington*-type hearing was required.

Conclusion

Mediation can be exhausting, frequently extending beyond the allotted time frame set for the session. Everyone is anxious to leave, but it is wise to not be hasty. Take the time necessary to confirm your client's understanding of the agreement, as well as your adversary's, prior to leaving mediation. If the agreement requires further consideration by your client, say so. If there are contingencies or conditions that must be met, take the time to address the open issues. Set a followup date by which the parties may accept or reject the agreement, or set a follow-up mediation date to resolve issues that arise by virtue of the drafting of the marital settlement agreement.

As the old adage says, the devil is in the details. ■

Michele E. D'Onofrio is a partner with the law firm of Shimalla, Wechsler, Lepp & D'Onofrio, LLP, and wishes to thank Erin Murphy, a former associate, for her assistance with this article.

Endnotes

1. *Harrington v. Harrington*, 281 N.J. Super. 39 (App. Div.) *certif. denied*, 142 N.J. 455 (1995).
2. *Lehr v. Afflitto*, 382 N.J. Super. 376 (App. Div. 2006).
3. N.J.S.A. 2A:23C-1 to -13.

4. *Id*. at 392.
5. *Id*.
6. *Id*. at 396.
7. N.J.S.A. 2A:23C-6.
8. *Id*.
9. *Hasty v. Hasty*, 2009 N.J. Super. Unpub. LEXIS 3173 (App. Div. 2009).
10. *Id*. at 2.
11. *Id*. at 4.
12. *Id*.
13. *Id*. at 4-5.
14. *Id*. at 5.
15. *Id*. at 6.
16. *Id*. at 14-17.
17. *Id*. at 19.
18. 421 N.J. Super. 445 (App. Div. 2011), *cert. granted*, 209 N.J. 97 (2012).
19. *Id*. at 448.
20. *Id*. at 449.
21. *Id*.
22. *Id*. at 450.
23. *Id*.
24. *Id*. at 452.
25. *Id*.
26. *Id*. at 450.
27. *Id*. at 451.
28. *Id*. at 453.
29. *Id*.
30. *Id*. (*citing Weichert Co. Realtors v. Ryan*, 128 N.J. Super. 427, 435 (1992).
31. *Id*. at 454.
32. *Id*. at 453.
33. *Id*. at 452-54.
34. *Willingboro*, 421 N.J. Super. 445.
35. 2010 N.J. Super. Unpub. LEXIS 2928 (App. Div. 2010).
36. *Id* at 1.
37. *Id*. at 2.
38. *Id*.
39. *Id*.
40. *Id*. at 2-3.
41. *Id*. at 4.
42. *Id*. at 5.
43. *Id*. (*citing Harrington*, 281 N.J. Super. 39, 46).
44. *Id*. at 8.
45. *Id*
46. *Id* at 11.
47. 2009 N.J. Super. Unpub. LEXIS 2598 (App. Div. 2009).
48. *Fritze v. Kominksy*, 2009 N.J. Super. Unpub. LEXIS 2598, 1 (App. Div. 2009).
49. *Id*.
50. *Id*. at 2.
51. *Id*.
52. *Id*.
53. *Id*. at 3-4.
54. *Id*. at 4.
55. *Id*. at 6.
56. *Id*. at 7.
57. *Id*. at 10.
58. *Id*. at 11-12.
59. *Id*. at 13.
60. *Id*.

Infuriatingly Unreasonable

by David J. Issenman and Lara Stolman

Imagine you represent a 53-year-old wife who has been married to her husband for 29 years. Their two children are grown and out of the house. Your client has been a stay-at-home mother since the birth of their first child, 26 years ago. She has no assets and no income. The husband earns in excess of $500,000 a year as base salary and receives bonuses and stock options bringing his annual income to approximately $900,000. Equitable distribution consists of a house (worth $800,000 with no mortgage), and the husband's retirement accounts. The parties have separated, and the husband recently filed for divorce.

You call your adversary to discuss temporary support, and she tells you: "This is not an alimony case; we will not pay a nickel. Conversation over!"

Such a response could strike you as not only unreasonable, but as positively infuriating.

Although it may not be possible to completely stop the practice of starting a case from an unreasonable settlement position, the use of the offer of judgment[1] may deter lawyers and litigants from taking these infuriating positions.

New Jersey's offer of judgment rule, Rule 4:58, was designed to foster pre-trial settlement in civil actions by shifting court costs and counsel fees to the party who rejects a reasonable settlement.[2] Promulgated in 1971, it was hailed as a restraint on frivolous or bad faith lawsuits.[3] The statute, however, specifically eliminates its application to matrimonial cases:

> *Except in a matrimonial action*, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.[4] (Emphasis added.)

Modeled after Rule 68 of the Federal Rules of Civil Procedure, which penalizes a plaintiff who refuses a reasonable settlement offer with court costs, Rule 4:58 goes further by allowing attorney's fees, and thus has been deemed a stronger, more effective tool to promote settlement.[5] The rule operates bi-laterally, providing both parties the incentive to settle reasonably by "imposing financial consequences on parties who unwisely reject an offer of settlement and insist on a trial."[6]

The offeree has 90 days or up to 10 days before trial to accept, whichever period expires first. If the offer is not accepted and the final judgment is less favorable to the offeree, as defined by the rule, the offeror is entitled to his or her expenses as a result of the rejection of the offer. Expenses are defined as court costs, prejudgment interest and reasonable attorney's fees.[7]

As an example of the application of Rule 4:58, a plaintiff who was injured in a car accident might make an offer to the defendant to accept a settlement of $100,000. If the defendant rejects the offer and the plaintiff wins a judgment of $120,000 (120 percent or more of the offer),[8] the defendant would be subject to the penalties of the rule. Similarly, if the defendant makes an offer to settle for $100,000 and the plaintiff rejects that offer and obtains a judgment of $80,000 (80 percent or less than the offer),[9] the plaintiff would be subject to the penalties of the rule.

The rule includes protections against an unjust result. There are no penalties if:

(1) the claimant's claim is dismissed,
(2) a no-cause verdict is returned,
(3) only nominal damages are awarded,
(4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or
(5) an allowance would impose undue hardship. Furthermore, if the court can eliminate the hardship by reducing the allowance, it should do so.[10]

In the case of *Reid v. Finch*,[11] the court did just that. In *Reid*, the plaintiff had suffered a permanent injury in an automobile accident. The defendant made an offer of judgment before trial, which the plaintiff rejected. The molded verdict was $20,647, less than 80 percent of the

defendant's offer. The defendant was therefore entitled to reasonable attorney's fees and costs, which totaled more than $5,000 above the plaintiff's verdict. The trial court reduced that amount because of undue hardship to the plaintiff, reasoning the Supreme Court could not have intended "that a party should lose money simply because the party brought a non-frivolous suit."[12]

As currently promulgated, Rule 4:58 does not apply to matrimonial actions. Despite that limitation, there is no good reason to believe that it could not serve in divorce litigation as an effective deterrent to unreasonable positions. Use of this rule in matrimonial actions would encourage settlement, and it might even streamline the adjudication of counsel fee applications.

Counsel Fees in Matrimonial Actions

Generally, New Jersey's approach to counsel fees reflects the "American rule," that parties pay their own legal fees.[13] Yet courts have the authority to award counsel fees in family actions, shifting the burden of fees from one party to another, as noted in Rule 4:42-9(a)(1),[14] N.J.S.A. 2A:34-23[15] and Rule 5:3-5.[16] Awards of counsel fees in matrimonial actions are discretionary.[17] The court must consider three factors: 1) the payee's financial need, 2) the payor's ability to pay, and 3) after those factors have been established, the good faith of the party seeking fees.[18] N.J.S.A. 2A:34-23 also provides that when considering a counsel fee application, the court "shall consider…the financial circumstances of the parties, and the *good* or *bad faith* of either party." (Emphasis added.) So it is not axiomatic that one who takes an unreasonable position will pay counsel fees.

Unreasonable is not synonymous with bad faith. Bad faith is defined as "an intent to mislead or deceive another, or a neglect or refusal to fulfill some duty or contractual obligation not prompted by some honest mistake as to one's rights or duties, but by some interested or sinister motive."[19]

In the family court context, bad faith has been found in cases where litigation is instigated for harassment purposes, as well as in cases where the cost of litigation is used as "a substantial form of economic coercion."[20] Although bad faith can outweigh other factors and favor an award of fees,[21] mere unreasonableness does not count. Thus, a spouse who is not in financial need but who was subjected to extensive litigation by a former spouse who took unreasonable positions, would not necessarily merit a fee award.

In *Kelly v. Kelly*,[22] a husband rejected the economic recommendations of an early settlement panel, only to ultimately receive a judgment that was approximately the same. The court denied a fee award, since the wife was not in financial need, and while the husband's behavior was unreasonable, it did not rise to the level of bad faith. As the court concluded, "a party is not obligated to negotiate. So long as the position assumed is not motivated by an attempt to "torture" the other party, bad faith cannot be found."[23]

But for the purpose of counsel fee awards, attempts are nonetheless made to characterize unreasonable positions in divorce litigation as bad faith, for in the absence of financial need, it is necessary for a finding of bad faith to merit a counsel fee award. Bad faith includes: "[a]n unwillingness or intransigence during the litigation process to fairly negotiate an equitable distribution of property legally or beneficially acquired during the marriage or to pay alimony, or separate maintenance and child support commensurate with one's ability to pay."[24]

Unreasonableness seems to be tolerated in family matters, but not in other civil actions. The frivolous litigation statute provides counsel fees if the pleading of a non-prevailing party was frivolous, defined as either: 1) "in bad faith solely for the purpose of harassment, delay or malicious injury," or 2) "without any reasonable basis in law or equity."[25] It would seem that this statute would deter unreasonable positions in family law litigation; however, it has been deemed not to apply to family actions.[26] Obtaining fees under this statute in a family law matter has been pronounced "a rarity at best."[27]

Also, applications for counsel fees in family matters involve a lengthy and detailed process. The fee request must be accompanied by an affidavit of services,[28] and comply with RPC 1.5(a).[29] The requested allowance must be critically reviewed, and a plenary hearing may be required to determine if the fee is reasonable.[30] It's often a laborious process for the court, involving an examination of the entire case.

A modified offer of judgment rule promulgated exclusively for family matters could curtail vexatious litigation and determine the issue of counsel fees swiftly and efficiently, by comparing the total final economic award (alimony and equitable distribution) to the offer made (or refused) prior to trial.

Consider, again, this article's initial hypothetical. If your client is the wife who has been married for 26 years, she quite naturally will expect to receive alimony,

presumptively payable on a permanent basis. If the husband refuses to pay alimony (for whatever reason), driving the case to trial, you might, as counsel for the wife, offer to accept a judgment for half the marital assets and $200,000 per year in permanent alimony. If the offer is not accepted, and after trial the court awards your client $240,000 in alimony, you would automatically be entitled to your reasonable counsel fees for trial. Need, ability to pay, good and bad faith, and the possibility of a plenary hearing may have all been obviated.

New Jersey's offer of judgment rule has already had a positive impact on judicial economy. Professors Albert Yoon and Tom Baker studied the effect of Rule 4:58 on automobile insurance litigation in New Jersey utilizing data from 1992 to 1997. They found that the duration of lawsuits was reduced on average by 2.3 months.[31]

Thus, the application of offers of judgment to matrimonial actions has the potential to shorten the length of matrimonial actions in general. But such an approach is not without its critics. In *Borchert v. Borchert*,[32] the court emphasized the back and forth nature of divorce negotiations often involving various interconnected issues such as custody, parenting time, child support, alimony and equitable distribution, and concluded "the complex, inter-related nature of basic matrimonial issues renders the offer–of–judgment process essentially ineffective."[33]

The offer of judgment may not be appropriate for all family matters, and certainly it does not lend itself to custody or parenting disputes. Nonetheless, it should not be dismissed entirely. For cases in which only equitable distribution and alimony are at issue, it can be highly effective.

Some seasoned matrimonial practitioners actually informally and by agreement implement a modified offer of judgment rule pursuant to which, with the approval of the trial judge, both counsel simultaneously submit in writing their final offers of settlement in a sealed envelope. The envelopes remain sealed until the court renders a decision. Then the court opens the envelopes and reviews each party's position. The party whose position is deemed to be "infuriatingly unreasonable" would pay the other's counsel fees. ■

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Endnotes

1. R. 4:58.
2. *Crudup v. Marrero*, 57 N.J. 353, 361 (1971).
3. *Id*. at 163-164.
4. R. 4:58-1 (2011).
5. Albert Yoon & Tom Baker, Offer of Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East, 59 *Vanderbilt Law Rev.* 155, 159 (2006).
6. *Wiese v. Dedhia*, 188 N.J. 587, 593 (2006).
7. R. 4:58-2 and 3 (2011).
8. R. 4:58-2 establishes the consequences of non-acceptance of a claimant's offer if the judgment is 120 percent of the offer or more.
9. R. 4:58-3 establishes the consequences of non-acceptance of an offer furnished by a party who is not a claimaint.
10. R. 4:58-3(c) (2011).
11. *Reid v. Finch,* 425 N.J. Super. 196 (2011).
12. *Id*. at 207.
13. *Johnson v. Johnson*, 390 N.J. Super. 269 (App. Div. 2007).
14. R. 4:42-9(a)(1) provides "In a family action, a fee allowance both *pendente lite* and on final determination may be made pursuant to R. 5:3-5(c)."
15. N.J.S.A. 2A:34-23 provides that in determining a counsel fee award "the court shall consider the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party."
16. R. 5:3-5 provides "an award for attorneys' fees in family actions are appropriate when such actions concern divorce, nullity, support, alimony, custody, visitation, equitable distribution, separate maintenance, enforcement of interspousal agreements relating to family-type matters, and claims relating to family-type matters in actions between unmarried persons."
17. *Williams v. Williams*, 59 N.J. 229, 281 (1971).

18. *Chestone v. Chestone*, 322 N.J. Super. 250, 256 (App. Div. 1999).
19. *Borzillo v. Borzillo*, 259 N.J. Super. 286, 292 (Ch. Div. 1992) (*quoting Black's Law Dictionary* 127 (5th Ed. 1979).
20. *Kozak v. Kozak*, 280 N.J. Super. 272, 277-79 (Ch. Div. 1994).
21. *Kelly v. Kelly*, 262 N.J. Super. 303, 307 (Ch. Div. 1992).
22. *Id*. at 303.
23. *Id*. at 310.
24. *Borzillo v. Borzillo*, 259 N.J. Super. 286, 293 (Ch. Div. 1992).
25. N.J.S.A. 2A:15-59.1.
26. *Kelly*, 262 N.J. Super. at 309.
27. Skoloff & Cutler, III *New Jersey Family Law Practice*, (9th ed. 1999) § 8.3B(1) at p. 8-77.
28. R. 4:42-9(b) (2011).
29. Rules of Professional Conduct 1.5(a).
30. *Mayer v. Mayer*, 180 N.J. Super. 164,169-170 (App. Div. 1981) *cert. denied*, 88 N.J. 494 (1981).
31. Yoon & Baker, *supra*, at 159.
32. *Borchert v. Borchert*, 361 N.J. Super. 175 (Ch. Div. 2002).
33. *Id*. at 182.

Settlement: The Client's Prerogative

by Amanda S. Trigg and Joseph DiPiazza

Most family law practitioners occasionally face a client who decides to settle his or her case on terms the lawyer cannot recommend. Although it may be obvious without being said, that lawyer must exercise caution. Rule of Professional Conduct (RPC) 1.2 addresses an attorney's scope of representation, and clearly states that "a lawyer shall abide by a client's decision whether to settle a matter."[1]

Situations in which a client's capacity may be impaired require special attention. RPC 1.14 provides that when a client's capacity to make adequately considered decisions relating to representation is diminished, a lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.[2] The rule allows the lawyer to take reasonably necessary protective action when he or she reasonably believes the client's diminished capacity puts the client at risk of substantial physical, financial or other harm.[3] This protective action includes seeking the appointment of a guardian *ad litem*, conservator, or guardian.[4]

As set forth in the article in this publication by Jamie Von Ellen and Marc Brown, an attorney may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.[5] Therefore, when faced with a situation that would involve a client's wishes to settle a family law case against a lawyer's advice, the lawyer may attempt to seek to limit the scope of his or her representation by, for example, simply providing legal advice regarding the terms reached in an agreement. This would also depend on how far along the parties are in the litigation.

When constrained to abide by the client's cogent desire to settle a case against the attorney's advice, the attorney must document any advice to the contrary, using all permissible manners of creating and preserving that documentation. A former client who later regrets the terms of the agreement entered into against the advice of his or her attorney may seek a scapegoat. Often, the disgruntled litigant will aim ire against the attorney. Moreover, as the law currently stands in New Jersey, but for rare exceptions, legal malpractice actions are permitted even after settlement of the underlying case. Therefore, in addition to providing their services with reasonable knowledge, skill, and diligence, family lawyers must exercise extra caution to protect themselves in accordance with the controlling and advisory case law.

Four New Jersey Supreme Court opinions that relate to this area of law include: *Ziegelheim v. Apollo*,[6] *Puder v. Buechel*,[7] *Guido v. Duane Morris, LLP*,[8] and the Court's most recent opinion in *Gere v. Louis*.[9]

In *Ziegelheim*, divorcing parties reached a settlement, the terms of which counsel placed on the record. Then, the parties testified that each unequivocally accepted the agreement and felt it was fair. The wife subsequently hired another lawyer and moved in the family part to set the agreement aside. The family part denied her motion, and the wife filed a malpractice action against her original attorney. Her complaint alleged, among other things, professional incompetence that led to the improvident acceptance of the settlement, and that her former attorney failed to discover hidden marital assets. The family part dismissed the wife's malpractice action, and the Appellate Division affirmed. The Supreme Court reversed, however, concluding that "the fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent."[10]

The Court further acknowledged that attorneys who pursue "reasonable" strategies in handling their cases and who render "reasonable" advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice.[11] "What constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform."[12] The lawyer must take "any steps necessary in the proper handling of the case."[13] Those steps will include, among other things, a careful

investigation of the facts of the matter, the formulation of a legal strategy, the filing of appropriate papers, and the maintenance of communication with the client.[14]

Finally, the *Ziegelheim* Court acknowledged that while the law requires that attorneys handle their cases with knowledge, skill, and diligence, it does not demand they be perfect or infallible, and it does not demand they always secure optimum outcomes for their clients.[15]

In *Puder*, another divorce action, an attorney sued a former client to recover unpaid legal fees arising from the matrimonial litigation. The client responded by filing a malpractice counterclaim against the attorney for negotiating an inadequate divorce settlement and for failing to obtain informed consent before accepting the settlement on the client's behalf. While the client's malpractice case was pending, she re-opened her divorce case with the assistance of new counsel and negotiated a second, more favorable settlement.

Subsequently, the matrimonial attorney moved for summary judgment on the malpractice counterclaim, arguing that by entering into the second settlement, the client waived her right to sue for malpractice arising from the first settlement. The Law Division granted the motion, but the Appellate Division reversed, holding that under *Ziegelheim*, a "former client may bring a legal malpractice action against an attorney for professional negligence in divorce litigation where a settlement ensued."[16]

The Supreme Court reversed the Appellate Division, concluding that any alleged deficiency resulting from the first settlement was ameliorated by the second settlement that the client deemed to be fair and equitable. The Court noted that unlike the plaintiff in *Ziegelheim*, the client in this case made a calculated decision to accept the second settlement before the trial court could decide whether the first settlement was enforceable. The client also entered the second settlement aware of the discovery deficiencies leading up to the first settlement, yet she accepted a second settlement substantially similar to the allegedly inadequate first settlement.[17]

In *Guido*, the Supreme Court addressed a legal malpractice claim arising from allegedly negligent advice related to a settlement agreement. The client was the majority shareholder in a corporation. The defendants, his former attorneys, represented the client in an underlying action against the corporation and several of its officers and directors. The case settled, and the terms were placed on the record. Approximately two years later, having made no effort to vacate the settlement, the client sued his attorneys for malpractice, claiming counsel failed to explain to him the long-term implications of the settlement, some of which were less than obvious. The defendants argued that a plaintiff must seek to vacate a settlement as a prerequisite to bringing a malpractice claim, and that the client's acceptance of the settlement estopped him from prosecuting his claim.

The Court first concluded that the client did not need to seek to vacate his settlement, and found that he may proceed directly against the lawyers who provided the allegedly negligent advice that culminated in the settlement. Second, the Court found that the defendants' estoppel defense, which it referred to as *Puder*'s "equity-based exception to *Ziegelheim*'s general rule," did not apply because unlike in *Puder*, the plaintiff did not represent to the court that he was satisfied with the settlement, or that the settlement was fair and adequate. The plaintiff merely represented to the court that he understood and agreed to abide by the settlement terms. As such, the plaintiff's malpractice claim was not barred as a matter of law.

Finally, in *Gere*, a legal malpractice case arose from a matrimonial dissolution action. The agreement established a six-month window of time during which the wife could decide whether she wished to remain a half-owner of her former husband's business interests, which included a marina. In her subsequent malpractice action against her attorney, the client alleged that her attorney wrote an unauthorized letter to the adversary, stating she waived her right to a one-half interest in a marina.

The client retained a new counsel to represent her in a post-judgment litigation concerning the issue, which ultimately settled. The new settlement provided that the client would share equally with her former husband in the net proceeds of the sale of the marina's real estate, and she would be entitled to 40 percent of all monies arising out of the marina's business operations. When questioned about the new settlement in open court, the client represented that given all the facts and circumstances, she thought the agreement was fair, reasonable, and the "best [she] could do." She further represented that by signing the agreement, she was waiving her right to later argue that the agreement was unfair. The client's new counsel did qualify the foregoing representations, however, by indicating that the client reserved her right to bring malpractice actions against her former attorneys, which she eventually did.

In the malpractice actions, the former attorneys argued that, under *Puder*, the client's second settlement barred her malpractice claims. The trial court agreed, and dismissed the client's actions. The Appellate Division affirmed. The Supreme Court reversed, however, finding the action distinguishable from *Puder*. In *Puder*, the second settlement placed the client in the same position as she had been at the outset. In *Gere*, the second settlement did not have that effect—it produced less than what she might have obtained under the original settlement. As such, the client's legal malpractice claim was not barred.

Guido and *Gere* demonstrate that *Ziegelheim* controls this area of law. *Puder* is the rare exception to the rule in *Ziegelheim*, which permits legal malpractice actions even after settlement of the underlying case. If a second settlement makes a client whole, as was the case in *Puder*, then the malpractice suit will be barred. If not, as was the case in *Gere*, a malpractice action will be permitted.

Additional guidance appears in unpublished decisions of the Appellate Division.[18] In *Harris v. Baer, Arbeiter, Ploshnick, Tanenbaum & Weiss, LLC*,[19] a lawsuit arose out of a firm's representation of a client in a workers' compensation action. The settlement terms of the compensation claim were placed on the record in open court. The client agreed to the settlement despite the advice of his attorney, who also placed on the record that the employer's settlement offer should be rejected. Two years after the compensation case was concluded, the client instituted a *pro se* malpractice action against his former attorneys. The trial court found the client's case lacked substantive merit because the client, with full knowledge of the attorney's advice, had decided to settle the compensation case. Because the attorney in this case had advised the client not to accept the settlement, the judge distinguished the case from *Ziegelheim* and granted the former attorney's motion to dismiss. The Appellate Division affirmed.

More recently, in *Heathcote v. Gidding*,[20] decided Aug. 11, 2010, after the conclusion of the underlying matrimonial action, the client asserted a variety of instances in which his former attorney allegedly deviated from the standards of professional representation. The trial judge, relying on *Puder*, granted the attorney's motion for summary judgment based on the client's representations in the underlying action that he understood the terms of his settlement, had entered into it freely and voluntarily, and believed it to be fair. The judge further noted that certain negligence claims advanced by the client were not supported by expert opinion.

The Appellate Division affirmed dismissal of the client's malpractice claim as an "equitable exception" under *Puder*. Once a client asserts that he or she entered into an agreement without the benefit of competent advice, he or she must support it with specific facts and, unless the issue is one of common knowledge, with expert opinion. Here, the client provided no expert opinion to identify his attorney's obligations, the manner in which he departed from those obligations, and the consequences to the client. After a detailed review of the factual circumstances, the Appellate Division further concluded that it would not be equitable to allow the client to pursue his claims against his former attorney.

From a practice standpoint, prior to the client's acceptance of an agreement against the attorney's advice, the attorneys must ensure, and document that the client has a complete and thorough understanding of the facts and circumstances surrounding the case before entering into settlement. Some practical methods of documenting this, in addition to meticulous retention of all written communications with the client including emails and any advisory letters, may include, for example, a discussion regarding the state of discovery, whether all financial information has been received from an adverse party, or whether experts have had the opportunity to render their reports. Such discussions and documentation of the advice rendered should, however, remain confidential between counsel and client, as contemplated by NJRE 504 in order to preserve attorney/client privilege.

In addition to documenting the legal advice rendered, counsel might consider various other means of proving that the settlement was reached with the client's full understanding and approval of the terms, including:

- preparing correspondence that specifically informs the client of the criteria utilized to evaluate any claim in the underlying action (*e.g.*, the statutory alimony factors pursuant to N.J.S.A. 2A:34-23(b));
- ascertaining the client's reasoning for accepting the settlement and incorporating the factors attendant to the client's motivation into the settlement;
- documenting in a letter that the client has decided to settle the case against the attorney's advice, while providing specific reasoning for why the attorney disagrees with the client's desires (*e.g.*, it will lead to an unfavorable balance of equitable distribution against the client, or unfair alimony terms against the client);

- considering asking the client to countersign the letter to indicate it was received, read, and understood.

Once private and confidential measures are taken, also consider the logistical steps toward implementing the client's desired settlement terms, including:

- promptly reducing settlement terms to writing for their clients to read so the clients may better understand the terms before they are placed on the record;[21]
- ensuring the client has sufficient time to review the agreement and its specific terms and answer any questions the client may have;[22]
- considering limiting the scope of the attorney's representation, if allowable, depending upon the point of the litigation.[23]

Eventually, in keeping with common practice, the uncontested divorce hearing will take place in open court. There again, opportunities for documenting the settlement and the client's satisfaction with the settlement procedures and its terms arise, including:

- thoroughly questioning the client when settlements are placed on the record. The terms of the settlement should also be fully explained in open court with the opportunity for the client to question the terms placed on the record;[24]
- asking the client, under oath, not only whether he or she fully understands the terms and agrees to them, but whether the terms are fair and equitable in light of all the circumstances;[25]
- establishing clearly that your client has not been exposed to any coercion or undue influence by anyone, including the attorney, in accepting the agreement;[26]
- asking the client, under oath, to confirm an understanding of the waiver of right to a full trial, and that the result may have been better or worse than what is provided in the settlement agreement;
- asking the client, under oath, whether present counsel provided representation throughout the litigation, and whether that representation was satisfactory to the client; and
- confirming, on the record and while the client remains under oath, that no further time to consider the terms in the settlement agreement is required.

Following the above practice tips should assist attorneys toward proactive, diligent, and cautious fulfillment of the obligations, express and implied, created by RPC 1.2, to let the client settle the case as he or she so desires. ■

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Endnotes

1. RPC 1.2(a).
2. RPC 1.14(a).
3. RPC 1.14(b).
4. *See also Julius v. Julius*, 320 N.J. Super. 297 (App. Div. 1999) (appointing guardian *ad litem* to defendant who was suffering from an unspecified psychiatric problem, which rendered him unable to proceed with the divorce litigation).
5. RPC 1.2(c).
6. 128 N.J. 250 (1992).
7. 183 N.J. 428 (2005).
8. 202 N.J. 79 (2010).
9. 209 N.J. 486 (2012).
10. *Ziegelheim v. Apollo*, 128 N.J. 250, 265 (1992).
11. *Id.* at 267.
12. *Id.* at 260, *quoting St. Pius X House of Retreats v. Diocese of Camden*, 88 N.J. 571, 588 (1982).
13. *Passanante v. Yormark*, 138 N.J. Super. 233, 239 (1975).
14. *Id.* at 238-39.
15. *Ziegelheim*, 128 N.J. at 267.
16. *Puder v. Buechel*, 183 N.J. 428 (2005).
17. *Id.* at 443.
18. In addition to the unpublished cases discussed above, the reader may also consider other unpublished decisions relating to the subject matter: *Shapiro & Croland v. Bairan*, (A-3704-05T5), decided June 1, 2007; *Angerame v. Arnold*, (A-4732-05T5), decided Oct. 3, 2007; *Goldsworthy v. Browndorf*, (A-1308-06T3), decided Jan. 16, 2008; *Pinto v. McGovern*, (A-3186-06T5), decided March 4, 2008; *Burke v. Skoloff & Wolfe*, (A-3527-06T2), decided July 25, 2008; *Schachter, et al. v. Stanton*, A-3174-06T3), decided Aug. 21, 2008; *Chen v. LaRocca*, (A-3890-08T3), decided April 28, 2010; *Gorjuice Wrap, Inc. v. Okin, Hollander & De Luca, LLP*, (A-4782-08T2), decided Jan. 12, 2011; *Smith v. Grayson* (A-1460-10T4), decided Dec. 19, 2011.
19. A-5165-05T1, decided June 14, 2007.

20. A-0316-07T1.
21. *See Entress v. Entress*, 376 N.J. Super. 125, 134 (App. Div. 2005) (discussing the difficulty of litigation involving a property settlement agreement read on the record but not incorporated in a written judgment).
22. *See Ziegelheim v. Apollo*, 128 N.J. 250, 267 (1992) (holding that malpractice claims "could be averted if settlements were explained as a matter of record in open court in proceedings reflecting the understanding and assent of the parties").
23. RPC 1.2(c).
24. *Ziegelheim v. Apollo*, 128 N.J. 250, 267 (1992) (holding that malpractice claims "could be averted if settlements were explained as a matter of record in open court in proceedings reflecting the understanding and assent of the parties").
25. *See Puder v. Buechel*, 183 N.J. 428 (2005) (finding "any alleged deficiency resulting from the first settlement was ameliorated by the second settlement that [defendant] deemed to be fair and equitable"); *see also Guido v. Duane Morris, LLP*, 202 N.J. 79 (2010) ("plaintiffs did not represent to the court that they were satisfied with the settlement, or that the settlement was fair and adequate").
26. *Ziegelheim v. Apollo*, 128 N.J. 250, 258 (1992) (finding "defendant unequivocally stated that she accepted the settlement without coercion").

To Scribe or Not to Scribe, That is the Question

by Jamie K. Von Ellen and Marc R. Brown

If an attorney is asked by a client to be a scrivener or review attorney only, is he or she abdicating his or her role as lawyer? Are family lawyers obligated to advocate in every case, even if the client does not seek the attorney's advocacy? The authors believe that if a client's objective is to obtain a divorce in the most cost-effective and/or amicable way possible, then it is incumbent upon family lawyers to help the client accomplish that goal. This article is written from the perspective of the authors, and is intended to provide their analysis and opinions, and the approach they suggest be taken when presented with a client who seeks specific limited representation rather than traditional advocacy.

Scenarios

In an effort to fully illustrate the issue, this article will describe what the authors believe to be the four general categories of the circumstances under which only review/preparation of an agreement is requested by the client. They are:

- the mediated 'vanilla' case scenario;
- the *Laufer*-type scenario;
- the unequal access to information/knowledge scenario; and
- the unequal bargaining power scenario.

Examples of each of these potential scenarios are as follows:

The Mediated 'Vanilla' Case

The parties have had several sessions with a trained attorney-mediator. Both parties are W-2 employees, and have provided the mediator, as well as each other, with copies of all tax returns and W-2s for the last five years. They also exchanged statements from all asset and liability accounts. The mediator has prepared a memorandum of understanding, and the client comes to you to either draft an agreement based on the memorandum of understanding or to review an agreement prepared by the other party's attorney.

The Laufer-Type

The parties are wealthy. They own several businesses and properties, none of which have been appraised or evaluated. The client comes to you advising that she has "successfully" completed mediation, and she is quite comfortable and satisfied with the trade-offs and terms of the agreement reached during mediation. She brings a memorandum of understanding prepared by the mediator, and advises that she wants you to review the agreement as previously negotiated. She specifically advises that she does not seek to have discovery performed or to renegotiate any provision. The client seems intelligent and well-versed in her financial circumstances.

The Unequal Access to Information/Knowledge Scenario

In the initial consultation, the client advises that her spouse has been self-employed in a cash business (*i.e.*, landscaping) for 20 years, and she has signed all joint tax returns each year. She has not worked in the last 20 years of the marriage. Her husband has told her that his business has no value beyond him, and that it has been suffering for the past few years. He has, nevertheless, offered to give her the house with $100,000 in equity, in exchange for the business. He explained that this is a one-time offer. No business evaluation has been undertaken, and none is contemplated. The husband has offered her support in an amount that would meet her expenses if she remains in the house, but nothing more. He has provided her with $3,000 to hire a lawyer to review an agreement his lawyer drafted, and to put through a divorce. He has advised there are no further funds available for legal expenses.

The Unequal Bargaining Power Scenario

The client advises his spouse has again learned he is having an affair with yet another co-worker. The wife has told him that she wants a divorce, and he "owes it to her" to "give her what she wants." She has also told him that, in the event he does not present her with a divorce settlement agreement providing her with 60 percent of the marital assets and waiving his right to receive alimony by the end of the week, she will advise his employer of his transgressions. The parties have been married for 15 years, and they have no children. The husband earns $75,000 per year, and the wife earns $125,000 per year. The husband advises he feels extremely guilty, and he wants to give his wife what she demands.

Recommended Approach

When a client advises that he or she seeks limited representation, an attorney has an obligation to first educate the client and ensure he or she is making informed and voluntary decisions. The attorney must also question and challenge the client's stated goals before advising them. Clients do not always come to attorneys knowing all of their potential options. They often have less than full knowledge of their potential rights or responsibilities, or what would actually or possibly be involved if they decided to engage in the adversarial process. Sometimes, clients may think they know what they want because of some preconceived notion, or from something they have heard or read, all of which may not be accurate. Other times, they are feeling vulnerable or afraid. Sometimes, they are being bullied or threatened. Attorneys must do their best to ascertain the motivation for entering into the agreement presented or the reason for seeking to waive or limit discovery. The attorney should ascertain what a client does and does not know, as well as the client's level of sophistication.

The best approach is to question clients in the same manner as any initial consultation. The initial consult should be used to answer the following questions:

- Why are the parties getting divorced?
- Why are they seeking a divorce now?
- What are their occupations, education and histories?
- What are their incomes, present and historical?
- What is the nature and value of each asset?
- Are the parties aware of all assets and their values?
- Have there been any pre- or post-marital contributions?
- What are their liabilities?

By questioning the client in this manner, the attorney will learn the client's general degree of sophistication, and what he or she knows and does not know. These inquiries will assist the attorney in evaluating the overall nature of the issues involved in the case, and whether and to what extent the agreement the client has presented or has asked the attorney to prepare is fair and equitable in light of his or her circumstances.

The attorney is then in a position to give feedback to the client regarding how the agreement compares to potential outcomes if the client were to engage in the traditional adversarial process. The attorney is also in a position to assist the client in understanding what procedures/discovery would be employed if the client chose to engage in the litigation process. The initial consultation should be used to educate the client so that he or she will be in a position to reevaluate in the event he or she chooses to do so. The client will then have the ability to make informed decisions relating to potential cost/benefit and risk/reward analyses.

Once the attorney has fulfilled the obligation to educate, he or she must not hesitate to counsel clients to expand the attorney's role when, based on the attorney's professional judgment, the circumstances warrant. Conversely, if after the client has been properly informed, and assuming the client is competent and capable of understanding the options the lawyer has presented, the client decides to maintain his or her initial approach, he or she should not be dissuaded. However, if the client's chosen approach deviates substantially from the lawyer's advice, the lawyer may believe the representation is too risky for the client, or that the representation is too risky for the lawyer. In either circumstance, representation may be declined.

Reasons to decline representation include, but are not limited to: the lawyer believes the client lacks the level of sophistication necessary to make informed decisions; perceives an imbalance of power between the parties; sees the client will be unable to make informed decisions without costly discovery but also sees there are no funds for that discovery; or perceives excessive pressure is being exercised by the other spouse.

Another option is to decide to represent a client even if he or she chooses not to follow the attorney's advice, or if he or she wants to or has to waive discovery contrary to the attorney's advice *provided* representation is handled in a manner that properly protects the client and the attorney.

Rules of Professional Conduct and Case Law

Limitations on the scope of representation are prescribed by the Rules of Professional Conduct and case law.

RPC 1.2 (a) provides, in pertinent part:

> A lawyer shall abide by a client's decisions concerning the scope and objectives of representation...and as required by RPC 1.4 shall consult with the client about the means to pursue them.

RPC 1.2 (c) provides:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Informed consent is defined in RPC 1.0 (e) as:

> ...the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

In addition, RPC 1.4 (c) provides:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

These rules collectively comprise the ethical mandates that authorize limitation of the scope of representation. Case law is also of assistance. For instance, in *Estate of Fitzgerald v. Linnus*,[1] the court decided that both lawyer and client had determined that the lawyer's role would be limited to representing the estate of the husband of the plaintiff and securing assets the plaintiff had sought, including life insurance proceeds. Both agreed, and the court found, that the plaintiff was advised to secure separate financial and tax advice. The Appellate Division concluded:

> The role of an attorney can be circumscribed by the terms of his or her engagement by the client. Here the engagement was narrowly conceived by both parties and defendant's role was clearly delineated....The suggestion that an attorney retained to represent an estate has an affirmative obligation to engage an executrix-wife in post-mortem estate planning fails to recognize the realities of the retention and that of a limited attorney-client relationship....[2]

In *Smith v. Grayson*,[3] a recent unpublished Appellate Division decision involving a legal malpractice claim in a divorce matter, the defendant-attorney filed a third-party negligence complaint against an attorney who was retained by the client to serve only as a "consultant" in the pending action. He was to propose "different settlement agreements" or participate in mediation, but he was not to be involved in litigating the case or appearing in court.

In affirming the decision of the trial court dismissing the third-party complaint, the Appellate Division again acknowledged and accepted the concept of limited representation, stating "we have previously approved of arrangements where attorneys take on less-than-complete representation of a client.[4] In such cases, the degree of care owed by the attorney providing the limited services "is framed by the agreed service...."[5]

The scope of representation is typically limited by the terms of the retainer agreement between the attorney and client. In preparing that agreement, it is incumbent upon the attorney, as the scrivener, to utilize language that not only may ultimately be determined to be objectively clear, but is capable of being deemed to be subjectively clear, in that it must take into consideration the level of understanding and sophistication of the particular client.

In *Davin, LLC v. Daham*,[6] the Appellate Division, in pertinent part, reversed the trial court's decision granting a summary judgment motion filed by third-party defendants, seeking the dismissal of a legal malpractice claim filed against those attorneys by the defendants. In rendering its decision, the Appellate Division directed:

> In counseling a client, a lawyer must advise the client of the risks of the transaction in terms which are sufficiently clear to enable the client to assess them. *Conklin v. Hannoch Weisman*, 145 N.J. 395, 413, 678 (1996). The care exercised by the attorney must be

> commensurate with the risks undertaken and tailored to the needs and sophistication of the client....[7]

Additionally, the Appellate Division has held that a failure to clearly express the limitation of an attorney's representation within a retainer agreement can become potentially problematic for counsel because in interpreting same, courts will adopt the meaning most favorable to the client as opposed to the attorney, who is more likely to draft the agreement.[8]

In the context of family law, the issue of limited representation and the duty of care owed to the client routinely arises when a client asks a lawyer to either prepare an agreement memorializing purportedly agreed-upon terms or to review a draft agreement prepared by a mediator or the other party's attorney based on terms agreed upon by the parties, without the benefit of formal discovery or the lawyer's full analysis. Only one reported case in New Jersey specifically addresses this issue in the context of family law.

Lerner v. Laufer, Esq.[9] resulted from a suit for legal malpractice. Lynne Lerner accused William Laufer of negligent representation and breaching the duty of care he owed to her. Lerner hired Laufer to review a draft agreement that had been prepared by a New York mediator. In their first telephone conversation, she told Laufer that she sought to engage him solely for the purpose of review, and to make sure the agreement prepared by the mediator protected her. She advised that she was not looking to renegotiate.

Four days after the initial telephone conversation, Laufer met Mrs. Lerner for the first time. The mediator had already sent him the draft agreement. At their first meeting, Laufer presented Mrs. Lerner with a comprehensive letter, which, in pertinent part, confirmed he had not done any discovery, had not received tax returns and had no knowledge of the various properties the parties owned. He, likewise, had no knowledge of the value of the husband's stock holdings in a closely held business known as Marisa Christina, Inc., and confirmed he had not reviewed any documentation concerning the parties' respective incomes, assets, liabilities or other financial information. The letter explicitly stated he was not in a position to advise on the fairness of the agreement or to recommend it. The letter further indicated the purpose of his representation, at Mrs. Lerner's request, was solely to review the agreement, as Mrs. Lerner told him she believed it to be fair and equitable, and was entering into it freely and voluntarily, and that she was satisfied with the services of the mediator.

The letter confirmed Mrs. Lerner was accepting Laufer's very limited services due to her assertions that she wanted only limited representation. Mrs. Lerner signed the letter. Shortly thereafter, after non-substantive language modifications, a property settlement agreement (PSA) was signed by the parties, and they proceeded with a divorce. One aspect of the PSA provided:

> The Husband and the Wife have both worked at Marisa (Christina) and both recognize that the value of Marisa may be significant. The Wife knows that Marisa has contemplated an Initial Public Offering ("I.P.O.") and that an I.P.O. could cause the Husband's ownership of Marisa to substantially increase in value and such potential value has been discussed between the Husband and the Wife and same is understood by both parties. Moreover, it is also understood that the value which would be placed on the Marisa stock in the event of an I.P.O. could be approximately eight to fifteen times projected earnings.[10]

Two months after the divorce was entered, Mrs. Lerner learned that Marisa was, in fact, going public. She was outraged because she claimed that, despite this provision that specifically acknowledged the potential public offering, representations were made to her during the mediation that the company was not going public. As a result, Mrs. Lerner moved to set aside the judgment as fraudulent. Mr. and Mrs. Lerner subsequently engaged in another round of mediations with a different mediator, and ultimately arrived at a second mediated agreement. Mrs. Lerner was not, however, fully satisfied with that agreement, and alleged the settlement was less than what she should have received. She blamed Laufer for the discrepancy.

Mrs. Lerner filed a legal malpractice claim against Laufer, alleging he engaged in negotiations on her behalf and drafted contractual language detrimental to her interests. She further claimed, as a consequence of his advice, she entered into a PSA that was inequitable and unconscionable, and represented only a small portion of the equitable distribution to which she was entitled. She specifically alleged Laufer was negligent in failing to conduct appropriate discovery concerning the assets subject to equitable distribution, failing to retain experts

to value the assets available for equitable distribution, failing to properly negotiate and prepare the property settlement agreement ultimately executed by the parties and failing to evaluate and determine the appropriate amount of alimony and equitable distribution to which the plaintiff would be entitled under the law.[11] Mrs. Lerner further alleged Laufer breached the duty he owed to her by his failure to exercise the knowledge, skill, ability and devotion ordinarily possessed and employed by members of the legal profession similarly situated in connection with the discharge of his responsibilities to her and breached his duty to utilize reasonable care and prudence in connection with those responsibilities.[12]

Laufer's defense was that he could not be held negligent for failing to do what he was not hired to do. He could not have breached his duty to exercise knowledge or skills he was not hired to exercise. His defense was that he performed the role he was hired to undertake.

The Appellate Division agreed with Laufer. The court found Mrs. Lerner had given informed consent to Mr. Laufer's limitation of representation, and that the limitation was reasonable under the circumstances, pursuant to RPC 1.2(c). The court viewed the issue as a clash between two significant values to the legal community—the value of alternative dispute resolution and the value of the adversarial process.

The court stated:

> When a PSA reached through the mediation process must be formally incorporated in a judgment of divorce, the participation of attorneys governed by the adversarial process gives rise to a question as to the nature and extent of the duty of care imposed upon the attorneys. A mediated divorce settlement may well look substantially different on the same facts than would such a settlement hammered out in adversarial proceedings.[13]

The court further noted:

> The law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them. Clients have the right to make the final decision as to whether, when and how to settle their cases and as to economic and other positions to be taken with respect to issues in the case.' Pressler, *Current N.J. Court Rules*, Appendix XVIII (2003). The voluntary settlement of disputes is a central policy dictate of the judiciary and is expressly encouraged. *See Harrington v. Harrington*, 281 N.J. Super. 39, 46 (App. Div.), *certif. denied*, 142 N.J. 455 (1995); *Pascarella v. Bruck*, 190 N.J. Super. 118, 125 (App. Div.) certif. denied, 94 N.J. 600 (1983). The courts approve hundreds of such settlements in all kinds of cases without once looking into their wisdom or the adequacy of the consideration that supports them. In divorce proceedings, the court daily approves settlements upon the express finding that it does not pass upon the fairness or merits of the agreement, *See Pascarella, supra*, 190 N.J. Super. at 125, so long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable.[14]

The court found if the service is limited by consent, then the degree of care required of the attorney is framed by the agreed-upon services. The court concluded that the letter Laufer wrote to Mrs. Lerner clearly spelled out that he did not and would not perform various named services, could not render an opinion on the fairness of the agreement and could not advise Lerner whether to execute the agreement. As a result, Laufer could not be found to have committed malpractice. The Appellate Division clearly recognized there are many different reasons why clients may choose not to engage in the traditional adversarial process, and provided they are making voluntary and reasoned decisions, they should be allowed to resolve their disputes in any manner they deem appropriate.

How to Do It

The retainer agreement with the client must clearly delineate the scope of the requested and agreed-upon representation, which must be in compliance with the Rules of Professional Conduct cited above. In preparing this agreement, language must be included that provides the following:

1. the client has the right to pursue discovery in the form of answers to written questions, sworn statements, production of documents or the appraisal/evaluation of assets;
2. the extent of discovery that will be pursued (if any);

3. the client's acknowledgment that the decision to waive the right to pursue such discovery is made freely and voluntarily; and
4. the limited ability of counsel to advise as to the fairness or adequacy of any agreement reached in light of the lack of or limitation in the discovery conducted.

An example of language that may be included in a retainer agreement to clearly define the scope of representation is as set forth in Appendix A, following this article.

Any agreement that is a product of limited representation by counsel must clearly reflect those limitations to best protect the interests of both attorney and client. The agreement must reference the following:

1. the extent of the discovery completed or lack of discovery;
2. an acknowledgment by each party of the right to obtain complete discovery, appraisals, etc., and that there was a knowing, willing and voluntary waiver of such rights, as shown, for example, in Appendix B, following this article;
3. if the other party was not represented by counsel in the negotiation and/or preparation of the agreement, then he or she must acknowledge there was a knowing, willing and voluntary waiver of the right to independent counsel, as shown, for example, in Appendix C, following this article; and
4. any representation made in the negotiations that are material to the negotiated settlement should be memorialized either within the agreement that is ultimately signed, or, if the parties do not want that information to be part of a public document, in a separate confidential document referenced in the document that is ultimately signed. This should include the parties' respective incomes, any special circumstances relating to their abilities to earn or historical earnings, assets and/or liabilities.

The Unrepresented Adverse Party

If the other party is not represented, additional considerations arise. In that event, once the agreement is acceptable to the client, the focus must shift to taking the actions necessary to ensure its ultimate enforceability. These actions include, but are not limited to, the following:

1. Clients in these scenarios will frequently say they are on good terms with their spouse and will deliver the proposed agreement to him or her. Do not allow the client to be a courier. The client should simply tell his or her spouse the draft agreement is being forwarded;
2. Send a letter to the *pro se* party enclosing the PSA and advising of the right to review with counsel of his or her own choosing, as the document contains significant legal rights. Also indicate the client will be filing a divorce complaint in which a request will be made that the PSA will become part of the divorce judgment, meaning that its terms will become as binding on each of them as if the court had ordered them to do what they have agreed to do; and
3. If the attorney is advised that the client's spouse finds the agreement to be acceptable and intends to execute it, neither the attorney nor anyone in his or her office should witness the other party's execution.

After a fully executed copy of the agreement is returned to the attorney's office, if the client requests the attorney file a divorce complaint on his or her behalf, the following must also be done:

1. As with the agreement, the client should not be the courier of the summons and complaint to his or her spouse;
2. The summons, complaint and acknowledgment of service should be sent to the other party by certified and regular mail;
3. Within the accompanying letter the other party must be advised that he or she has a right to review the summons and complaint with counsel of his or her own choosing, and that the attorney does not represent his or her interests. The other party should also be advised that, on behalf of the client, the attorney is asking the court to enter a judgment of divorce and for the agreement to become part of that judgment. The letter should also notify the other party that a default judgment will ultimately be entered against him or her if he or she fails to respond to the complaint within 35 days;
4. When the 35 days expires and the entry of default is sought, a copy of the transmittal letter should be sent to the court, and related documents to the other party by regular and certified mail;
5. When notice is received of the date of the default hearing, a letter should be sent to the other party advising of the hearing date and explaining his or her right to appear and the client's intention to ask the court for a judgment of divorce and a determination that each party be held to the terms of the PSA they previously signed; and

6. Assuming the other party does not appear at the default hearing, a copy of the divorce judgment and fully executed copy of the PSA should be sent to the other party with a letter advising that the parties are now divorced, that the agreement was found to be binding and that both parties will be held to its terms.

Although some of these steps may seem to the client to be unnecessarily time consuming and potentially costly, the client must be made aware of the fact that, at any time, the good will that may then exist with the soon-to-be former spouse can disintegrate. In that event, numerous claims could be made that may cause the agreement and/or the entry of the divorce judgment to become subject to attack. These claims could include allegations of forged signatures; failure to receive documents; lack of understanding of the right to seek representation and attacks on the attorney's independent representation of the client. The client must be persuaded that all of these precautionary steps must be followed.

Conclusion

There can be many valid reasons for clients to seek to limit the role of their attorney. Many do not wish to engage in expensive, protracted or hostile litigation. Some people actually trust each other. Others recognize they will have an ongoing family relationship after their divorce. Still others simply need or want to preserve their financial resources. Limited representation may produce a result that is different from what would have occurred if the parties had engaged in the adversarial process. Conversely, engaging in the litigation process will almost invariably result in greater expense and may not produce a better result for the client.

Attorneys must assess the client's situation and determine what motivates him or her. If the conclusion is that the client has the ability to engage in a knowing and voluntary limitation on the scope of his or her attorney's duties, and it is believed that the client will benefit from the limited representation he or she seeks, then there should be no impediments to that form of representation. In contrast, if the information available at the outset indicates that review alone is not in the client's best interest, the attorney has the choice to either decline the representation altogether or, in appropriate circumstances, undertake the representation after the client signs a document acknowledging the attorney's advice and that he or she is choosing a course of conduct contrary to that advice.

The practice of family law is an art, not a science. A proper exercise of professional judgment will allow practitioners to achieve the delicate balance between providing advice and taking over the client's right to exercise his or her informed decision-making power. ■

Jamie K. Von Ellen and Marc R. Brown are partners in the law firm of Wolkstein, Von Ellen & Brown, LLC located in Springfield.

Endnotes

1. *Estate of Fitzgerald v. Linnus*, 336 N.J. Super. 458 (App. Div. 2001).
2. *Id*. at 470-471.
3. *Smith v. Grayson*, 2011 WL 6304145 (App. Div. 2011).
4. *Lerner v. Laufer*, 359 N.J. Super. 201, 217-218 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
5. *Id*. at 317.
6. *Davin LLC v. Daham*, 329 N.J. Super. 54 (App. Div. 2000).
7. *Id*. at 71-72.
8. *Estate of Albanese v. Lolio*, 393 N.J. Super. 55 (App. Div. 2007).
9. *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003).
10. *Id*. at 476.
11. *Id*. at 477.
12. *Id*. at 476-477.
13. *Id*. at 482.
14. *Id*. at 482-483.

APPENDIX A

Waiver of Information Gathering, Analysis, and/or Exchange

You have advised the law firm that either you intend to or are currently in the process of attempting to resolve all issues related to your separation/divorce through mediation. As a result the law firm, HAS ADVISED YOU THAT YOU HAVE THE RIGHT TO REQUEST A LIMITATION ON THE SCOPE OF OUR REPRESENTATION. Specifically, you are permitted by law to direct the law firm to engage in either limited or no information gathering, analysis, and/or exchange with the other party (parties) to this dispute. By signing this Rider to the Retainer Agreement, you are advising that you choose to limit the law firm's representation in this regard, and unless specifically agreed, *the law firm will comply with your directive*. For example, the law firm will not prepare written questions for the other party (parties) to answer under oath, which are called "Interrogatories"; will *not* take formal and sworn statements from the other party (parties), which are called "Depositions"; will *not* issue Notices to Produce/Inspect/Copy Documents; will not seek formal appraisals of any assets or liabilities that are the subject of this dispute; will *not* retain experts to evaluate the issues in controversy and/or make recommendations within the scope of their expertise as to the resolution of those issues; and will *not* take any other steps, whether formal or informal, to gather, analyze, and/or exchange with the other party (parties) any other and similar types of information.

If you had *not* directed the law firm to limit the scope of representation regarding information gathering, analysis, and/or exchange, as stated above, the law firm ordinarily and customarily would have taken some or all of these steps in the course of representing you. By signing this limitation of representation section of the Retainer Agreement, you are confirming your understanding that your decisions as to whether, when and how to settle your case and as to economic and other positions to be taken with respect to issues in the case, will be less than fully informed. You have made the decision to give up information gathering, analysis and/or exchange with the other party (parties) freely and voluntarily without coercion, undue pressure or undue influence having been applied by anyone, including the law firm.

You specifically acknowledge to the law firm, and, if required, will later acknowledge to a Judge of the Superior Court, that without such full information gathering, analysis, and/or exchange with the other party (parties), the law firm IS NOT IN A POSITION TO ADVISE YOU WHETHER OR NOT ANY SETTLEMENTS REACHED IN THIS NEGOTIATION PROCESS ARE FAIR TO YOU OR IN YOUR OWN BEST INTERESTS.

You are willing to fully accept the risks of such information nondisclosure, which, in fact, could produce an agreement that is different from and less beneficial to you than a judge might have ordered in your case after a full hearing based full information or what could have been negotiated on your behalf based on full information.

You specifically affirm that you have been advised of the risks you are taking, both known and unknown, in proceeding with negotiations upon less than full information. You also specifically affirm that your decision to so proceed was made in good faith and neither with the purpose nor with the effect of defrauding a party (or parties) to this negotiation nor of defrauding the state or federal tax authorities.

You also affirm that you are over the age of 18 and of sound mind, that your waiver of information gathering, analysis, and/or exchange with the other party (parties) will not jeopardize the best interests of your child(ren) and that no other known public policy interests will be adversely affected by such information waiver.

If, at any time, you decide to change your mind about engaging in information gathering, analysis, and/or exchange with the other party (parties), or if your circumstances should change, such that any of the foregoing representations made by you are no longer accurate, then you understand and agree that you are obligated to and will, in fact, so notify the law firm promptly and in writing. You further understand and agree that the law firm is entitled to and does rely upon the accuracy of the foregoing representations and any future representations made by you on these important issues.

In the event you determine either on your own or based on our advice that information gathering, analysis and/or exchange with the other party is to be performed by us on your behalf, you understand that a further retainer (in an amount to be set based on the anticipated work to be performed) will be required. You acknowledge that this waiver specifically modifies the attached Agreement to provide legal services.

Consented and Agreed to by the Parties:

_____ Dated:

_____ Dated:

_____ Dated:

APPENDIX B

It has been explained to both parties that customarily in the course of matrimonial matters such as this, detailed financial investigation is conducted by the parties and their attorneys. This investigation may include, but is not limited to, the submission of written financial questions or Interrogatories, the taking of oral testimony or depositions, evaluations of assets, and the filing of financial statements or Case Information Statements. In this particular instance, due to the sufficiency of knowledge of the parties, and representations made by the other during settlement negotiations and otherwise and after consultation with their respective attorneys, the parties do not wish to engage in the further emotional and financial expenditure that such an investigation would require. Each party represents that he and she have made full disclosure of all assets acquired individually or jointly during the marriage, and each understands that the other party is relying on those representations for the purposes of settlement. Accordingly, each party by his and her signature below indicates his and her satisfaction that there have been a sufficiency of discovery and a sufficiency of understanding of the assets and income sources available in this matter. On that basis, each party is entering into this Agreement voluntarily, freely and under no pressure whatsoever. Each party acknowledges that he or she has been advised of his or her rights to and has had a full opportunity to pursue such formal discovery. Notwithstanding the lack of additional discovery in this matter, each party acknowledges that he or she is willing to execute the within Agreement.

APPENDIX C

The parties acknowledge that they are aware that the within Agreement is a legal document with an important legal significance and consequence and that prior to signing the same, they should consult an attorney-at-law. The parties further acknowledge that the wife has consulted an attorney prior to signing and has been fully advised by her counsel as to the nature and effect of this Agreement. The husband has not consulted an attorney and hereby waives, relinquishes and releases any and all rights which he may or may not have to raise lack of legal advice or his lack of knowledge of the terms, nature and effect of this Agreement as a defense in the enforcement of the same. The wife/husband has been represented in this matter by _____, and the wife/husband is hereby advised to seek legal representation. The parties further acknowledge that they have read the within Agreement in its entirety, understand the nature and effect of this Agreement and believe the terms of this Agreement to be fair, reasonable and equitable under the circumstances. Each party further represents this Agreement has been entered into voluntarily and is not the result of any undue influence. The parties acknowledge this Agreement constitutes the entire Agreement between the parties, and there have been no oral promises or representations to induce its execution and that neither party is relying upon any promises or inducements for the execution hereof, not expressly or specifically set forth herein.

MESPs Uncovered

by Megan M. Murray and Kimber L. Gallo

Family law practitioners in New Jersey know all too well that the procedures for matrimonial early settlement panels (MESPs)[1] vary greatly across the state's 21 counties. As a result, when practitioners have to appear for a MESP in a county where they do not regularly appear, they often find themselves scrambling to find out the answers to questions such as: "Where do I report?"; "Do I have to submit a memorandum in advance?"; and "What happens after the panel?". The following article, based on research,[2] provides the basic procedures and expectations for the MESP in each county.

ATLANTIC COUNTY

ESP coordinator's name and phone number: Michael Pyle, 609-594-3927

Where to report when you get to the courthouse: Proceed to Judge Light's courtroom on the 3rd floor on the 'old' side of the courthouse.

What submissions to bring and when they are due: Attorneys are expected to bring an early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, with an attached copy of the party's case information statement.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge will assign each case to a panel and give the litigants a speech about the MESP process and the advantages of settling their case. Panelists generally take the cases as they appear on the calendar list. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel back to provide their recommendation.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the attorneys must go back to the courtroom of the judge assigned to the case to get the next court date. If the judge assigned to the case has time on the calendar, he or she will often speak with the attorneys to see whether the judge can assist in helping to resolve any outstanding issues.

BERGEN COUNTY

ESP coordinator's name and phone number: The team leader for the judge assigned to the case serves as the MESP coordinator.

Where to report when you get to the courthouse: Report to the courtroom of the judge assigned to your case.

What submissions to bring and when they are due: Attorneys are expected to submit to the panelists and the adversary, seven days prior to the MESP, an updated case information statement of the party and a written settlement proposal. The proposal must include supporting factual data and/or expert reports. If child support is an issue, counsel must provide a proposed completed child support guidelines worksheet. Sanctions may be imposed for failure to submit the required information to the panelists within the noted timeframe. Faxes are not permitted.

Number of panelists: The panel consists of three panelists.

Procedure for the panel: After the calendar call, the judge will assign each ready case to a panel and give the litigants a speech about the MESP process and the advantages of settling their case. The panelists will meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide their recommendation.

What happens after the panel: If the case settles, the attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the attorneys will receive an order for economic mediation. The judge may elect to do a case management conference with counsel after the panel.

BURLINGTON COUNTY

ESP coordinator's name and phone number: Rose Bobbitt, 609-518-2690

Where to report when you get to the courthouse: Report to main desk on the 5th floor of the courthouse. Attorneys will wait to be called by the panel assigned to their case, and clients will be called into the courtroom of the judge assigned to their case for the MESP procedure speech.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary five days prior to the assigned MESP date. Failure to submit this memorandum in a timely manner can result in sanctions.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: The judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panel will decide in which order to take each case. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel back to provide a written recommendation for settlement. The written recommendation for settlement is sealed and placed in the court's file.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the attorneys must go back to the courtroom of the judge assigned to the case to get the next court date.

CAMDEN COUNTY

ESP coordinator's name and phone number: Kelli Bolinski, 856-379-2200, ext. 3628

Where to report when you get to the courthouse: Report to courtroom 21 at 8:45 a.m. for the MESP procedure speech.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary five days prior to the assigned MESP date. The memorandum should have attached to it a copy of the case information statement for that party and any other documents that will be of assistance to the panel.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge will assign each ready case to a panel and give the litigants a speech about the MESP process and the advantages of settling their case. The panels are held on the 4th floor. Only attorneys are allowed to appear before the panelists, not litigants. The only exception is for *pro se* litigants. Panelists have the discretion to bring parties in if they have specific questions, but this is not a typical occurrence. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel back to provide their recommendation.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the judge will have a case management conference and issue a scheduling order for the next court appearance, which includes initial trial dates. Camden does not have a mandatory post-MESP economic mediation. The parties can agree to request it.

CAPE MAY COUNTY

ESP coordinator's name and phone number: Edie Filachek, 609-463-6607. Edie Filachek is the MESP court representative; however, the scheduling of panelists is handled by Lisa Radell, Esq., 609-465-9910.

Where to report when you get to the courthouse: Report to Judge Rauh's courtroom on the 2nd floor.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary on the assigned MESP date. There are no required attachments to the submission.

Number of panelists: The panel consists of two or three panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panelists will call the cases in no particular order. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The

panelists then confer privately before calling counsel back to provide their recommendation.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the judge will assign a trial date or settlement conference.

CUMBERLAND COUNTY

ESP coordinator's name and phone number: Judge Telsey's (A-F) coordinator is Donna Bonner, 856-453-4548; Judge Johnson's (G-Z) is Dawn Guth, 856-453-4526

Where to report when you get to the courthouse: Report to the courtroom of the judge assigned to your case.

What submissions to bring and when they are due: an early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary on the Friday before the scheduled MESP date. There are no required attachments to the submission.

Number of panelists: The panel consists of three panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. After the speech, the attorneys will let the panelists know when they are ready to panel and wait to be called. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel back to provide a written recommendation for settlement. Panelists have the discretion to bring parties in if they have specific questions, but this is not a typical occurrence.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the judge will issue a scheduling order assigning a trial date or settlement conference.

ESSEX COUNTY

ESP coordinator's name and phone number: Carmen Picon-Giron, 973-693-6708

Where to report when you get to the courthouse: Report to the 10th floor of the courthouse, courtroom 12.

What submissions to bring and when they are due: Attorneys must submit to the panelists and their adversary (with a copy of the cover letter to the MESP coordinator), five days prior to the MESP the following materials: statement of outstanding issues, statement of client's position and draft of PSA, update case information statement, copy of case management order, complete child support guidelines worksheet and custody/parenting time consent order.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. After the speech, the panels are directed to the conference room, and attorneys will wait to be called by the panel. A discovery needs form must be completed by the attorneys. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide a recommendation for settlement.

What happens after the panel: Report back to the early settlement panel coordinator. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge assigned to that case. If the case is not settled, an order will be issued by the ESP coordinator for economic mediation and a case management conference.

GLOUCESTER COUNTY

ESP coordinator's name and phone number: Allison Massaro, 856-686-7466

Where to report when you get to the courthouse: Report to the judge assigned to the case.

What submissions to bring and when they are due: Attorneys must submit to the panelists and their adversary, by noon on the Monday prior to the scheduled MESP date, an Early settlement panel memorandum setting forth basic case information, including the income, assets, and debts of the parties.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. When ready to have the case paneled, the attorneys will advise

the panel. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel back to provide a written recommendation for settlement. Panelists have the discretion to bring parties in if they have specific questions, but this is not a typical occurrence.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement. If the case is not settled, the judge will issue a scheduling order assigning a trial date or settlement conference.

HUDSON COUNTY

ESP coordinator's name and phone number: Michelle Meese, 201-217-5235

Where to report when you get to the courthouse: Report to 595 Newark Avenue, 2nd Floor, Room 209.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary five days prior to the assigned MESP date. The memorandum should have attached to it the case information statement for that party and any other documents that will be of assistance to the panel.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the ESP coordinator gives the litigants a speech about the MESP process. Litigants also view a video presentation, outlining the procedures and benefits of the program. After the speech, the panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide a recommendation for settlement.

What happens after the panel: Report back to the judge assigned to the case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge assigned to that case. If the case is not settled, the attorneys will have a conference with the judge, and a scheduling order will be issued.

HUNTERDON COUNTY

ESP coordinator's name and phone number: Kathy Stine, 908-237-5927

Where to report when you get to the courthouse: Report to Judge Mawla's courtroom on the 2nd floor.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary (with a copy of the cover letter to the MESP coordinator). The memorandum must be provided to the adversary five days prior to the assigned MESP date. The memorandum is provided to the panelists on the day of the MESP. The memorandum should have attached to it the case information statement for that party.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. After the speech, the attorneys should submit their MESP memorandum to the panelists assigned to their case and wait to be called. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide a recommendation for settlement.

What happens after the panel: Report back to the judge. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, the judge may elect to have a conference with counsel. A scheduling order will be issued for mandatory economic mediation.

MERCER COUNTY

ESP coordinator's name and phone number: Dee Tatum, 609-571-4398

Where to report when you get to the courthouse: Report to Judge Fitzpatrick's courtroom on the 4th floor.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, should be submitted to the panelists and the adversary prior to the date of the panel (usually one to two days prior).

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panelists meet with the attorneys for both parties first, and the attorney for each party is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and parties back to provide a written recommendation for settlement.

What happens after the panel: Report back to the ESP coordinator. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, the attorneys will meet with the ESP coordinator to schedule economic mediation and then meet with the judge to schedule trial.

MIDDLESEX COUNTY

ESP coordinator's name and phone number: Leonard R. Busch, Esq., 732-821-2300

Where to report when you get to the courthouse: Report to Judge Venezia's courtroom.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary on the date of the panel. A case information statement for the party should be attached to the memorandum.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. After the speech, the attorneys should submit their MESP memorandum to the panelists assigned to their case and wait to be called. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide a recommendation for settlement.

What happens after the panel: Report back to the judge. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, the judge may elect to have a conference with counsel. A scheduling order will be issued for mandatory economic mediation. The scheduling order will also include trial dates.

MONMOUTH COUNTY

ESP coordinator's name and phone number: Erich Schneider, Esq., 732-264-6000

Where to report when you get to the courthouse: Report to the judge assigned to your case.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary seven days prior to the scheduled MESP date. A copy of the case information statement for that party should be attached to the memorandum.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. Attorneys should submit their MESP memorandum to the panelists assigned to their case and wait to be called. The panelists meet with the attorneys for both parties first, although some panelists elect to meet with both counsel and the attorneys for the parties. At that time, each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide a recommendation for settlement.

What happens after the panel: Report back to the judge. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, counsel will be provided a scheduling order with a date for economic mediation and an intensive settlement conference.

MORRIS COUNTY

ESP coordinator's name and phone number: Eileen D'Uva, 973-656-4309 and Helaria Mensah, 973-656-4310

Where to report when you get to the courthouse: Report to Judge Wright's courtroom for the call. If Judge Wright is unavailable Judge Enright will do the call.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted

to the panelists and the adversary (with a copy of the cover letter to the MESP coordinator) 10 days prior to the scheduled MESP date. As a matter of practice, most panelists are ok if submissions are received by the Friday before the MESP date.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call and the judge confirms that the panelists have received submissions for each case, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panels sit in separate rooms on the 4th floor of the administration building next door to the courthouse. Cases are taken on a first come/first serve basis. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide recommendations for settlement.

What happens after the panel: Report back to the judge who is assigned to your case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, counsel will receive an order for economic mediation. No one is allowed to leave until an economic mediator has been selected.

OCEAN COUNTY

ESP coordinator's name and phone number: Judy Holmes, 732-506-5086

Where to report when you get to the courthouse: Report to the courtroom of the judge who is assigned to the case. Follow up with the ESP coordinator for assignment to a panel.

What submissions to bring and when they are due: A case profile form and/or an early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, as well a CIS filed within the past six months must be submitted to the panelists and the adversary, 10 days prior to the scheduled MESP date. As a matter of practice, most attorneys bring their submissions with them on the day of the ESP or send them a few days prior. Faxing submissions is disfavored.

Number of panelists: The panel consists of one panelist, who can be an attorney or an accountant.

Procedure for the panel: After the calendar call, the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panelist meets with the attorneys for both parties first and each party's respective attorney is given time to present the case of his or her client to the panel. The panelist confers privately before calling counsel and the parties back to provide recommendations for settlement. The panelist may spend substantial time on one case. It is not limited to 15-30 minutes, which can make the ESP much more effective.

What happens after the panel: Report back to the ESP coordinator with the court's file. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, counsel will receive an order for economic mediation and be required to conference with the assigned judge who may schedule a subsequent case management conference, a pre-trial conference or a trial date.

PASSAIC COUNTY

ESP coordinator's name and phone number: Barbara Danko, 973-247-8516, or call Judge Selser's Chambers (Liz Coyle), 973-247-8587

Where to report when you get to the courthouse: Report to the 9th floor of the Passaic County Administration Building (401 Grand Street, Paterson), and wait for Judge Selser to call the calendar.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, as well a copy of the CIS and copies of any *pendente lite* orders must be submitted to the panelists and the adversary, seven days prior to the scheduled MESP date.

Number of panelists: The panel consists of three panelists. There are two panels every Wednesday (except for the months of July and August, when there are no panels.

Procedure for the panel: After the calendar call, Judge Selser gives the litigants a speech about the MESP process and the advantages of settling their case. The panelist meets with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelist confers privately before calling counsel and the parties back to provide recommendations for settlement and answer any questions.

What happens after the panel: Report back to Liz Coyle (Judge Selser's secretary). If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, counsel will receive an order for mandatory economic mediation and be required to go to the 8th floor and see staff, to select a mediator who is contacted by the staff, and a date and time for the first mediation is scheduled and included in the order. The order also contains date for a telephonic case management conference, so the court can be advised of the progress of economic mediation.

SALEM COUNTY

ESP coordinator's name and phone number: Judy Pangburn in family intake, 856-935-7510.

She is the MESP court representative; however, the scheduling of panelists is handled by Noranne Stradley, Esq., 856-935-4500.

Where to report when you get to the courthouse: Report to the judge's courtroom (Courtroom #5 on the main floor).

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and to the adversary five days in advance of the scheduled MESP date. Requests can be made to the panelists and the adversary for late submissions for good cause.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panels sit in the arbitration room (which is in the basement of the courthouse). Cases are taken on a first come/first serve basis. The panelists meet with the attorneys for both parties first, and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel back to provide recommendations for settlement.

What happens after the panel: Report back to the judge's secretary. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, the judge may elect to have a conference with the attorneys and a scheduling order may be issued.

SOMERSET COUNTY

ESP coordinator's name and phone number: Michelle DiGuilio, CSSI, 908-231-7673

Where to report when you get to the courthouse: Report to the courtroom of Judge Goodzeit (Room 302, 3rd Floor).

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, and an updated case information statement must be submitted to the ESP coordinator and your adversary five days prior to the scheduled MESP date.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panelists meet with the attorneys for both parties first and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide recommendations for settlement.

What happens after the panel: Report back to the judge assigned to your case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, the judge may elect to have a conference with the attorneys and an order will be issued scheduling the matter for mandatory economic mediation.

SUSSEX COUNTY

ESP coordinator's name and phone number: Melissa Conklin, 973-579-0704

Where to report when you get to the courthouse: Report to Judge Farber's courtroom (Courtroom 1, 2nd Floor).

What submissions do you need to bring and when are they due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, and a copy of the party's case information statement must be submitted to the panelists and the adversary (with a copy of the cover letter to the MESP coordinator), five days in advance of the assigned MESP date.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panelists meet with the attorneys for both parties first and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and parties back to provide recommendations for settlement.

What happens after the panel: Report back to the judge assigned to your case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, attorneys submit a case management order and will receive a scheduling order for economic mediation with a date for mandatory economic mediation and an intensive settlement conference. At the intensive settlement conference, the court will enter an order setting trial dates.

UNION COUNTY

ESP coordinator's name and phone number: Donna Madrigal, 908-659-4737

Where to report when you get to the courthouse: Report to Judge Walsh's courtroom (3rd Floor Rotunda).

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties, must be submitted to the panelists and the adversary one week prior to the assigned MESP date. The Memorandum should have attached to it the case information statement for that party and any other documents which will be of assistance to the panel. Submissions submitted by email must be received within 72 hours prior to the scheduled ESP date.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call the judge gives the litigants a speech about the MESP process and the advantages of settling their case. The panelists meet with the attorneys for both parties first and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and parties back to provide recommendations for settlement.

What happens after the panel: Report back to the judge assigned to your case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, you will receive a scheduling order with a date for mandatory economic mediation and a post-mediation conference.

WARREN COUNTY

ESP coordinator's name and phone number: Kathy Metz, CSS1, 908-475-6163

Where to report when you get to the courthouse: Report to Courtroom #4 (2nd Floor) at 8:30 a.m.

What submissions to bring and when they are due: An early settlement panel memorandum, setting forth basic case information, including the income, assets, and debts of the parties and an updated case information statement, must be submitted to the ESP coordinator and your adversary at least five days prior to the scheduled MESP date.

Number of panelists: The panel consists of two panelists.

Procedure for the panel: After the calendar call the judge assigns the cases to a panel and gives the litigants a speech about the MESP process and the advantages of settling their case. The panelists meet with the attorneys for both parties first and each party's respective attorney is given time to present the case of his or her client to the panel. The panelists then confer privately before calling counsel and the parties back to provide recommendations for settlement.

What happens after the panel: Report back to the judge assigned to your case. If the case is settled, attorneys can elect to put the terms of the settlement on the record and put the divorce through as a final settlement before the judge. If the case is not settled, you will receive a scheduling order with a date for mandatory economic mediation and a date for an intensive settlement conference. ■

Megan S. Murray is the senior associate at Paone, Zaleski & Brown, where she practices matrimonial law. Kimber Gallo practices family law at Skoloff & Wolfe, P.C.

Endnotes

1. R. 5:5-5.
2. Special thanks to all of the court staff and attorneys who provided information for this article.

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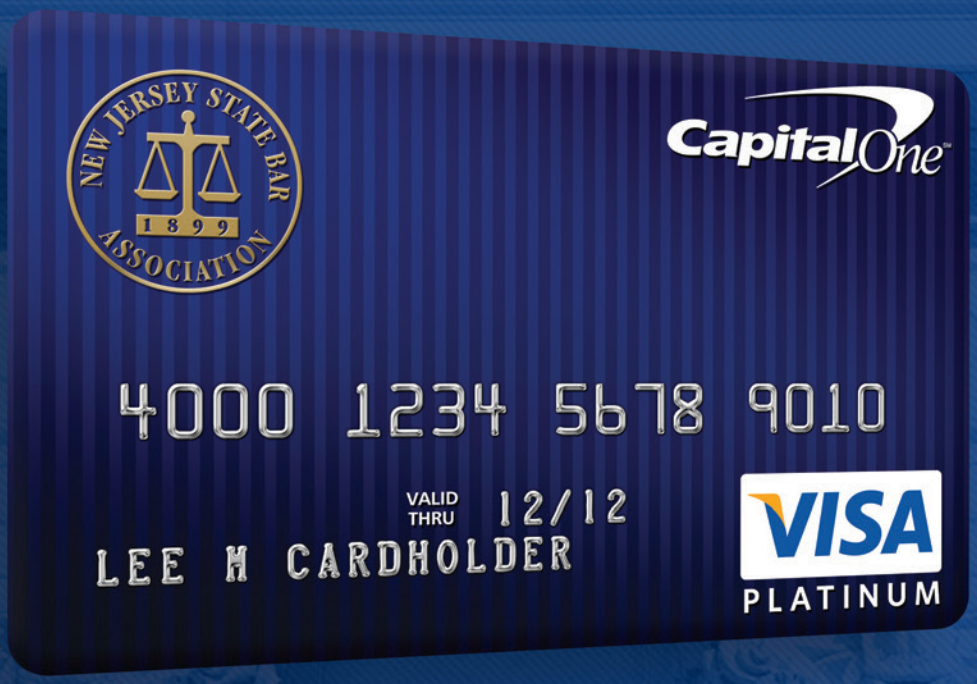

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