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It Takes Too Long and It Costs Too Much

A Critical Review of Best Practices and Recommendations for Improvement of Dissolution Practice

On April 9, 1996, the Supreme Court created the Special Committee on Matrimonial Litigation; the Court chose as its chairs Linda R. Feinberg, A.J.S.C., and Lee Hymerling, Esq. and the committee itself included judges, attorneys and non-attorneys. The committee was to review the practice of family law—from the administration of the family court to the practice of family law by attorneys—and make recommendations for its improvement. The areas the committee sought to review included: ethics and non-fee issues; fees; case processing; motions and custody issues.[1] The committee held four extensive public hearings—in Newark, Trenton, Cherry Hill and Teaneck—and took testimony from lawyers and the public at large at these hearings.

According to the final report of the committee, issued on Feb. 4, 1998:

> A common theme that resounded throughout much of the testimony was that the process of divorce took too long and cost too much. A further theme was that the system could be improved were various procedural initiatives to be undertaken and were a greater commitment of resources to be made to assure the prompt resolution of matrimonial matters.[2]

In its introduction, the committee noted the "extreme demands" placed upon family part judges, and noted the following for the court year ending 1997: "As to a comparison of the number of cases handled by each judge in each division, for court year 1997 on average, each Criminal Division judge handled 500 cases, each Civil Division judge 1,059 cases, and each Family Part judge 3,820."[3]

The committee also noted:

> The demands and stress that Family Part judges must accept make understandable why the Family Part experiences so much judicial turnover. While relatively few judges represent the core of the Family Part serving for as many as ten or more years, the Family Part service of most rarely exceeds three years. Often, assignment to the Family Part comes as a judge's first judicial assignment. Family Part judges hesitate to serve in the years immediately preceding tenure hearings. Each of these factors has an impact upon the way the Family Part functions and how its work is perceived by a skeptical public.[4]

The result of nearly two years of work, the final report was issued by the committee on Feb. 4, 1998. The report contained 54 separate recommendations, most of which would be the framework for rule changes that became effective on April 5, 1999, more commonly known as best practices. The report itself was quite impressive and, without question, thoroughly addressed the issues that were facing the family part at the time.

The path toward a more efficient and more effective family part—and family law practice—was in sight. For the first few years of best practices, there was improvement—backlogs were reduced, counsel fees were more commonly awarded by courts, statewide procedures began replacing local practice, and the process of getting divorced seemed to be getting easier and more efficient. This was due to a commitment by bench and bar alike to move cases more efficiently and, to the extent possible, to streamline discovery.

Equally important, many attorneys were choosing *not* to enter the court system immediately. For example, in lieu of an immediate filing of a complaint for divorce, cases were commenced informally; parties and counsel agreed to exchange case information statements and basic discovery without the need for the filing of a complaint. Once these basic documents were exchanged, parties and counsel met to discuss how best to proceed, in essence holding their own case

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management conferences and setting dates for the matter to proceed. Unless and until relief from the court was required by a party, the matter proceeded without any court involvement at all.

Unfortunately, despite early signs of success, some 12 years after the implementation of best practices, it once again seems that it takes too long and, it could be argued, costs even more. Frankly, if there were to be a new mantra it would likely be 'hurry up and wait' and, by the way, it still costs too much. It would be easy to outline the criticisms of current dissolution practice: significant backlogs, a merry-go-round of judges in and out of the family part, significant issues with payment and collection of fees, and lack of 'face time' with judges, just to name a few.

The goal of this issue of *New Jersey Family Lawyer* is not to focus on those criticisms. Rather, these articles will not only outline some of the issues that presently plague the family part, and family law practice in general, but will make recommendations to improve the current state of this practice—to build upon the laudatory goals and accomplishments of the committee and its predecessors.

For this issue of the publication, the following areas of dissolution practice will be reviewed extensively: case management/tracking, motions, trial dates, and counsel fees. In future issues, non-dissolution, domestic violence and children in court will be given similar treatment.

ACKNOWLEDGEMENTS

This issue of the *Family Lawyer* is yet another product of the collaboration of bench and bar. First, the board wishes to thank Harry Cassidy, assistant director of the Administrative Office of the Courts, Family Practice Division. Harry was kind enough to provide statistical (and anecdotal) information, some of which is noted within the various articles and columns published herein. Harry is a true friend of the family lawyer and is committed to improving the family part. Next, the board thanks Robert A. Fall, J.A.D. (ret.). His historical perspective and insight is only partly captured in the wonderful foreward of this issue. Judge Fall has always been a champion of and for the family part; his opinions have helped shape the law as we know it. He is a wealth of information and knowledge, and he has been kind enough to share that with us.

We must recognize and thank the judges of the family part. As noted by Judge Fall in the foreward to this issue, sitting in the family part is the hardest assignment in the courthouse. Family part judges must not only hear the matter, make factual findings and reach legal conclusions to support their decisions, they must also fully explain why that decision was made. Further, the sheer volume of decisions required to be made in the family part by far eclipses those to be made in the other divisions. There is no additional compensation for this extra work. Perhaps most importantly, there can be little doubt that emotions run very high in the family part among not only the litigants, but as expressed by their attorneys, making the cases very personal, which can be emotionally and physically draining for a judge, especially one unfamiliar or uncomfortable with the interpersonal dynamics of family disputes. The bench should know that the bar understands and acknowledges these pressures.

Last, the editorial board acknowledges the efforts of family attorneys throughout the state. We regularly offer our time and energy to improve our practice. Our efforts include participating as early settlement panelists, blue ribbon panelists, mediators, family law section (state and local) committee members and *pro bono* counsel—all offered free of charge. As the budget of the Judiciary shrinks—along with its resources—we will be called upon to increase our efforts in order to provide our clients with efficient and effective resolution of their matters. ■

ENDNOTES

1. Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, Final Report, Feb. 4, 1998, p. 14. Editor's Note: All references to page numbers for the final report corroborate with the report as it appears in Gary Skoloff and Lawrence Cutler, *New Jersey Family Law Practice*, Historical Documents Volume, Appendix G.
2. *Id.*
3. *Id.*
4. *Id*. at p. 15.

EDITOR-IN-CHIEF'S COLUMN

Fiscal Responsibility of Litigants

An Effective Tool Underutilized By the Family Part

by Charles F. Vuotto Jr.

As is evident from the other columns and articles contained within this issue, the family part in virtually every vicinage in the state is approaching a crisis situation with regard to a burgeoning docket in the face of declining judicial resources. There is, however, an effective tool that is underutilized by many judges sitting in the family part. That tool relates to fiscal responsibility on the part of litigants for the decisions they make in their cases. In other words, if litigants were consistently required to pay the reasonable fees of their professionals as the case proceeds, most would temper the decisions that cause their case to become protracted and often spiral out of control.

The issue of counsel fees was addressed in the final report issued by the Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, on Feb. 4, 1998.[1] The final report contained recommendation number three, which proposed a rule amendment to authorize the family part to direct the liquidation, encumbrance or hypothecation of assets to provide the litigants, where equities warrant, a source of resources to fund the litigation.[2] Recommendation number five proposed a rule amendment to specifically authorize the family part to permit counsel to withdraw from representation in the event that a client fails to abide by the terms of the retainer agreement. The latter recommendation specifically noted that the holding in *Kriegsman v. Kriegsman* should be relaxed.[3]

The aforementioned recommendation number three was essentially adopted by the revisions to Rule 4:42-9(a)(1). Recommendation number five was not adopted by rule amendment or changes in decisional law. More importantly, the implementation of recommendation number three in conjunction with no adoption of recommendation number five has had a material impact on judicial backlog.

The concept is very simple. When a litigant sees his or her income and/or assets being depleted to fuel irrational or unsupported positions, vendettas, emotional tirades or other bad faith litigation practices, he or she (in most cases) will likely make better choices. Those better choices will reduce the number of *pendente lite* motions and trials, which will in turn lessen the burden upon our courts. Further, when a payor-spouse fails to meet his or her court-ordered obligations, he or she should be assessed with fees on a consistent basis. When a party engages in obstructionist discovery tactics, that party should be required to reimburse the other party for all fees associated with enforcement motions *and* the additional time spent by the non-offending party in obtaining the discovery from other sources.

Therefore, there are two essential ways in which our family part judges can directly impact the burden upon the courts: 1) make litigants responsible for their reasonable professional fees, and 2) consistently shift the fees to offending litigants.

Although the committee's recommendations and the clear intent of the amendments to Rule 5:3-5 were to give the family part judges sufficient authority to accomplish these goals, their actual implementation has been underwhelming. The lack of an assiduous and consistent application of these tools has had a negative impact on the backlog of the family part, and further drains dwindling judicial resources. Litigants must have a true stake in the case in order for them to put emotions aside and be motivated to resolve their matter in a reasonable fashion. Implementation of the two approaches stated above will motivate clients to act reasonably in the manner in which they direct their professionals.

Often the courts blame the extent of litigation on the attorneys when, in fact, it is the clients who are directing the ship. It is the clients who must be motivated to act reasonably. If these recommendations, along with those contained

within the conclusion of the excellent article authored by Jennifer Millner of Fox Rothschild, LLP found within this issue of *New Jersey Family Lawyer*, are followed, it will have a profound impact on reducing the family part backlog.

ENDNOTES

1. Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, Final Report, Feb. 4, 1998, p.28. (Editor's Note: All references to page numbers for the final report coincide with the report as it appears in Gary Skoloff and Lawrence Cutler, *New Jersey Family Law Practice,* Historical documents Volume, Appendix G.)
2. *Id*. at p.29.
3. *Id.*

Foreward

by Hon. Robert A. Fall, J.A.D. (retired)

In order to understand the context of the various articles included in this issue, and the implementation of best practices in general, a brief history is necessary. I consider the history important because it demonstrates the vision of how good-thinking professionals believed the family part should work, and places into context the fact that this vision has unfortunately failed to take hold in practice. It is my view that the failure to adhere to and implement the principles upon which that vision was based is the major reason for the current state of the system, as applied to dissolution cases. In my view, this has collectively resulted in a situation where it takes too long and costs too much to obtain a divorce in New Jersey when the parties have legitimate issues requiring adjudication. One result of this failure is the ever-increasing (over)reliance by practitioners and litigants on privately retained mediators and arbitrators, in order to resolve cases.

In December 1983, the Administrative Office of the Courts issued a report titled *Family Part Operations and Organization*, dealing with organizational and operational matters as a prelude to the commencement of the family part system. In October 1984, the Supreme Court formed the Family Division Liaison Committee, whose function was to evaluate the operation of the family part.After nearly two years of extensive review, that committee issued a report in June 1986—coincidentally, the month I began my assignment as a family part judge. I remember the report well; I read it thoroughly because I had never, in my career as a lawyer, handled family cases.

Among the notable recommendations made by that committee, three stand out as being still worthy of discussion some 25 years later:

1) there should be multi-year judicial assignments in the family part;
2) there should be well-qualified judges assigned to the family part; and
3) there should be continuous trials in dissolution cases.

As history has demonstrated, some vicinages marginally adhered to these recommendations, while many viewed judicial assignments to the family part as a place where newly appointed superior court judges, with or without attorney experience in family cases, should start their judicial career. There were several reasons for the evolution of that practice.

First, and perhaps foremost, judicial assignments to the family part were not viewed favorably by most judges and, as such, when a new judge was appointed in a vicinage, there was a clamoring—lobbying even—by some judges sitting in the family part to be re-assigned to another division.

Next, having sat in the family part I know firsthand that it is the hardest assignment. Unlike most civil and criminal judicial assignments, family part judges must not only hear the matter, make factual findings and reach legal conclusions to support their decisions, they must also fully explain why that decision was made. In other words, in the other divisions a jury often makes the ultimate decision, without being required to provide an explanation for it; there is no such luxury in the family part. Similarly, the sheer volume of decisions required to be made in the family part by far eclipses those to be made in the other divisions. Despite the additional work, family part judges receive nothing extra, monetarily wise or benefit-wise, for clearly working harder than their colleagues.

Additionally, emotions run very high in the family part among not only the litigants, but as expressed by their attorneys, making the cases very personal and, quite frankly, emotionally and physically draining for a judge, especially one unfamiliar or uncomfortable with the interpersonal dynamics of family disputes. The strain, for example, of agonizing over a custodial or parenting-time decision is an extremely exhausting experience for a judge.

Further, many assignment judges have believed that in order for a superior court judge to be well-rounded, they should be rotated regularly among the civil, criminal and family divisions. There is, of course, some merit to that approach. Parenthetically, the regular-rotation system also provides a vehicle to re-assign judges when experience clearly demonstrates that a particular judge is, for one reason or another, not well-suited to a family part assignment. Of course, in such circumstances the damage to the litigants, and the integrity of the system may have already been done. As noted in the *Pathfinders Report*, discussed *infra*, there are recognizable criteria for determin-

ing, in advance, the suitability of a judge for a family part assignment.

Lastly, the evolution of special interest groups in family part cases, aided by the recognition given to them by some members of the executive and legislative branches, provided widespread support for the notion among judges that it was not necessarily wise to be an untenured judge sitting in the family part at or near the time of consideration for a tenure appointment. The special interest groups that I can recall who aggressively lobbied, sometimes successfully, against the tenure appointment of some family part judges included the fathers' rights groups and the parents'/children's rights groups.

Cases involving a parent's access to one's child, tempered by the duty of the court to protect children from harm (physical, psychological or otherwise) are extremely visceral and volatile in nature. Again, the cases being heard and decided by family part judges are often very 'personal' in nature, sometimes evoking 'explosive' reactions by litigants or one of the special interest groups. Thus, many judges were concerned, sometimes rightly so, with their ability to secure tenure.

Notwithstanding the above, it bears noting that many judges have successfully lobbied to remain in the family part because they believe it to be challenging and, from a societal perspective, sitting in the family part constitutes the most important work in the Judiciary. An assignment in the family part can be extremely rewarding, as it provides an opportunity to assist litigants and children through, perhaps, the most difficult time in their lives.

The family part was, by constitutional amendment, formed on Jan. 1, 1984. Less than three years later, in August 1986, Chief Justice Robert Wilentz formed the Pathfinders Committee, which would be the first comprehensive review of the family part in operation. Chaired by the Honorable Robert W. Page, the committee issued its *Pathfinders Committee Report* in 1989.

Among other issues, the Pathfinders Committee discussed with disfavor the practice of assigning newly appointed judges to the family part as a matter of routine. The committee also advocated the assignment of qualified, sensitive and well-trained judges to the family part, stating:

> The personal attributes of Family Part judges are critical. The judges must be learned both in the law and behavioral sciences, and able to apply them to complex factual situations. They must be sensitive to the needs of persons and families in crisis and understanding of social mores and community standards. A Family Part judge needs physical and mental energy, confidence, patience, and an accepting, sympathetic and open mind. A sense of proportion in analyzing and resolving disputes, together with the ability to communicate decisions clearly and articulately, is indispensable. Most importantly, Family Part judges must have a personal gyroscope which enables them to stay level and adhere to Kipling's admonition to "keep your head when all about you are losing theirs."
>
> Even with training, some judges will never have these attributes. It is incumbent upon the assignment judges and the Chief Justice to carefully evaluate persons whom they are considering for recommendation and assignment to the Family Part. Modes of assessing such qualities should be considered when appropriate.
>
> To grasp the significance of the issues presented and understand the programs available, a judge should be assigned to the family Part for a significant period. Three years appears to be an absolute minimum term.
>
> In the past, the Family Part has suffered by the lack of assignment of quality and experienced judges. Through rotation of experienced judges into the Family Part, the court will become more vibrant and effective. Generally, experienced judges who wish to remain in the family Part should be permitted to do so.
>
> The Family Part needs more judges. Family Part judges need more time to handle the cases that come before them....Every judge and attorney who expressed an opinion to the Committee concerning comparable workloads between serving in the Family Part and other divisions stated emphatically that the Family Part involved more stress and greater pressure on the judges.[1]

The *Pathfinders Report* also set forth specific criteria for determining whether there were enough family part judges assigned in a particular vicinage to handle the caseloads, including a recommendation for "floating judges" to bridge the gap.[2] The report made several other recommendations, including, but not limited to:

- establishing case disposition time goals;[3]
- maintaining a close bench-bar relationship to monitor the progress of the family part in meeting its established goals;[4]
- effective case management system for dissolution cases;[5]
- continuous trials must be required in all dissolution matters.[6]

In summary, I cannot over-emphasize the comprehensive breadth of the analysis and recommendations contained in the 1989 *Pathfinders Report* as a starting point for any analysis of why many dissolution cases still take too long to conclude and unnecessarily drain the financial resources of litigants.

Following issuance of the *Pathfinders Report*, the Supreme Court expanded the work of the Pathfinders Committee, charging it with developing principles and operating procedures for all aspects of the family part. I served on that expanded committee (which was again chaired by Judge Page).

On Oct. 1, 1991, the committee issued *The Principles and Operating Procedures for the Family Divi-*

sion report (more commonly known as *Pathfinders II*).

Section III of *Pathfinders II* deals with dissolution cases, and recommended, *inter alia*:

- "a case management system that compels timely discovery and fruitful settlement negotiations with a view to limiting the issues requiring trial[;]"
- "[e]ach contested case shall be managed and monitored by a track coordinator from filing of the first pleading to disposition and shall be assigned to an expedited track, standard track, complex track and/or custody/visitation track[;]"
- "[t]he court shall calendar dissolution trials expeditiously and limit trials to the presentation of evidence on the disputed facts[;]"
- "[m]otions shall be case managed aggressively. Motions shall be decided promptly after presentation and consideration of all required information."[7]

Following issuance of the *Pathfinders II* report, the Supreme Court charged the Conference of Presiding Family Part Judges with the responsibility of preparing uniform standards for submission to the Court. Fortunately for me, at that time I was a presiding judge and served on the conference. We issued a Family Division green paper to the Court dated Jan. 28, 1993, that dealt with and made specific recommendations for the "Consolidation of Standards" for the family part; the "Management of the Family Division"; "Management of Support Staff for the Family Division"; "Family Division Trial Court Structure"; "Family Division Operations"; and the establishment of "Facilities and Equipment" necessary for the proper and efficient workings of the family part. Following the submission of this green paper to the Court, it was approved by the Supreme Court, with minor changes, as a Family Division white paper on March 1, 1993.

Unfortunately, just a short time after the issuance of these reports, it became clear that the principles and procedures envisioned by these studies and reports were not being satisfactorily implemented in the area of matrimonial litigation. In the mid-1990s, there was significant discontent expressed by members of the family bar, members of the Legislature and executive branches, as well as special interest groups, with the handling and resolution of dissolution cases. As a result, the Supreme Court Special Committee on Matrimonial Litigation was formed on April 9, 1996, co-chaired by Judge Linda R. Feinberg and Lee M. Hymerling, Esq. I was also a member of that committee, which, after an exhaustive study and public hearings, issued its report on Feb. 4, 1998. That report laid the groundwork for the implementation of best practices, as well as numerous legislative initiatives.

Following issuance of the special committee report, the Supreme Court charged the Conference of Presiding Family Part Judges with the task of providing "Best Practices and Standardization" recommendations to the Judicial Council (comprised of the chief, Administrative Office of the Courts director, all assignment judges, the chair of each Conference of Presiding Judges, and others), giving consideration to the various findings and recommendations contained in the *Report of the Special Committee on Matrimonial Litigation*. The conference issued its best practices and standardization report on July 30, 1999, and, after additional review and input from the Supreme Court Family Practice Committee, the best practices rules were ultimately adopted by the Court.

Following the Court's adoption of the best practices rules, visitation teams were established, principally headed by presiding judges and family Part managers. Over the years, these visitation teams have been visiting each vicinage to determine compliance with the best practice rules and examine other areas of family part operations. The design of the visitation teams was to improve functioning of the family part and assure compliance with best practices.

Nevertheless, despite this monumental effort over the course of at least the last 25 years, the family part still experiences significant problems in the efficient management and expeditious disposition of dissolution cases, particularly custody and complex financial matters. Aside from the various issues raised in the articles that follow, there must be recognition given to the reality that there has been a significant increase in the complexity of family part dissolution cases in recent years. Additionally, the volume of matrimonial motions and post-judgment applications has significantly increased. Also, the other docket types of the family part have likewise increased exponentially. At the same time, the Judiciary has experienced a diminishment of the judicial resources necessary to provide continuous trial days, even in some of the larger vicinages.

Over the past several years, rules have been adopted to require various methods of alternative dispute resolution (ADR), to supplement the existing Early Settlement Program. However, there are a number of areas of concern with the application of these additions to the ADR system in dissolution cases. Specifically, the 2011 Supreme Court Family Practice Committee Report identified mediator-quality concerns in the operation of the Court-approved economic mediation program, as to whether there is proper compliance with mediation standards; awareness of adherence to programmatic guidelines; and mediator competence in managing and mediating cases to facilitate productive settlement discussions. That report also identified significant concerns about the parent coordinator program, including the fact that "litigants are free to agree and

judges are free to order the appointment of anyone as a parenting coordinator, without regard to their qualifications, training or licenses[;]" "the unregulated nature of parenting coordination[;]" and "the scope of authority that parenting coordinators have co-opted for themselves in the engagement letters that are presented to litigants who use them[.]"[8] The report also expressed "doubts about whether litigants should be compelled to use parenting coordination if they do not wish to use it."[9]

The point is that these programs cost litigants money and often delay the final disposition of their cases. There also remains the issue of whether these programs are inherently discriminatory because many litigants cannot afford their cost.

Another point worthy of mention is that prioritization of numerous other case-types within the family part (DV, FN, FG, FL for example) over the years has significantly drained the judicial time remaining for attention to the proper and aggressive managing and hearing of dissolution cases. There is nothing inherently wrong with prioritizing those cases; the problem is that it often, of necessity, pushes dissolution cases onto the back burner. The increase in the number of non-dissolution cases, as well as a general increase in their complexity, is another factor.

In summary, I continue to hear from practitioners, as well as from litigants embroiled in a pending divorce case, that the dissolution process simply takes too long and costs too much in New Jersey. In many, if not most, vicinages, the trial of a dissolution case consists of sporadic trial days over the course of many months, resulting in enormous frustration for the litigants, attorneys as well as the judges, and an accumulation of redundant trial costs. If that is true, it is because the basic, fundamental recommendations contained in just about every credible report that has studied the system over the last 25 years have not been properly or fully implemented. This is not due to a lack of effort; the family part judges, their staff and administrators are among the most committed in the system and work tirelessly at their jobs. Rather, the various recommendations discussed above have been compromised, of necessity, due in large part to a lack of judicial resources and the other non-exclusive list of factors discussed in this edition. Likewise, the family lawyers in this state are devoted to their clients, the court system, and provide countless hours of their time without compensation in a continuing effort designed to forge systemic improvements.

The articles that follow attempt, in a positive manner, to explore meaningful solutions to these dilemmas, and are designed to continue the important, constructive dialogue that has always existed between the dedicated members of the family part and family law practitioners. I remain confident that cooperative bench-bar partnership efforts can achieve meaningful results. ■

ENDNOTES

1. *Pathfinders Report*, at p. 11-12.
2. *Id*. at p. 14-15, 19.
3. *Id*. at p. 51.
4. *Id*. at p. 65-67.
5. *Id*. at p. 69-76.
6. *Id*. at p. 76.
7. *Pathfinders II,* at p. 27-35.
8. Supreme Court Family Practice Committee 2009-2011 Final Report, at p. 97-98
9. *Id*. at p. 101.

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Case Management and Tracking

by Brian Schwartz

In its report, the committee recognized that not every case is the same—that is, not every case requires the same amount of judicial/attorney time and resources. "The premise that all cases are not the same and do not make the same demands is one that everyone accepts intuitively, but it was not broadly applied to case management until recently."[1] As a result, the committee offered a series of recommendations to provide that, early in a matter, counsel and the court could determine the level of attention necessary to effectively and efficiently move the matter through the court system.

Those recommendations were:

Recommendation #14: The rules should be amended to provide for differentiated case management in the family part.[2]

Recommendation #15: Rule 5:5-2(b) should be strictly enforced. The rule should also be amended to permit the filing of a motion by a party to dismiss another party's pleadings for failure to have filed a case information statement.[3]

Recommendation #16: Rule 5:5-6 should be amended to provide for mandatory case management conferences in all family part actions.[4]

Recommendation #17: Implementation of a one judge/one case policy in dissolution actions, with "hands on" active case management by judges and lawyers, will reduce the length and cost of many dissolution cases.[5]

With regard to the concept of differentiated case management (DCM), the committee noted:

> The [DCM] premise…is simple. Because cases differ substantially in the time required for a fair and timely disposition, not all cases make the same demands upon judicial system resources. Thus, they need not be subject to the same processing requirements. Some cases can be disposed of expeditiously, with little or no discovery and few intermediate events. Others require extensive court supervision over pretrial motions, scheduling of forensic testimony and expert witnesses, and settlement negotiations….
>
> Inherent in the concept of DCM is the recognition that many cases can, and should, proceed through the court system at a faster pace….Under a DCM system, cases do not wait for disposition simply on the basis of chronological order of their filing.[6]

The committee then espoused two goals and four objectives for DCM:

> The goals:
> - Timely and just disposition of all cases consistent with their preparation and case management needs.
> - Improved use of judicial system resources by tailoring their application to the dispositional requirements of each case.
>
> To achieve these goals, a DCM program should have the following objectives:
> - Creation of multiple tracks or paths for case disposition, with differing procedural requirements and time frames geared to the processing requirements of the cases that will be assigned to that track.
> - Provision for court screening of each case shortly after filling so that each will be assigned to the proper track according to defined criteria.
> - Continuous court monitoring of case progress within each track to ensure that it adheres to track deadlines and requirements.
> - Procedures for changing the track assignment in the event the management characteristics of a case change during pretrial process.[7]

As a result of the recommendations concerning DCM, on Jan. 21, 1999, the Supreme Court adopted two new rules—Rule 5:1-4 and Rule 5:5-7:

> R. 5:1-4. Differentiated Case Management in Civil Family Actions
>
> A. Case Management Tracks; Standards for Assignment. Except for summary actins, every civil family action shall be assigned, subject to reassignment as provided by paragraph (c) of this rule, to one of the following tracks as follows:
>
> 1. Priority Track. The action shall be assigned to the priority track if it involves contested custody or parenting time issues.
> 2. Complex Track. The action shall be assigned to the complex track for judicial management if it appears likely that it will require a disproportionate expenditure of court and litigant resources in preparation for trial and at trial because of the number of parties involved, the number of claims and defenses raised, the legal difficulty of the issues presented, the factual difficulty of the subject matter, the length and complexity of discovery, or a combination of these or other factors.

3. Expedited Track. The action shall be assigned to the expedited track if it appears that it can be promptly tried with minimal pretrial proceedings, including discovery. Subject to re-assignment as provided by paragraph (c) of this rule, a dissolution action shall be assigned to the expedited track if (A) there is no dispute as to either the income of the parties or the identifiable value of the marital assets and no issue of custody or parenting time has been raised; (B) the parties have been married less than five years and have no children; (C) the parties have entered into a property settlement agreement; or (D) the action is uncontested.
4. Standard Track. Any action not qualifying for assignment to the priority track, complex track, or expedited track shall be assigned to the standard track.

B. Procedure for Track Assignment. The Family Presiding Judge or a judge designated by he Family Presiding Judge shall make the track assignment as soon as practicable after all parties have filed Family Case Information Statements as required by R. 5:5-2 or after the case management conference required by R. 5:5-7, whichever is earlier. The track assignment shall not, however, precede the filling of the first responsive pleading in the action. In making the track assignment, due consideration shall be given to an attorney's request for track assignment. If all the attorneys agree on a track assignment, the case shall not be assigned to a different track except for good cause shown and after giving all attorneys the opportunity to be heard, in writing or orally. If it is not clear from an examination of the information provided by the parties which track assignment is most appropriate, the case shall be assigned to the track that affords the greatest degree of management. The parties shall be advised promptly by the court of the track assignment.

C. Track Reassignment. An action may be reassigned to a track other than that specified in the original notice to the parties either on the court's own motion or on application of a party. Unless the court otherwise directs, such application may be made informally to the Family Presiding Judge or to a judge designated by the Family Presiding Judge and shall state with specificity the reasons therefor.[8]

R. 5:5-7. Case Management Conferences in Civil Family Actions.

A. Priority and Complex Actions. In civil family actions assigned to the priority or complex track, an initial case management conference, which may be by telephone, shall be held within 30 days after the expiration of the time for the last permissible responsive pleading or as soon thereafter as is practicable considering, among other factors, the number of parties, if any, added or impleaded. Following the conference, the court shall enter an initial case management order fixing a schedule for initial discovery; requiring other parties to be joined, if necessary; narrowing the issues in dispute, if possible; and scheduling a second case management conference to be held after close of the initial discovery period. The second case management order shall, among its other determinations, fix a firm trial date.

B. Standard and Expedited Cases. In civil actions assigned to the standard or expedited track, a case management conference, which may be by telephone, shall be held within 30 days after the expiration of the time for the last permissible responsive pleading. The attorneys actually responsible for the prosecution and defense of the case shall participate in the case management conference and the parties shall be available in person or by telephone. Following the conference, the court shall enter a case management order fixing a discovery schedule and a firm trial date. Additional case management conferences may be held in the court's discretion and for good cause shown on its motion or a party's request.[9]

In addition, Rule 5:5-1 was amended to adopt paragraph (e):

> (e) Discovery shall be completed within 90 days from the date of service of the original complaint in actions assigned to the expedited track and within 120 days from said date in actions assigned to the standard track. In actions assigned to the priority or complex track, time for completion of discovery shall be prescribed by case management order.[10]

Interestingly, the committee's proposed rule for DCM differed slightly from those that were adopted by the Supreme Court. With regard to the definition of a standard track case, the committee had recommended the following:

> Standard Track. An action not qualifying for assignment to the complex track or expedited track shall be assigned to the standard track. *All cases in which the income of the parties, the marital assets subject to equitable distribution, and the value of the assets can be determined through normal discovery shall be assigned to the standard track."*[11] (emphasis added)

The highlighted provision was deleted in the final form of Rule 5:1-4(c), which, in practice, has significantly altered the difference between a standard track case and a complex case. This change will be discussed in more detail below.

At the same time, the Supreme Court adopted new rules regarding case management, it also created time goals for concluding cases. In its annual New Jersey Judiciary management report, the Court lists its

statistic terminology. Under the definition of "inventory," there is a list of time goals for various cases throughout the court system. In pertinent part, inventory is defined as "active pending cases within generally accepted normative case-processing time frames."[12] The time goal for resolution of a new dissolution case is 12 months from the filing date; the time goal for resolution of a "reopened" dissolution case is six months from the filing date.[13] As for custody and parenting time matters, which would be assigned to the priority track, the time goal for resolution is six months from the date of the last responsive pleading.[14]

STATISTICAL DATA

In order to better understand some of the practical issues that have arisen since 1998, a review of some basic statistics is necessary. For the court year ending June 30, 1998, there were 30,148 new, pre-judgment dissolution filings in the family part. In addition, there were 27,042 re-opened dissolution cases (that is, post-judgment matters). The total number of filings in 1998, therefore, was 57,190. By comparison, in the court year ending June 30, 2010, there were 30,484 new, pre-judgment dissolution filings; however, there were 37,140 re-opened matters—a staggering increase of 10,000 post-judgment filings.[15]

As for family part assignments, in 1998, there were a total of 117 judges assigned to preside over all family part case types.[16] As of March 31, 2011, despite the significant increase in inventory, there were a total of 127 judges assigned to preside over all family part case types. There are currently 16 vacancies in the family part, including four counties with two vacancies each. Unfortunately, due to the anticipated retirement of judges, there may be as many as 50 vacancies throughout the Judiciary by Sept. 1, 2011, which may further deplete the family bench. Equally important, the budgetary constraints that have been placed upon the Judiciary (and the state in general) means that the courts will have to do more with less—less staff and less resources.

With regard to the disposition of dissolution cases, in the court year ending June 30, 2010, there were 29,509 pre-judgment dissolution cases that reached disposition. Of those cases, 11 percent were "over-goal," that is disposed of more than 365 days after the initial filing; 0.75 percent were tried to conclusion but 72.4 percent of those cases tried to conclusion were over-goal.[17] It is also worth noting that 56.2 percent of the cases were resolved by default judgment.[18]

PRACTICAL PROBLEMS WITH THE IMPLEMENTATION OF DCM/TIME GOALS

What is a Complex Case Versus a Standard Case?

As noted above, the committee recommended that the definition of a standard track matter include the following provision: "All cases in which the income of the parties, the marital assets subject to equitable distribution, and the value of the assets can be determined through normal discovery shall be assigned to the standard track." Utilizing this definition, a matter involving a small business owner (*e.g.,* general contractor, landscaper, plumber) or a commission-based employee (with potentially significant fluctuations in income) would properly be placed on the complex track, as the 'income' of that spouse is not easily determined through normal discovery. In other words, it appears that the committee intended for standard cases to involved W-2 employees with routinely determined values for assets and liabilities.

However, the Supreme Court removed the language noted above when adopting 5:1-4(a)(4). Consequently, almost immediately, courts reserved complex tracking for a very small minority of matters. Anecdotally, when the Institute for Continuing Legal Education presented its first lectures regarding best practices, Graham T. Ross, then presiding judge of the Somerset, Warren and Hunterdon vicinage, noted that in his view there was no case that should be assigned to the complex track. As a result, many cases that otherwise should be assigned to the complex track (and the more appropriate discovery deadlines which come with that tracking) are instead assigned to the standard track. Thus, many attorneys are faced with trying (often unsuccessfully) to meet the unrealistic 120-day discovery deadlines.

Custody Time Goals

Pursuant to Rule 5:8-6, "the court shall set a hearing date no later than six months after the last responsive pleading." Though laudable, this deadline is nearly impossible for the bench and bar to meet. Pursuant to Rule 5:5-7(a), the initial case management conference is supposed to be scheduled within 30 days of the last permissible responsive pleading. Assuming *arguendo* that the initial case management conference does, in fact, occur within the time frame required by the rule, upon a determination that custody and/or parenting time is a "genuine and substantial" issue, the matter must be referred to custody and parenting time mediation.[19] There is no timeframe for when this mediation must occur; it is based solely upon the availability of the mediator. If the mediation is terminated without a resolution—a process that may take more than one session and could take up to 30-45 additional days from the date of the case management conference—then the parties may obtain expert(s). By this time, 60-75 days have already passed.

Unfortunately, the evaluation process is a time-consuming procedure. At a minimum, most experts will need to meet with the parents individually twice, with each of the parents and the children once, and

the children—collectively and individually—as deemed appropriate. There may also be psychological testing.There may be collateral contacts. Anecdotally, this process alone generally exceeds the six-month period, not to mention the production of the expert's report. Further, if either party is not satisfied with the report of the joint expert, either party may retain his or her own expert after the issuance of the report.[20]

It should be noted that some counties have sought to adopt more 'streamlined evaluations.' In Burlington County (and, more recently, in others), the court and counsel have utilized custody-neutral assessments in an attempt to avoid the costly, time-consuming evaluation process. Similarly, some mental health professionals have utilized brief focused evaluations, used when there are discreet issues that are limited in scope (*e.g.*, alleged or actual alcohol/drug use by a parent) that prevent resolution of custody and parenting time issues.

Nevertheless, due to the practical constraints noted above, in a true custody or parenting time dispute, it is nearly impossible for an attorney to properly prepare the case so that the matter is brought to trial within six months.

Dissolution Time Goals

As noted above, the Supreme Court has determined that the time goal for resolution of a new dissolution case is 12 months from the filing date. In its report, the committee correctly observed that:

> Because cases differ substantially in the time required for a fair and timely disposition, not all cases make the same demands upon judicial system resources. Thus, they need not be subject to the same processing requirements. Some cases can be disposed of expeditiously, with little or no discovery and few intermediate events. Others require extensive court supervision over pretrial motions, scheduling of forensic testimony and expert witnesses, and settlement negotiations.[21]

Yet, despite this disparity, the time goal for *all* cases—whether standard, complex or expedited—is 12 months.

The June Crunch

The court year commences July 1 and ends June 30. When preparing its annual statistics, the backlog—defined as the number of active pending cases that are not within generally accepted normative case processing time frames[22]—for a vicinage is measured each year as of June 30. This results in a frantic attempt by judges and attorneys to resolve cases that are over goal before June 30. Courts employ various tools to accomplish this task—blitz week, intensive settlement conferences, blue ribbon panels—which often commence in May and continue through June 30. The levels of stress placed upon the courts and attorneys during these months is incredible.[23] Attorneys are regularly required to appear on several different cases, perhaps in different counties, in order to resolve matters before the end of the court year.

Lack of Firm Trial Dates/ Continuous Trial Dates

Rule 5:5-7 discusses case management conferences; the rule directs that at the case management conference, a "firm trial date" be established. For cases assigned to the priority and complex tracks, the firm trial date is set at the second case management conference; for cases assigned to the standard and expedited tracks, the firm trial date is scheduled at the first case management conference.[24] Despite fairly strict adherence to the rule in terms of scheduling the trial date, unfortunately firm trial dates in many counties are as rare as UFO sightings.

CASE MANAGEMENT/TRACKING RECOMMENDATIONS

Case Management Recommendations

In the discussion section following recommendation #16 (mandatory case management conferences), the committee supported active judicial case management.

> The implementation of a regular, mandatory and active case management system will better enable lawyers and judges to predict and schedule realistic trial dates and this, by itself, will have a significant impact on abating client frustration and the size of legal bills. Moreover, active case management affords lawyers access to a judge on a regular basis thereby giving lawyers and litigants the opportunity to secure the position and insight of the judge which may result in a resolution of issues in dispute.[25]

The committee also properly acknowledged that mandatory case management conferences, "will add to the time limitations on judges who already have extensive responsibilities. On balance, however, it may eliminate the filing of motions and assist counsel and the litigants to focus on the file to review unresolved discovery issues necessary to bring the matter to trial." Surprisingly, despite this strong position regarding active, aggressive case management, the committee then also recommended that a judge could delegate this important task to staff members. In this regard, the committee's recommendation fell short.

The most efficient and effective case management conference is that which is conducted by a judge, in court and on the record, preferably with the parties in attendance. There are several benefits to this type of conference:

1. When an attorney is required to appear before a judge for the first case management conference, with the client, that attorney must, at a minimum, be familiar with the file and the issues at hand. Often, when a case management conference is held by phone with a staff member (or even less desirable, submission of a case management

order by consent), there is very little need to be familiar with the file. In essence, the 'conference' becomes a rote, fill-in-the-blank procedure with very little benefit.

2. Most parties to a dissolution action have never before appeared in court. By appearing at a case management conference in court, the litigants have an opportunity to meet the judge who will be presiding over their case. Similarly, the judge will have an opportunity to speak directly to the parties, making litigants active participants in their own dissolution action.
3. Because the parties, counsel and the judge are in attendance, the case management conference can be so much more than just a scheduling conference. If for no other reason, the scheduling of the appearance will also 'encourage' counsel to submit case information statements in a timely fashion. With that important document filed, and the litigants and counsel at counsel table, the court and counsel can flesh out potential issues—and discuss potential resolutions—early in the matter.
4. In some counties, judges require submission of a pre-conference summary. By requiring a submission, again, the attorneys must be familiar with their matters in advance—identifying legal and discovery issues early in the matter. In those counties, judges are also willing to address substantive issues, such as an award of fees for attorneys and experts. This procedure should be encouraged.
5. After reviewing all of the information, the court can set realistic time goals for the completion of discovery. This begins with assigning the matter to an appropriate track and scheduling 'next events' based upon the level of complexity. The court can determine whether experts are necessary and, if so, whether joint experts can be utilized. The court can also determine a funding source for the experts and encourage the parties to cooperate with the experts.

The main criticism of in-court, judge-conducted case management conferences is the lack of time in which to conduct them. Critics argue that there is already precious little bench time available for trials, and these conferences for every case would further consume that time. This argument is short-sighted. Active case management, as noted by the committee in its report, will: 1) reduce motion practice (especially discovery-related motion practice); and 2) cause litigants and counsel alike to begin discussing resolution at an early stage, thereby creating an atmosphere for resolution as opposed to litigation.

In sum, with regard to case management, it is recommended that:

A. The initial case management conference be conducted by a judge, in court, on the record, with litigants in attendance;
B. Counsel be required to submit a pre-conference summary of legal issues and discovery requirements;
C. The filing of a case information statement within 20 days of the filing of a responsive pleading, as required by Rule 5:5-2(b), be strictly enforced;
D. Courts be permitted, in the appropriate case, to award of legal and expert fees at the conference;
E. Courts permit future conferences either in court or by telephone upon the request of counsel in order to resolve any discovery issues.

Tracking Recommendations

As noted by the committee, "all cases are not the same and do not make the same demands" on the court system.[26] Therefore, the concept of assigning each case to an appropriate track must continue. However, the current standards for DCM require practical adjustments. The following are recommendations for modifying the current DCM system:

Assign appropriate cases to the complex track: It seems that courts are reluctant to designate matters as complex. By assigning a matter to the complex track, it is argued, there is an inherent acknowledgement that the matter will be 'overgoal.' Instead, the court assigns what should be complex matters to the standard track. In doing so, counsel, experts and the parties are set up for assured failure—financial discovery cannot be completed within 120 days; expert reports cannot be completed within 120 days. This failure results in unnecessary and inflammatory motion practice—counsel seeking to place 'blame' on the other party for the inability to complete discovery in a 'timely fashion.' Contrary to the early dictate of Judge Graham T. Ross, there are cases for which a complex track assignment is proper. Courts must be willing—in fact, encouraged—to assign cases to the appropriate track.

To further assist the court and counsel in making proper track assignments, Rule 5:1-4(a)(4) must be amended to include the original definition proposed by the committee; to wit:

> Standard Track. An action not qualifying for assignment to the complex track or expedited track shall be assigned to the standard track. All cases in which the income of the parties, the marital assets subject to equitable distribution, and the value of the assets can be determined through normal discovery shall be assigned to the standard track.[27]

Differentiated time goals: The time goal for completing an expedited track case should not be the same as the time goal for a standard track case, which should not be the same as the time goal for a complex

case. The Supreme Court has determined that *all* dissolution actions have a goal of one year. If there are differentiated tracks due to the varying levels of complexity, then there likewise should be different time goals associated with those tracks; for example, expedited cases, nine months; standard track cases, 12 months. As for complex cases, the time goals should be managed by the court.

Currently, the Administrative Office of the Courts does not compile statistics on the actual length of cases from filing to conclusion as compared to track assignment. In fact, there are no statistics maintained for the number of cases assigned to each track. As such, there are no statistics to determine whether the complex cases are generally overgoal. It may be of benefit to the court in general to compile statistics regarding track assignment as compared to the length of time from inception to conclusion.

Realistic time goals for custody/parenting time matters: As noted above, it is a laudatory goal for all "genuine and substantial" custody and parenting time issues to be scheduled for trial "no later than six months after the last responsive pleading."[28] Unfortunately, it is unrealistic for true custody and parenting time disputes, which generally involve expert opinions and analysis, to be trial-ready within six months.

In lieu of this mandate, these matters must instead be actively case managed. For example, a court can hold regular (perhaps monthly) telephone status conferences with the court to provide updates regarding the status of expert reports and the progress of discovery. Once the completion of discovery is in sight, the court can bring the parties and counsel to court for a final case management conference. At this conference, firm trial dates can be assigned, including the scheduling of any expert testimony. Further, custody and parenting time hearings would be deemed peremptory in nature, so that these hearings (and the scheduled dates) would take priority to any other court appearance. In this regard, the court can continue to confer the priority demanded for custody and parenting time hearings while, at the same time, allowing the parties and counsel to properly prepare for the hearing. ■

ENDNOTES

1. *Id.* at p. 73.
2. *Id.* at p. 70.
3. *Id*. at p. 75.
4. *Id*. at p. 77.
5. *Id*. at p. 79.
6. *Id.*
7. *Id.* at p. 73-74.
8. Sylvia B. Pressler and Peter G.Verniero, *Rules Governing The Courts of the State of New Jersey*, 2011.
9. *Id.*
10. *Id.*
11. Final Report, at p. 71.
12. New Jersey Judiciary Court Management Report, January 2011.
13. *Id.*
14. R. 5:8-6; *see also*, *Watkins v. Nelson*, 163 N.J. 235, 258 (2000) ("The differentiated case management system should ensure that the action is concluded in the trial division within six months. If an appeal is taken from the trial court's determination, that appeal also should be concluded within six months. Similarly, any appeal to this Court should be concluded in six months. We do not intend to be insensitive about problems caused by backlogs and protracted dispositions. But in this type of custody dispute, justice delayed is justice denied; slow justice is not good justice. Neither can be tolerated.").
15. Administrative Office of the Courts Family Practice Survey, February 2011.
16. Unfortunately, there are no statistics maintained to determine how many judges were assigned to dissolution.
17. Administrative Office of the Courts Family Practice Survey, February 2011.
18. *Id.*
19. R. 1:40-5(a)(1).
20. R. 5:3-3(h).
21. Final Report, at p. 79.
22. New Jersey Judiciary Court Management Report, January 2011.
23. As an interesting strategy, attorneys or parties who might otherwise have filed a complaint in May or June might, instead, file the complaint in July. By filing in July, the matter would not be deemed over-goal if not resolved by the following June; consequently, that matter may avoid the June crunch.
24. R. 5:5-7(a).
25. Final Report, at p. 78.
26. *Id*, at p. 73.
27. Final Report, at p. 71.
28. R. 5:8-6.

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Motion Practice and Plenary Hearings

by Derek M. Freed

When the Special Committee on Matrimonial Litigation issued its final report in 1998,[1] it led to myriad rule changes that were collectively referred to as best practices. Initially, the backlog[2] of cases decreased; unfortunately, over the past several years, the backlog has once again increased.[3] In fact, in fiscal years ending June 2009 and June 2010, on average one out of every five dissolution cases was in backlog.[4]

A statistical analysis of the backlog tells only part of the story. Best practices sought to not only improve judicial efficiency, but to create a uniform, statewide practice of law. Backlog rates may fluctuate for various reasons, including judicial resources and the number of filings. The lack of uniformity in the practice, however, has remained consistent from 2000 to the present.

This article examines the goals of best practices as it relates to motion practice and plenary hearing practice in the state of New Jersey. It then evaluates the critical failures to properly implement the committee's recommendations and rule amendments, particularly the lack of uniformity. Finally, it proposes suggestions to improve the current system.

THE GOALS OF BEST PRACTICES

The "general purpose [of the Best Practices rule amendments] was to insure the statewide uniformity of pleading, discovery, and trial practice as well as to provide a relatively certain trial date."[5] Stated slightly differently, best practices was "undertaken…for the purpose of attempting to improve the efficiency and expedition of the litigation process as well as to restore state-wide uniformity to the wide range of discretionary and increasingly disparate judicial responses to such matters, among others, as the resolution of discovery problems and disputes, the fixing of trial calendars and adjournments of trial dates."[6] It was hoped that if these two goals were accomplished, the result would be to "restore the public's faith in expeditious and efficient litigation and to control dilatory litigation tactics by providing the trial courts with tools to manage litigation."[7]

MOTION PRACTICE

Trials are rare.[8] As such, for most litigants motion practice is, to a great extent, their 'litigation experience' in the family part when matters are contested. As cases take longer to be resolved, motion practice (especially for *pendente lite* support) becomes all the more important.

There is, however, a complete lack of uniformity relative to motion practice in the family part. Indeed, despite the goal of uniformity, the committee's recommendations often acknowledged that inconsistency would continue. Several 'recommendations' of the committee instead became 'suggestions'—left, of course, to the discretion of judges/vicinages regarding whether and to what extent those suggestions were implemented.

RECOMMENDATIONS THAT WERE *PER SE* DISCRETIONARY

Recommendation #21 of the committee provided: "Friday should be retained as motion day uniformly throughout the State. Each vicinage should be permitted to continue to determine the frequency of motion Fridays."[9] This discretion afforded to each vicinage has led to a split among the counties regarding whether they will hear motions on each Friday or every other Friday. As of February 2011, the family part judges of 14 counties hear motions each Friday, while the family part judges in six counties hear motions every other Friday.[10] In one county, five judges hear motions every Friday, while the remaining judges hear motions every other Friday.[11] In other words, regarding the issue of how frequently to schedule motions, there is a lack of uniformity across the state. Indeed, even within one county, we have a lack of uniformity.

Additionally, in some counties, there continues the practice of 'administrative adjournments.' Frequently, soon after the timely filing of a motion seeking a specific return date, a notice will be received from the court—the requested return date 'cannot be accommodated' by the court and has, instead, been rescheduled to a new date. In some vicinages, that 'new' return date can often be one or two cycles after the requested return date. As the scheduling of motions remains in the discretion of the court, this practice has continued.

Other recommendations contain 'discretionary' components. Recommendation #19 stated: "New R. 5:5-4(e) should be adopted providing for the discretionary implementation of the tentative decision practice statewide."[12] The committee found: "Members of the bar voiced

strong support for the program….None of the attorneys who had experience with the tentative decision program expressed concerns that judges are unwilling to modify their decisions in appropriate cases."[13] The committee even went so far as to actually describe the methodology for the distribution of tentative decisions. It noted:

> Prior to the date scheduled for the motion hearing and after both parties have submitted the motion papers allowed by the Court Rules, the court would be given the discretion to submit a written tentative decision based upon the court's review of the pleadings filed. That decision would be made available to the parties and counsel either by telefax or for pick-up at the courthouse. It is anticipated that the court's tentative decision normally would be completed one to two days prior to the motion's scheduled return date. Thereafter, the parties and/or their respective counsel would have an opportunity to review and discuss the court's tentative decision.[14]

Perhaps anticipating resistance from the Judiciary to this recommendation, the committee did "not recommend that tentative decisions be mandated statewide." With slight modifications, the committee's proposed Rule 5:5-4(e) was adopted, making it clear that courts *may* issue tentative decisions at their discretion.

Statistics show that seven counties have a practice of issuing tentative decisions, while six counties do not issue tentative decisions.[15] Of the remaining eight counties, most do not have a standard policy about tentative decisions and instead leave the decision of whether to issue a tentative decision to each judge.[16]

The counties that do utilize tentative decisions employ different methods. For instance, in certain counties when the parties appear for oral argument they are handed the court's tentative decision just prior to argument. In yet other counties, courts may read an informal tentative decision from the bench at the commencement of oral argument. While both of these methods may potentially eliminate the need for oral argument itself, they do not address: 1) the costs associated with preparing for the argument and traveling to the courthouse; 2) the need for counsel to have ample time to discuss the tentative decision with their client; or 3) the need for *pro se* litigants to have ample opportunity to understand the implications of the tentative decision and, if needed, perform research/consult with counsel.

Recommendation #25 made by the committee was also discretionary in nature. It stated: "No rule change [to Rule 5:5-4(a)] is required concerning the oral argument of motions; Judges should be encouraged, however, to direct

argument to those issues that most concern the court; Judges should also be encouraged to conference motions when the nature of the motion and time permits."

Rule 5:5-4(a), states in pertinent part:"Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of disposition of motions, the court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions."

The committee did express concerns about various counties employing local rules regarding when oral arguments would be permitted. Notably, the committee stated that "adoption of tentative decisions as recommended elsewhere…should also expedite the motion process."

Despite Rule 5:5-4 and the committee's recommendation, local rules still exist in terms of permitting oral argument. There is a plethora of case law in which the Appellate Division has discussed a trial court's practice of permitting or denying oral argument.[17] This case law often comes to different conclusions regarding the propriety of oral argument, which reveals that a lack of uniformity still remains with respect to the issue of when oral argument is permitted or denied.

Additionally, where oral argument is granted, judges employ different methods of execution. Certain judges permit counsel unlimited time to place their positions on the record, asking questions as they arise. Other judges place time limits on oral arguments (similar to the practice of Appellate Division argument), with attorneys being directed to 'reserve time' for rebuttal. Still other judges direct oral argument, as recommended by the committee, to those issues that most concern the court.

A similar issue arises as to whether litigants are required to appear. Years ago, oral argument was 'attorney day' at the courthouse; that is, counsel appeared without any requirement that their clients appear for oral argument. Counsel and the bench engaged in oral argument without any client involvement, and the court rendered its decision based upon argument and the pleadings submitted. Now, frequently, counsel is required to have litigants present for oral argument. In fact, certain judges not only require the litigants to attend, but also require that the litigants be sworn. The court will then direct questions directly to the litigants, who are under oath, often bypassing counsel entirely. This practice is not authorized by any specific rule, but is likely deemed another 'discretionary' tool of the trial court.

Regarding conferencing motions prior to argument, there is no statistical evidence on how often, if at all, the trial courts conduct such conferences. Anecdotally, it seems that the practice is rare.

RECOMMENDATIONS THAT WERE ASPIRATIONAL AND ADOPTED IN VARYING DEGREES

Many other recommendations have been adopted by only a handful of counties, which has actually contributed to the lack of uniformity of practice. Recommendation #22 stated: "Family Part judges should utilize technology and prudent time management to foster the most efficient use of attorney time in the disposition of motions."[18] Specifically, the committee recommended:"(1) that the oral argument of motions by telephone, as permitted by R. 1:6-2(e), should be encouraged; (2) that motions should be scheduled in 'waves' or staggered; and (3) that complex motions that will consume a great deal of time be scheduled, at the discretion of the court, on non-motion days."[19] The committee sagely wrote that the implementation of each of those recommendations would "greatly minimize the amount of time a lawyer or litigant spends at the courthouse. This reduction will result in less fees and a more efficient resolution of the outstanding issues."[20]

Those concepts were reinforced in recommendation #23: "Vicinages should experiment in the staggered scheduling of motion hearings."[21] The committee believed that if this recommendation were embraced, it would "reduce the number of hours that clients miss from work in order to sit in court and wait to have a motion heard. If clients have a better idea of when the motion will be heard, they will be in a better position to determine whether they can miss work to be present at oral argument, how much time they will miss, and reduce the amount of time spent waiting in court."[22] Just as importantly, it would reduce the amount of time that the attorneys would be sitting and waiting, while charging their clients for the waiting time.

With respect to permitting oral arguments to occur via telephone, there is no uniform policy, even within counties. Again, such a decision is at the discretion of the court, and few implement it on a regular basis.[23] In fact, several counties do not permit oral argument on motions via telephone.[24]

With respect to the issue of staggering the start times for argument, nine counties do not stagger motions; rather all counsel/litigants are required to appear for the calendar call at the same time.[25] Eight counties have a practice of staggering the start times of motions.[26] Two counties have a mixed practice of staggering motions—leaving it to the discretion of the individual judges.[27] Two counties, instead, utilize 'ready holds' (*i.e.*, the appearance of counsel/litigants at a specified time other than the calendar call); however, this is generally done at the request of counsel and is, therefore, not truly a 'staggering' of motions as envisioned by the committee.[28]

As with the two prior concepts,

counties have various practices with respect to the scheduling of motions on non-motion days. Several counties prohibit it, while others absolutely permit it.[29] Regardless of the policy, such decisions are left to the discretion of their judges.[30]

Recommendation #26 concerned the issuance of orders relative to a motion: "There should be a new Rule creating a procedure for expeditious entry of orders following determination of a motion. The rule should contain a presumption in favor of the entry of the motion order prior to counsel, or the parties if they are *pro se*, leaving the courthouse." The committee acknowledged that their goal was to avoid disputes as to form of orders, which resulted in the need for the parties to obtain "costly transcripts" and taxed judicial (and attorney) resources.[31]

The committee did, however, acknowledge "particularly with certain omnibus *pendente lite* motions, counsel, *pro se* litigants or the court might be confronted with the daunting task of amending/conforming multiple rulings made by the court from the bench."[32] It cited approvingly to various efforts in specified counties whereby the courts: 1) required parties/counsel to hand-write the form of order and submit it to the court prior to leaving the courthouse; or 2) prepared computer-generated orders and provided them to the parties/counsel prior to their leaving the courthouse so that any disputes could be resolved that day.[33] The committee also specifically discouraged the practice of issuing multiple forms of an order relative to one motion day hearing.[34]

The committee suggested that the various *approved* practices for the issuance of orders should be tried by different vicinages. They recommended that "toward the end of the 1998-2000 rules cycle, the Family Division Practice Committee could review the programs in place to seek possible uniformity."[35]

The goal of issuing orders immediately after argument was ultimately embodied in Rule 5:5-4(f), which states: "Absent good cause to the contrary, a written order shall be entered at the conclusion of each motion hearing." However, there is no specified procedure for the issuance of those orders. Judges who provide tentative decisions are often able to provide final orders to the parties prior to their leaving the courthouse, especially where few if any changes have been made to the tentative decision as a result of the argument. The judges that do not provide tentative decisions may require the attorneys to handwrite their forms of order. Other judges tend to utilize the discouraged practice of modifying each party's proposed form of order, thereby issuing two orders for the same motion hearing. Some judges simply indicate that an order will be issued in due course.

PRE-EMPTIVE PROHIBITIONS AGAINST FILING MOTIONS

One issue that was not addressed by the committee or the best practices rule amendments is the practice of preemptive orders that prevent parties from filing motions without the court's permission. This practice differs from an order in which the court properly prevents a litigant from filing motions due to a clear and lengthy history of the use of motion practice as a means of harassment. Rather, certain judges either include the directive in an order or state their policy on the record. In some counties, such a directive is included in the initial case management order.

This policy is problematic in that it literally ties the parties' hands from seeking relief on a *pendente lite* basis without the permission of the court. This can result in unnecessary delays because judicial permission must be obtained before the filing of a motion. More importantly, it can create a feeling by the litigants that their cases are being 'pre-judged' and that they are not receiving their 'day in court.'

PROPOSED RULE CHANGES REGARDING MOTION PRACTICE

The above discussion illustrates that despite the recommendations of the committee, the lack of uniformity in motion practice continues in the family part. Without this uniformity on: 1) when motions are heard; 2) the time for motions to be heard; 3) the use of non-motion days for more complex motions; 4) the nature of the oral argument (and whether litigants are actively involved in argument); (5) the manner and timing of the production of the order; 6) so-called 'administrative adjournments'; and 7) pre-emptive prohibition against filing motions, the goals of the best practices rule amendments will continue to be subverted.

Following are some recommended solutions to address these issues.

As an initial matter, at times "the better part of valor is discretion…"[36] Anyone who has practiced in the family part understands that there is no 'uniform' family part case, and that judges must be able to tailor their methods to the specific facts presented to them. Indeed, many family part cases are resolved as a direct result of a trial judge providing 'individualized' solutions to those cases. These proposed rule change are not intended to 'handcuff' trial judges from engaging in such behavior.

Nonetheless, in some instances, the lack of uniformity in motion practice causes confusion among counsel and the litigants, which serves to undermine their overall confidence in the process. The lack of uniformity throughout the state, inevitably, also results in the increased allocation of resources, which undermines the goal of efficiency.

The following recommendations are offered for consideration:

MOTIONS SHOULD BE HEARD EVERY FRIDAY

The place to begin uniformity would be to adopt a statewide rule for motions to be heard in the fami-

ly part each Friday, as opposed to permitting motions to be heard on alternating Fridays. The potential benefit of this approach would be to reduce the actual number of motions heard on any given Friday, as compared with motions accumulating over two weeks and then being heard on alternating Fridays. Judges would then be able to more promptly issue orders for a given motion day, as the amount of motions to be decided would inherently be reduced.

THE STANDARDIZATION OF THE FORM OF A NOTICE OF MOTION

It is also recommended that the Family Practice Committee create a standard form of notice of motion, complete with checklists for required attachments, specified forms of relief, the specific delineation of the type of motion that is being filed (*e.g.*, motion for *pendente lite* support, motion for post-judgment modification of support, etc.), whether oral argument is sought, and if so, the amount of time that may be needed to argue the matter.

The committee had strongly endorsed the creation of a "standardized *pro se* manual."[37] The view was that this manual would "minimize applications being returned by the Family Case Management Office, will reduce the delay in the filing and scheduling of applications and will benefit the court, the bench, and the parties."[38] In fact, a standard form of *pro se* motion manual has been adopted and is available to *pro se* litigants, both at the various courthouses and on the Internet.

It is submitted that by adopting a standard form of notice of motion for use by counsel, as well as *pro se* litigants, this will further achieve the goals set forth by the committee. An excellent starting point for the form of notice of motion would be the form adopted by the state of California. On each notice of motion, the filing party must delineate the specific type of motion that is being filed. Additionally, the party must complete a checklist of the items that are being provided as supporting attachments, including financial statements, property declarations, and so on. The instructional materials that are provided with the form explain which attachments are needed in support of specific motions.

The use of a standardized form notice of motion should reduce the amount of motions that are denied 'without prejudice' due to procedural improprieties. It seems that judges and their staff lose a significant amount of time reviewing motions that, on their face, appear to have some merit, but must be denied without prejudice due to the failure of a party to provide supporting documentation. They only learn of the absence of this documentation after they have already reviewed the motion. This problem could be alleviated through the adoption of a standard motion form that sets forth a checklist of the required supporting attachments.

Additionally, by mandating the proper designation of all motions, judges would ideally be able to more effectively schedule and direct oral arguments (and potentially conference motions). For example, as a general rule, motions to enforce litigants' rights are less time consuming in terms of oral argument than motions to establish or modify *pendente lite* support. Judges could schedule the start times of motions in consideration of the types of motions they have for any given motion Friday.

Finally, by designating the amount of time needed for oral arguments that are sought, counsel or *pro se* litigants can assist the courts in the efficient scheduling of oral arguments. It may be appropriate to limit the amount of time allocated for oral argument based upon the type of motion and the time that the litigants indicated they would need, unless the court grants permission for a lengthier argument.

THE START TIME OF ORAL ARGUMENTS MUST BE STAGGERED

The committee recommended the staggering of motions; yet, the courts have not uniformly adopted this practice. Motions should be scheduled by the courts in order to limit the amount of 'waiting time' experienced by the parties and counsel. The more precise scheduling of motions will reduce counsel fees and prevent litigants who attend oral argument from unnecessarily taking additional time to appear for oral argument.

REQUESTS FOR ORAL ARGUMENTS MUST BE GRANTED IN ALL NON-DISCOVERY AND NON-CALENDAR MOTIONS

Because of the inconsistent interpretation of Rule 5:5-4(a), this rule should be amended to require oral argument for all motions on substantive matters, unless the parties/counsel request that the motion be decided on the papers. Further, there would be no oral argument for discovery and calendar motions. This will eliminate the vagaries of the present iteration of the rule. Specifically, Rule 5:5-4(a) could be amended to state: "Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of disposition of motions, there shall ~~ordinarily~~ be oral argument on all ~~substantive and~~ non-~~routine~~ discovery motions, unless counsel specifically requests that the motion be decided on the papers submitted, and shall ~~ordinarily~~ deny requests for oral argument on calendar and ~~routine~~ discovery motions." This modification would promote uniformity across the state and prevent the needless appeals that are generated when oral argument is improperly denied to the parties on non-discovery or non-calendaring matters.

TENTATIVE DECISIONS MUST BE EMBRACED

The tentative decision should be

embraced; there should be a movement toward mandatory use throughout the family part on all motions where oral argument is sought, absent good cause. It is acknowledged that by making tentative decisions mandatory, additional work for an already overburdened court may be created. However, mandatory tentative decisions will actually, in the long term, reduce the amount of work for the Judiciary in numerous respects.

First, tentative decisions allow for the possibility that oral argument will not be necessary. Often, requests for oral argument are withdrawn upon the receipt of tentative decisions. Moreover, even where the parties do not accept tentative decision (either in whole or in part), the court has effectively directed the argument of counsel to address those aspects of the tentative decision with which counsel or the parties disagree. This should reduce the amount of time necessary for the actual argument. This is especially important in more complex matters.

Tentative decisions also allow for more efficient timing when staggering motions. For example, more complex motions could be argued on Friday afternoons, as opposed to being scheduled on Friday mornings with other, less complex matters. Alternatively, the court would have time to conference more complex matters prior to the argument after understanding the areas of the tentative decision with which the parties disagree. This would promote the goal of active case management, which was stressed throughout the best practices rule amendments.

Third, the use of tentative decisions should expedite the issuance of an order following the argument. Instead of needing to allocate resources after the argument to draft a form of order, counsel, the parties, or the court could simply amend the tentative decision to reflect any changes stated by the court after hearing oral argument. If no changes are made, the court could simply enter the tentative decision as an order. This would, in most cases, eliminate the time lapse between oral argument and the issuance of an order.

At times, a court may not be in a position to render a decision prior to argument, perhaps due to the complexity of the issues presented, which could be deemed 'good cause' to decline issuing a tentative decision. In those cases, a court may opt to not issue a tentative decision. However, there should be guidelines to define good cause.

It is imperative, however, that in addition to making tentative decisions mandatory, the process for issuing a tentative decision must be standardized. The committee's recommendations were quite prescient in recognizing that a tentative decision only serves a valuable purpose if it is provided far enough in advance of an oral argument for counsel and the parties to carefully review it and discuss it. While tentative decisions issued from the bench or at the courthouse moments before oral argument can serve to limit the amount of time needed for a particular motion or eliminate the need for the motion, such a procedure still requires counsel to prepare for and appear at the courthouse for argument. Additionally, these types of tentative decisions still require the parties to take time off from work to appear for argument.

Rule 5:5-4(e) could be amended as follows: "In any Family Part motion scheduled for oral argument pursuant to this rule, the motion judge prior to the motion date shall tentatively decide the matter on the basis of the motion papers, absent good cause. The motion judge shall make the tentative decision available to the parties at least one day prior to the proposed date for the oral argument. The tentative decision shall be transmitted to the parties via electronic mail and/or telefax. After such tentative decision has been made, unless either party renews the request for oral argument, that request shall be deemed withdrawn and the tentative decision shall become final and shall be set forth in an appropriate order. If the parties renew their request for oral argument, they must do so by the close of business on the day before the oral argument, having specifically identified those provisions of the tentative decision with which they disagree."

SAME-DAY ENTRY OF ORDERS MUST BE ENFORCED

Rule 5:5-4(f) states: "Absent good cause to the contrary, a written order shall be entered at the conclusion of each motion hearing." There is no need to change the text of this rule, especially if tentative decisions become mandatory. As stated above, if tentative decisions are made mandatory, absent good cause, motion judges will be able to more efficiently issue written orders at the conclusion of each motion hearing.

Nevertheless, it must be reinforced that orders need to be issued promptly. Litigants should not be required to wait days, weeks, or in some cases months prior to receiving orders on their motions. When motions are time-sensitive and orders are not promptly provided, litigants are prejudiced. Moreover, their confidence in the judicial system, and its ability to promptly administer justice, is shaken.

In the family part, in many instances, "justice delayed is justice denied." A more strict enforcement of the rule requiring the prompt issuance of orders would serve to prevent the parties from being denied justice.

THE PRACTICE OF PRE-EMPTIVE FILING PROHIBITIONS AND ADMINISTRATIVE ADJOURNMENTS MUST CEASE

As referenced above, certain motion judges or vicinages have adopted practices that are not provided for in the Rules of Court. These

include administrative adjournments and preemptive orders preventing the filing of motions. These practices must cease.

The family bench and bar have always prided themselves on maintaining a healthy, collaborative relationship. This remains imperative. By instituting and applying policies that are not set forth in the Rules of Court, family part judges force attorneys to face this troublesome question from their clients: "Can the judge do that?" Because the judge cannot (under the Rules of Court), this leads to the litigant questioning the entire process. Litigants are left wondering whether the same judges who deviated from the Rules of Court will deviate from the rule of law when deciding their cases.

There will obviously never be complete agreement between judges and attorneys on the merits of a position. The Rules of Court and various statutes afford judges with a great deal of discretion, and rightly so. Family law issues require decisions that are tailored to their individualized circumstances. However, the starting point for these decisions must be statutes, rules of court and case law. This will promote confidence among litigants and further strengthen the relationship between the family bench and bar.

PLENARY HEARINGS

In recommendation #36, the committee "concluded that, too often, plenary hearings are scheduled by the family part. Greater emphasis should be placed upon that portion of the Supreme Court's opinion in *Lepis v. Lepis,* 83 N.J. 139 (1980), which held that plenary hearings need not be held in those situations in which material facts are not in dispute and where substantial justice can be achieved without holding a plenary hearing. The committee envisions the family part undertaking an analytic process not unlike that referred to by the Supreme Court in *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 533 (1995)."[39]

This recommendation was coupled with recommendation #37: "The Rules shall be amended to require all orders that direct a plenary hearing shall specifically define the issues to be determined at the hearing."

THE IMPACT OF THE COMMITTEE'S RECOMMENDATIONS

The Judiciary initially embraced recommendation #36, which was intended to reduce the frequency of plenary hearings. It is very hard to evaluate whether greater emphasis has been placed upon the language in *Lepis*[40] that provides for a plenary hearing only where material facts are not in dispute, and where substantial justice can be achieved without holding a plenary hearing. In 1998, the year of the committee's report, a total of 27,042 matters were re-opened post-judgment.[41] In 2010, this number had increased to 37,140.[42] This obviously does not reflect the number of plenary hearings that resulted from these post-judgment applications. However, it is likely that an increase in post-judgment applications would correlate to an increase in plenary hearings. If these figures continue to increase, the courts will become greatly encumbered by post-judgment plenary hearings. To avoid this outcome, trial courts must be willing to make determinations on the facts submitted whenever possible.

Further, in those cases where a plenary hearing is unavoidable, the trial court must specifically set forth the issues to be addressed at the hearing and, concurrently, set forth the expedited discovery schedule. Unfortunately, the court did not adopt recommendation #37, which would have created a rule to specify the issues to be addressed at a plenary hearing. It is submitted that the court should adopt this recommendation and an appropriate rule created.

It may also be advisable for the Family Practice Committee to develop a standardized form of order establishing a plenary hearing. Paragraph one of the form of order could indicate that date for the plenary hearing. Paragraph two could indicate with specificity the issues to be addressed at the hearing. Paragraph three could set forth the scope and type of discovery and establish discovery deadlines. The remaining paragraphs of the order could set forth a proposed date for a matrimonial early settlement panel (MESP) appearance. An intensive settlement conference and trial date could then be established at the time the parties appear for their MESP, if the matter does not amicably resolve.

This would make the process of a post-judgment hearing analogous to the process of an initial dissolution matter. Based upon their experience with the dissolution process, the litigants would have a greater understanding of the process, and counsel would better understand their responsibilities relative to discovery and the time limits to accomplish their goals.

PROMPT ISSUANCE OF JUDICIAL DECISIONS

In recommendation #38, the committee recommended, "a greater effort be made for judicial decisions to be rendered more promptly. The Judiciary should improve its efforts to monitor reserved decisions."[43] It is an oft-repeated mantra that the Judiciary must 'do more with less' due to vacancies and overall budgetary restraints. Nonetheless, there must be an acknowledgment by the Judiciary that decisions must be rendered promptly after the conclusion of a plenary hearing. The first step in this acknowledgment would be to afford family part judges with 'chambers time' during the court day in which they could write opinions. For example, argument hours could be adjusted so that matters are not scheduled for the first hour or last hour of the court's day, to afford time to the individual judges

to write their decisions. Vicinages should be encouraged to adopt policies to provide judges with chambers time where the judges' sole responsibility would be to work on decisions from outstanding hearings.

Additionally, trial counsel and/or *pro se* litigants could make better use of technology, which would likely assist with the prompt issuance of decisions. For example, written summations/proposed findings of facts and law could be provided to the court as email attachments or via disc, so the court may have them readily accessible when they start their opinion writing process. Electronic copies of documentary evidence should also be provided.

PROMPT RESOLUTION OF CUSTODY MATTERS

In recommendation #39, the committee recommended the amendment of Rule 5:8-6 to "provide that, where the court finds that the custody of children is a genuine and substantial issue, the court shall set a hearing date no later than six months after the filing of the last responsive pleading."[44] The need to promptly resolve contested custody matters should remain high on the family part's list of priorities. However, the issue may not lie with the wording of Rule 5:8-6 and the need to conduct custody hearings within six months of the filing of the last responsive pleading.

The Family Practice Committee should consider the following possibilities to ensure the prompt disposition of custodial matters. First, Rule 5:8-5 should be revisited. Rule 5:8-5(a) requires the parties to submit "a Custody and Parenting Time/Visitation Plan to the court no later than seventy-five (75) days after the last responsive pleading, which the court shall consider in awarding custody and fixing a parenting time or visitation schedule."

Instead of filing this plan 75 days after the last responsive pleading, the plan should be produced at least seven days prior to the occurrence of the first custody mediation session, which is mandatory under Rule 5:8-1. This will allow the parties to understand whether custody is truly 'at issue' prior to their mediation; it also assists the mediator in delineating the issues to be resolved. If, for example, the parties agree that one party should be the residential custodian and the only disagreement relates to the amount of parenting time to be afforded to the noncustodial parent, the case should be viewed differently than the case where the parties disagree about which of them should serve as the custodial parent.

Additionally, Rule 5:8-1 should be reviewed. At present, the rule states: "During the mediation process, the parties shall not be required to participate in custody evaluations with any expert. The parties may, however, agree to do so." If the mediation process is permitted to last as long as two months under this rule, it affords experts less than four months to complete their evaluation (if the goal is to have the reports for the hearing within six months). A possible revision to the rule could provide for a mandatory case management conference within seven days of the first mediation session if the matter remains unresolved, in order to promptly address the necessity of the involvement of an expert. At a minimum, the rule should provide for a mandatory case management conference at the conclusion of a failed mediation to ensure that the case is promptly advanced.

At this conference, the litigants and counsel should resolve the following: 1) whether custody and/or parenting time is at issue; 2) whether to obtain an expert's report and, if so, whether the expert shall serve as a joint expert or whether each party will be retaining their own expert; 3) whether to have probation perform an investigation; or 4) whether to consider another approach to resolution, such as arbitration. Deadlines should be imposed for any steps taken with another case management conference (or an intensive settlement conference) being set at the end of the deadline. If, at the end of the deadline, a dispute still exists, a trial date must be fixed. With this level of active case management, the case has a better chance of being resolved efficiently as mandated by Rule 5:8-6. Without this type of supervision, the case could 'drift' and the matter could be delayed.

That noted, the timeframe for scheduling a custody hearing date as set forth by Rule 5:8-6—six months—does not appear feasible. For good reason, every effort should be made to avoid custody litigation. In this regard, the Court created a mandatory mediation program for all custody and parenting time issues as well as other alternatives to litigation. These procedures take time. Consequently, when all efforts at resolution have failed, it is nearly impossible for counsel—and more particularly, the experts—to properly prepare a custody matter for trial in accordance with the time frame set forth in Rule 5:8-6. Although the priority granted to custody matters must remain, a more reasonable timeframe for trial of such issues must be considered. ■

ENDNOTES

1. Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, Final Report, Feb. 4, 1998. Editor's Note: All references to page numbers for the final report corroborate with the report as it appears in Gary Skoloff and Lawrence Cutler, *New Jersey Family Law Practice*, Historical Documents Volume, Appendix G.
2. The Judiciary has defined the term "backlog" to mean the number of active pending cases that are not within generally accepted normative case processing timeframes *New Jersey Judiciary Court Management*, December 2010, p. i.

3. *New Jersey Judiciary Court Management*, June 2005-December 2010.
4. *New Jersey Judiciary Court Management*, June 2009, p. 51; *New Jersey Judiciary Court Management,* June 2010, p. 51.
5. Sylvia B. Pressler and Peter Verniero, *Current N.J. Court Rules*, comment 2.3 on R. 1:1-1 (2011). *See also Ponden v. Ponden*, 374 N.J. Super. 1, 8 (App. Div. 2004) in which the Appellate Division stated that the primary goal of best practices was to "improve not only the efficiency but also the expedition of civil proceedings...by ratcheting down on the needless delays in the completion of discovery, by eliminating the easy availability of discovery extensions, and by rendering meaningful the arbitration and trial dates scheduled by the courts." (Internal citations omitted). *See also Ponden*, 374 N.J. Super. at 10, stating "The proper application of the 'Best Practices' rule amendments has had, and will continue to have a salutary effect on the fair and efficient administration of justice. But these rule amendments are not a means unto themselves. Their raison d'être was to render trial dates meaningful and, thus, the enforcement or relaxation of discovery end dates are chiefly governed by the presence of an existing trial or arbitration date and whether the late discovery can be completed without jeopardizing the arbitration or trial date."
6. Pressler and Verniero, *Current N.J. Court Rules*, comment 4 on R. 1:1-2 (2011). *See also Parish v. Parish*, 412 N.J. Super. 39, 70 (App. Div. 2010)(J. Ashrafi, concurring and dissenting)(stating that best practices was a term "that designates efforts to bring statewide efficiency and uniformity to procedures employed in our courts.").
7. *See Leitner v. Toms River Regional Schools*, 392 N.J. Super. 80, 91-92 (App. Div. 2007) in which the Appellate Division stated, "'Best Practices' was adopted to establish uniformity in the trial courts throughout the State, to establish firm and meaningful trial dates, to restore the public's faith in expeditious and efficient litigation and to control dilatory litigation tactics by providing the trial courts with tools to manage litigation. It is important to note, therefore, that Best Practices was not adopted primarily as a means of reducing case backlog or increasing case clearance rates. While those goals are laudable, it is a misperception to think that Best Practices was principally adopted to give judges a seductive tool to be used chiefly to reduce backlog and increase clearance rates. A careful review of the Report, the case law, and Judge Pressler's comments, make clear that that is not the case."
8. Under one percent of all matters proceeded to trial in 2010. Administrative Office of the Courts Family Practice Survey, February 2011.
9. Final Report, p. 50.
10. Administrative Office of the Courts Family Practice Survey, February 2011.
11. Administrative Office of the Courts Family Practice Survey, February 2011.
12. Final Report, p. 45.
13. Final Report, p. 46.
14. Final Report, p. 47.
15. Administrative Office of the Courts Family Practice Survey, February 2011.
16. Administrative Office of the Courts Family Practice Survey, February 2011.
17. *See*, for example, *Santiso v. Santiso*, 2010 WL 3418277 (App. Div. 2010)(holding that the denial of oral argument on the parties' applications for enforcement of their rights as litigants was erroneous, where both counsel had requested oral argument.). *See also Friedman v. Friedman*, 2011 WL 13741 (App. Div. 2010)(stating that the defendant was entitled to orally argue her application, as it was requested, and the application did not deal with a discovery or calendar issue.). *See also Rothfeld v. Rothfeld*, 2008 WL 4763271 (App. Div. 2008); *Blanke v. Blanke*, 2008 WL 2199962 (App. Div. 2008). *But see Anderson v. Ludeking*, 2008 WL 4630697 (App. Div. 2008)(holding that while the litigant requested oral argument on a non-calendar and a non-discovery related matter, the trial court properly denied his request as "the record contained all of the evidence necessary for the court to properly decide the motions, and none of the evidence raised a genuine dispute as to any material facts."). *Id.* at *3.
18. Final Report, p. 50.
19. Final Report, p. 51.
20. *Ibid*.
21. Final Report, p. 52.
22. Final Report, p. 53.
23. Administrative Office of the Courts Family Practice Survey, February 2011.
24. Administrative Office of the Courts Family Practice Survey, February 2011.
25. Administrative Office of the Courts Family Practice Survey, February 2011.
26. Administrative Office of the Courts Family Practice Survey, February 2011.
27. Administrative Office of the Courts Family Practice Survey, February 2011.
28. Administrative Office of the Courts Family Practice Survey, February 2011.
29. Administrative Office of the Courts Family Practice Survey, February 2011.
30. Administrative Office of the Courts Family Practice Survey, February 2011.
31. Final Report, p. 57.
32. *Ibid*.
33. Final Report, p. 57-58.
34. Final Report, p. 58.

35. Final Report, p. 59.
36. William Shakespeare, *Henry the Fourth*, Part 1, Act 5, Scene 4, 120-121.
37. Final Report, p. 53.
38. Final Report, p. 54.
39. Final Report, p. 61.
40. *Lepis v. Lepis*, 83 N.J. 139 (1980).
41. Administrative Office of the Courts Family Practice Survey, February 2011.
42. Administrative Office of the Courts Family Practice Survey, February 2011.
43. Final Report, p. 64.
44. Final Report, p. 66.

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Trials

by Brian Schwartz

In New Jersey, trials are rare. In fact, in the court year ending June 30, 2010, of the nearly 30,000 dissolution filings, there were 221 cases tried to conclusion.[1] There are a number of reasons for this. In some cases, the parties have relatively few issues and are able to resolve their matters without difficulty. For example, in the court year ending June 30, 2010, 16,571 cases (56 percent) were disposed of by default judgment.[2] Additionally, over the course of time, the Supreme Court has instituted various forms of mandatory alternative dispute resolution options such as the matrimonial early settlement panel, custody and parenting time mediation, and economic mediation, to name a few prominent programs. In addition to these 'sanctioned' forms of alternatives to litigation, the courts have employed other programs such as intensive settlement conferences with a judge, blue ribbon panels, 'blitz weeks' and other creative methods to assist with the resolution of matters—all in an effort to avoid trials. However, as any trial judge will likely acknowledge, the success of these programs is in many ways directly related to the parties' acknowledgement of the consequences of their failure to reach an agreement—the emotional and financial cost of a trial.

Unfortunately, as many practitioners know all too well, in many counties a real trial date is rare; and if a real trial date is rare, consecutive trial dates are extraordinarily rare. As will be discussed below, issues regarding trials are not new; many have sought to find a solution, but the problems with trial dates continue to haunt the family part.

BACKGROUND

The Special Committee on Matrimonial Litigation, in its final report dated Feb. 4, 1998, made a significant recommendation regarding trial practice—recommendation #29, which stated: "In counties having four or more judges assigned to the Family Part, there shall be continuous trials."[3]

In reaching this apparent compromise of aspiration and practicality, the committee first reviewed the longstanding goals regarding continuous trials. The committee set forth, at length, a Sept. 3, 1993, memorandum from former Chief Justice Robert N. Wilentz to the Family Division presiding judges. Quoting Chief Justice Wilentz:

> Finally, the problem of continuous day trials. This is a problem that is festering in many areas of the state. Probably not in all vicinages, but in many. All kinds of trials, but especially dissolution trials, including the custody and visitation issues, are tried one day at a time, but not one day after another, four days of trial sometimes taking four months, sometimes a year, sometimes more. I won't tell you the damage that is done, you know it better than I do. Way back when we had one of the first studies of the Family Court, in Pashman I or Pashman II, the need for continuous trials was identified. In 1979 a letter directed Assignment Judges to provide for continuous calendars in matrimonial matters. It was followed by a directive issued March 17, 1981, requiring continuous trials in guardianship cases. But it is clear that these directives are not now being complied with statewide. I am aware of the fact that there are many managerial problems that interfere with the ability to have continuous day trials, but I am even more aware that the need for such trials is far greater than the managerial problems that exist. We simply must do this, we cannot fail any longer, it is absolutely mandatory. Our failure in this area, if it continues, has to be incomprehensible to the public, and to the litigants who suffer from it. The idea that a divorce trial requiring three days, will start on the first of one month, and be finished on the 30th of another month ten months later is incomprehensible to the public and to me….I want continuous day trials as the rule, not the exception, and I want the exceptions to be rare…. For all the good we have done, and we have done a great deal, we'll be destroyed if we do not solve this problem and solve it soon.[4]

Although the above was written nearly 20 years ago, and makes reference to similar observations from reports drafted over 30 years ago, this easily could have been written today.

The committee itself then noted—at the time of the final report—that, "[u]nfortunately, there are vicinages which have been less than consistent in their adherence to the policy [of continuous day trials]. In others, anecdotally, the committee has learned that performance has been disappointing."[5] In sum,

> The Committee unanimously agreed that continuous trials are essential in the timely and efficient processing of dissolution matters. The Committee recognized, however, that the implementation of a continuous trial policy is dependent on adequate judicial staffing. Therefore, the Committee

> recommends that continuous trials be the policy in vicinages where there are four or more Family Part judges.[6]

The committee further defined a court day for trial purposes as "at least a three hour block of time on that day."[7]

As a result of recommendation #29, the Court adopted Rule 5:3-6, which states: "Insofar as practicable, civil family actions should be tried continuously to conclusion and, in the absence of exigent circumstances, shall be so tried in counties in which four or more judges are assigned to the Family Part on a full-time basis."

In addition to consecutive trial dates, the committee discussed the importance of scheduling a firm trial date.

> The public expects and deserves prompt and affordable justice. Delays signal a failure of justice and subject the court system to public criticism and a loss of confidence in its fairness and utility as a public institution. Once a litigant invokes the jurisdiction of the judicial system, the court has the responsibility of pressing the attorneys and litigants to prepare the case for adjudication without delay. The court's loss of control over the litigation invariably leads to procedural inactivity. The public, litigants, lawyers and judges all will benefit from the elimination of elapsed time beyond what is necessary to prepare for and conclude a particular case. Delay devalues judgments, creates anxiety in litigants and uncertainty for lawyers, results in loss or deterioration of evidence, wastes court resources, needlessly increases the costs of litigation, and creates confusion and conflict in allocation of court resources.[8]

As a result, Rule 5:5-7 directs, in part, that at the case management conference, a "firm trial date" be established. For cases assigned to the priority and complex tracks, the firm trial date is set at the second case management conference; for cases assigned to the standard and expedited tracks, the firm trial date is scheduled at the first case management conference.[9]

FIRM CONSECUTIVE TRIAL DATES

The greatest incentive for parties to settle their matter is the consequence of not settling—the costs of a trial, the loss of control over decision-making in their lives and that of their family, and the general apprehension of the unknown. Often, counsel will use the 'threat' of an impending trial as a means of persuasion in settling matters, to encourage their clients to make one final concession, to accept the recommendation by an early settlement panel or an economic mediator. However, for these methods of persuasion to be effective there needs to be a real trial date on the horizon. Unfortunately, despite the recommendations of the committee—and its predecessors addressing these issues—and the rule changes, in many vicinages neither firm trial dates nor consecutive trial dates exist.

In some counties, the reasons for this are evident. In Warren County, for instance, there is one family part judge who is responsible for every case type, leaving less than one day per week for dissolution trials. In other counties, there are judicial vacancies—Bergen, Essex, Ocean and Union counties each have two vacancies in the family part, and nine other counties have one vacancy in the family part.[10] That noted, the concerns recited by former Chief Justice Wilentz and the committee cannot be ignored; there is simply no excuse for a three-day trial to take 10 months to complete. Similarly, there is a cost—financial and emotional—to telling a litigant over and over again that their trial date is a 'real' trial date, only to be disappointed time after time.

With regard to a firm trial date, often courts schedule more than one matter for a specific date. The reason is simple—the statistics support that most cases scheduled for trial will settle before the trial. However, most courts are hesitant to freely discuss trial dates with counsel. Often, counsel will call the trial judge's chambers in advance of the trial date and inquire whether the trial date is 'real.' All too often, counsel is told that, in fact, it is a real date, even though the court likely knows that it is not.

As a result of that discussion, counsel (and the litigants) will spend an inordinate amount of time and money preparing for the trial by preparing trial briefs, pre-marking and copying voluminous exhibits, creating trial notebooks/binders, preparing witnesses (and perhaps paying for travel costs of witnesses) and canceling other client appointments or court appearances. Counsel will then appear prepared for the real trial date, only to be advised that there are five other cases on the calendar, all of whom are prepared to start their trials. This cycle is regularly repeated over the course of the next several months.

Quoting the former chief justice, "failure in this area, if it continues, has to be incomprehensible to the public, and to the litigants who suffer from it."[11] More to the point, counsel and the parties lose confidence in the system, at a significant financial and emotional cost.

Frankly, this problem evidences a lack of trust between the bench and bar. The bench fears that telling counsel a date is not a real trial date (and, instead, a settlement conference with the court) will lead to counsel being less prepared to resolve the matter or the litigants being less inclined to discuss resolution. The bar, on the other hand, become frustrated by the lack of information from the court, causing counsel, at times, to not adequately prepare for the scheduled court appearance, in an attempt to control litigation costs. Worse, after the first false start, litigants are less willing to make the concessions necessary to resolve the case, making resolution less likely.

In those counties where real trial dates do not regularly occur, the bench and bar need to develop a better system. Some suggestions are as follows:

1. One month in advance of a scheduled trial date, the matter should be scheduled for an intensive settlement conference with the court. At this conference, the court will be able to gauge the likelihood of settlement, the depth of the issues and, if no resolution is reached, the number of days a trial will require.
2. Two weeks in advance of the scheduled trial date, counsel and the court should schedule a conference call. During this call, counsel must be candid with the court regarding: 1) the likelihood of settlement of the matter in advance of the trial date, and 2) if the matter is going to proceed to trial, the number of days that will be required to try the matter to conclusion.
3. A tacit understanding should be developed between the bench and bar that a first trial date is not a real trial date, but rather an intensive settlement conference. All pre-trial submissions must be delivered to the court in advance of this first trial date, including trial briefs, witness lists and settlement positions. However, should this conference not result in a settlement, the next scheduled trial date—whenever that date is—must be a firm date.

These are merely suggestions, but the spirit of these suggestions center on an increased level of trust between bench and bar.

Regarding consecutive trial dates, in many counties, as a practical matter, this cannot occur. However, every vicinage must make a greater effort to conclude matters as quickly as possible. The practice of trying matters over several months must cease; the thought of one jurist presiding over several trials concurrently is troubling. From a jurist's point of view, it is nearly impossible to retain the facts (let alone the nuances) of several different dissolution trials at the same time. At some point, the court will inevitably confuse the facts from one case with the facts of another, causing a duplication of efforts for the trial judge. For counsel and the litigants, as noted by the committee, the level of redundancy of preparation, and the significant financial cost related thereto, is highly objectionable. Further, in terms of the actual trial, counsel is required to review prior testimony, to revisit important matters which had previously been covered, all to ensure that the point is made.

Unfortunately, with the current budget concerns, the number of judicial vacancies, the expansion of other family part case types, and other issues affecting the Judiciary, it appears that issues regarding trial dates will only get worse. It is imperative that the Family Part Practice Committee, the Family Law Section of the state bar, and the Council of Family Part Presiding Judges work together, with the Administrative Office of the Courts, to address these issues. ■

ENDNOTES

1. Administrative Office of the Courts Family Practice Survey, February 2011.
2. *Id.*
3. Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, Final Report, Feb. 4, 1998, p. 99. Editor's Note: All references to page numbers for the final report corroborate with the report as it appears in Gary Skoloff and Lawrence Cutler, *New Jersey Family Law Practice*, Historical Documents Volume, Appendix G.
4. *Id*, at 100-101.
5. *Id*, at 101.
6. *Id.*
7. *Id.*
8. *Id*. at 78.
9. Rule 5:5-7(a).
10. Administrative Office of the Courts Family Practice Survey, February 2011.
11. Final Report, at 100.

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Counsel Fees

by Jennifer Weisberg Millner

In addition to case management, the Special Committee on Matrimonial Litigation focused on issues related to counsel fees. Unfortunately, while the rules of court have undergone significant revisions consistent with the recommendations of the committee, the implementation of those rule changes by the courts has been inconsistent at best, leaving many attorneys with significant balances due for services rendered both during and after the dissolution action. The result is that both lawyers and litigants leave the system feeling frustrated and dissatisfied.

BACKGROUND

In its report, the committee recommended significant revisions to the rules regarding counsel fees. The committee vetted these issues during the various public hearings. The committee:

> heard extensive testimony, conducted substantial research, and thoughtfully deliberated the interrelated issues of the need to assure litigant's access to legal representation; counsel's desire to be paid or have unpaid fees reasonably secured; as well as the practical problems the interpretation of existing decisional law has created in making it very difficult to withdraw from a case once any fee has been paid.[1]

After consideration, the committee made six separate recommendations in regard to fees. Those recommendations were:

> **Recommendation #3**
> The Rule should be amended to specifically authorize the Family Part to direct the liquidation, encumbrance of hypothecation of assets so as to provide the litigants, where equities warrant, a source of resources to fund the litigation. [2]
>
> **Recommendation #4**
> The Rule should be amended to explicitly preclude matrimonial attorneys from taking security interest in their client's property.[3]
>
> **Recommendation #5**
> The Rule should be amended to specifically authorize the Family Part to permit counsel to seek withdraw from a representation in the event that a client fails to abide by the terms of the retainer agreement. The holding in *Kriegsman v. Kriegsman* should both by Rule and Decisional Law be relaxed. Acceptance of a fee should not constitute a per se bar to being granted permission to withdraw from a matter.[4]
>
> **Recommendation #6**
> Non-refundable retainer should be prohibited.[5]
>
> **Recommendation #7**
> If interest is to be kept charged on delinquent fee accounts, there must be compliance with ACPE Opinion 446. Compliance shall include specificity of the interest to be charged in the retainer agreement. Based upon Opinion 446, in no event should interest be charged sooner than thirty (30) days following the rendering of a bill.[6]
>
> **Recommendation #8**
> Other than in dealing with tort claims recognized by Rule 1:21-7, Contingent Fees shall be prohibited in matrimonial matters.[7]

Recommendations #7 and #8 are self-explanatory, and are generally accepted by the bench and bar. As such, they will not be discussed here.

In connection with recommendations 3, 4, and 5, above, the committee suggested a number of rule changes. Those proposed changes included the following:

Rule 4:42-9(a)(1), regarding an award of fees, be amended to read as follows (which rule was ultimately adopted):

> In a family action, the Court in its discretion may make an allowance pendente lite and on final determination to be paid by any party to the action, including if deemed to be just any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, visitation, equitable distribution, separate maintenance, enforcement of interspousal agreement relating to family type matters and claims relating to family type matters and actions between unmarried persons. Any pendente lite allowance may include a fee based upon an analysis of prospective services to be performed and the respective financial circumstances of the parties. In determining what award may be reasonable and just, the Family Part may, for good cause shown, direct the liquidation, hypothecation, or encumbrance of assets in order to provide the funds the Court deems necessary to permit both parties to litigate the action.[8]

Rule 1:21-7(b), regarding contingent fees:

> In family actions, no attorney shall take or hold a security interest, mort-

gage or obtain a lien from a client during the course of that attorney's representation of a client. Finally, the Committee recommended that Rule 1:11-2 providing for the withdraw of an action, that withdraw from family actions set forth in Rule 5:1-2(a) shall be pursuant to Rule 5:3-6.[9]

Despite the proposed rule of the committee, Rule 1:21-7 was only amended as follows:

(e) Paragraph (c) of this Rule is intended to fix maximum permissive fees and does not preclude an attorney from entering into a contingent fee arrangement providing for, or charging or collecting a contingent fee below such limitations. In all cases, contingent fees charged or collected must conform to R.P.C. 1.5(a).[10]

R.P.C. 1.5(a) was also amended to state that:

(d) a lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

Rule 4:42-9 was amended simply to state that:

(1) in a family action, a fee allowance both pendente lite and on final determination may be made pursuant to Rule 5:3-5(c).[11]

Rule 5:3-6, regarding withdrawal of counsel:

In family actions as defined in Rule 5:1-2(a), after a Matrimonial Early Settlement Panel hearing, or the fixing of a trial date, whichever is earlier, an attorney may withdraw from the action only by leave of court by motion on written notice to all parties supported by the attorney's affidavit or certification which shall contain the reasons why leave to withdraw is sought and shall have appended to it the written retainer agreement between the attorney and client. Prior to such time, an attorney may withdraw without leave of court upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear *pro se*. If the client will appear *pro se*, the withdrawing attorney shall file the substitution. An attorney retained by a client who had appeared *pro se* shall file a substitution. If, prior to the Matrimonial Early Settlement Panel hearing or the fixing of a Trial date, whichever is earlier, in a family action, in the event that the client does not consent to the withdrawal of the attorney, withdrawal may only be with leave of court by motion or on written notice to all parties supported by the attorney's affidavit or certification which shall contain the reasons why leave to withdraw is sought and shall appended to it the written retainer agreement between the attorney and client.

In determining whether leave of court shall be granted on notice, the Court shall consider, among such other factors as the court may be equitable and just, the terms of the written retainer agreement between the client and the attorney; whether either the attorney or client has breached the term of said agreement; age of the case; proximity of the MESP and Trial date; complexity of the issues and the ability of substituted counsel to properly represent the client; ability of the client to locate and retain substitute counsel; the likelihood of the attorney receiving payment of the balance in accordance with the retainer agreement if the retainer is tried; the impact on the court's calendar; the amount of money already paid by the client to the attorney; the financial burden to the attorney if the withdraw application is not granted; and the prejudice of the client or the other party.[12]

Rule 5:3-5, regarding an award of counsel fees:

5:3-5. Attorney Fees and Retainer Agreements in Civil Family Actions; Withdrawal

(a) Retainer Agreements. Except where no fee is to be charged, every agreement for legal services to be rendered in a civil family action shall be in writing signed by the attorney and the client, and an executed copy of the agreement shall be delivered to the client. The agreement shall have annexed thereto the Statement of Client Rights and Responsibilities in Civil Family Actions in the form appearing in Appendix XVIII of these rules and shall include the following:

(1) a description of legal services anticipated to be rendered;

(2) a description of the legal services not encompassed by the agreement, such as real estate transactions, municipal court appearances, tort claims, appeals, and domestic violence proceedings;

(3) the method by which the fee will be computed;

(4) the amount of the initial retainer and how it will be applied;

(5) when bills are to be rendered, which shall be no less frequently than once every ninety days, provided that services have been rendered during that period; when payment is to be made; whether interest is to be charged, provided, however, that the running of interest shall not commence prior to thirty days following the rendering of the bill; and whether and in what manner the initial retainer is required to be replenished;

(6) the name of the attorney having primary responsibility for the client's representation and that attorney's hourly rate; the hourly rates of all other attorneys who may provide legal services; whether rate increases are agreed to, and, if so, the frequency and notice thereof required to be given to the client;

(7) a statement of the expenses

and disbursements for which the client is responsible and how they will be billed;

(8) the effect of counsel fees awarded on application to the court pursuant to paragraph (c) of this rule;

(9) the right of the attorney to withdraw from the representation, pursuant to paragraph (d) of this rule, if the client does not comply with the agreement; and

(10) the availability of Complementary Dispute Resolution (CDR) programs including but not limited to mediation and arbitration.

(b) Limitations on Retainer Agreements. During the period of the representation, an attorney shall not take or hold a security interest, mortgage, or other lien on the client's property interests to assure payment of the fee. This Rule shall not, however, prohibit an attorney from taking a security interest in the property of a former client after the conclusion of the matter for which the attorney was retained, provided the requirements of R.P.C. 1.8(a) shall have been satisfied. Nor shall the retainer agreement include a provision for a non-refundable retainer. Contingent fees pursuant to R. 1:21-7 shall only be permitted as to claims based on the tortious conduct of another, and if compensation is contingent, in whole or in part, there shall be a separate contingent fee arrangement complying with R. 1:21-7. No services rendered in connection with the contingent fee representation shall be billed under the retainer agreement required by paragraph (a) of this rule, nor shall any such services be eligible for an award of fees pursuant to paragraph (c) of this rule.

(c) Award of Attorney Fees. Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, parenting time, 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. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective financial circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained: (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

(d) Withdrawal from Representation.

(1) An attorney may withdraw from the representation ninety (90) days or more prior to the scheduled trial date or prior to the Matrimonial Early Settlement Panel hearing, whichever is earlier, upon the client's consent in accordance with R. 1:11-2(a)(1). If the client does not consent, the attorney may withdraw only on leave of court as provided in subparagraph (2) of this rule.

(2) After the Matrimonial Early Settlement Panel hearing or after the date ninety (90) days prior to the trial date, whichever is earlier, an attorney may withdraw from the action only by leave of court on motion on notice to all parties. The motion shall be supported by the attorney's affidavit or certification setting forth the reasons for the application and shall have annexed the written retainer agreement. In deciding the motion, the court shall consider, among other relevant factors, the terms of the written retainer agreement and whether either the attorney or the client has breached the terms of that agreement; the age of the action; the imminence of the Matrimonial Early Settlement Panel hearing date or the trial date, as appropriate; the complexity of the issues; the ability of the client to timely retain substituted counsel; the amount of fees already paid by the client to the attorney; the likelihood that the attorney will receive payment of any balance due under the retainer agreement if the matter is tried; the burden on the attorney if the withdrawal application is not granted; and the prejudice to the client or to any other party.[13]

Clearly, the intent of the rule changes—especially the addition of Rule 5:3-5—was to provide the bench with the necessary tools to provide for the payment of fees, both during the pendency of the case and at its conclusion. Yet, over a decade later, many question whether the promulgation of these rules have in fact led to the use of these tools by the courts—that is, have the rule changes led to court orders for the "sale or dissipation of assets" in order to pay fees, and are attorneys being permitted to withdraw from cases when they are not being paid.

PENDENTE LITE AWARDS

The recommendation with regard to the *pendente lite* distribu-

tion of assets in order to fund the litigation was in response to the *Grange v. Grange,*[14] in which the Appellate Division found that the court did not have the power to issue such an order. The rule was changed to specifically allow for the sale of assets during the pendency of the case in order to appropriately fund the litigation. Anecdotally, the bar perceives that the bench has been slow to actually implement the rule allowing for the use of marital assets to fund litigation. This is particularly so in the present economy, as the assets available to many litigants have declined in value. The courts often seem inclined to preserve the marital estate for the litigants going forward, requiring counsel to await the final outcome before being compensated for the work performed.

Similarly, many in the bar perceive that the bench is of the opinion that awarding fees to an attorney *pendente lite* only serves to 'encourage' litigation. To the contrary, an award of fees *pendente lite* should have the opposite effect. As noted by the committee:

> Counsel also complain that, too frequently, they are forced to prosecute litigation without sufficient access to resources, thereby having to wait until the conclusion of litigation to be paid. Counsel note that this forces attorneys to accumulate unreasonable levels of receivables and leads to (a) later fee disputes with clients and (b) clients, as the matter progresses, having an unrealistic view of the actual costs of the litigation. *The point has been made that if clients would actually see the costs that are being incurred in terms of expended assets, litigation might be more readily settled.* (emphasis added)[15]

It likewise cannot be ignored that solo practitioners and small firms are greatly affected by the lack of an award of *pendente lite* fees. In a contentious matter, a solo practitioner may expend a significant amount of billable time on one matter. If that attorney is not paid by the client on a regular basis, and the court is unwilling to liquidate assets (or require the litigants to incur debt as permitted by the rules), the attorney's practice suffers; the attorney may be required to incur debt in order to meet the on-going expenses of the office. In other words, rather than the client funding the litigation, the attorney is required to fund the litigation. Further, because there is no guarantee of payment on what may be a significant balance due at the conclusion of the matter, the attorney is clearly in a position of weakness in collecting the fee. This scenario is exactly the set of circumstances envisioned by the committee in recommending the rule changes.

ATTORNEY WITHDRAWAL

As the committee acknowledged, the case of *Kriegsman v. Kriegsman*[16] had long been interpreted to hold that when an attorney takes in a matter, he or she implicitly agrees to the representation of a client until the conclusion of the case regardless of whether the client can continue to pay his or her attorney. The committee clearly felt that while there were certain instances in which it would be unjust to allow counsel to abandon a client, there are other circumstances in which it is unfair to require an attorney to remain in a case when there is little chance the attorney will be paid. The committee grappled with the competing interests of the right of the lawyer to be compensated for his or her services against the public interest in being able to retain competent legal representation with some security in knowing they will not be abandoned.[17]

The committee sought to strike a balance between these interests. The new Rule 5:3-5(d) addressed withdrawal, providing a somewhat bright line rule regarding when the attorney can withdraw as a matter of right, and when permission of the court is required. Under the new rule, more attention was to be given to the retainer agreement. In fact, the committee's recommendations resulted in significant changes in matrimonial engagement and retainer agreements, to the benefit of both attorney and client. However, in practice very little deference has been given to the specific terms of the retainer agreement.

Pursuant to Rule 5:3-5(d)(1), attorneys may withdraw as a matter of right prior to an appearance at the matrimonial early settlement panel (MESP) or 90 days prior to trial, whichever is earlier. However, most attorneys feel an obligation to remain in a matter until attending the MESP, as this is often the first true opportunity to obtain a neutral perspective and, more to the point, the MESP often leads to resolution—whether just before the MESP, at the MESP or shortly thereafter. In the court year ending June 30, 2010, approximately 9,500 cases were presented to early settlement panelists; approximately 30 percent of those cases were settled as a direct result of the panel.[18] However, this figure does not include cases that settled either just prior to the panel date (likely as a result of the pending panel appearance) or shortly after the panel (*i.e.*, those settlements that are not placed on the record but, instead, permit the parties time to draft an agreement). Consequently, it is only after the MESP is concluded that counsel may realize that either one or both of the litigants are taking positions that will likely lead to further litigation, and the resultant rapid increase in fees. The limitation on withdrawal from case now places the attorney in a precarious position.

SECURITY FOR PAYMENT OF OUTSTANDING FEES

When discussing the issue of attorneys holding a security interest in property of their clients, the committee noted that:

> few issues have so divided the bar

> and public as the question of whether attorneys should be permitted to take security interests for fees during the course of matrimonial representation. Indeed, among the concerns expressed by the Michels Commission in its 1993 Report was a specific concern about "attorneys placing liens upon the sole residence of matrimonial clients or, worse yet, of lawyers forcing clients to execute a mortgage upon the residence in favor of the attorney as a condition of continuing with their representation where the initial retainer has been exhausted." That concern was among those that led to the creation of this Committee.[19]

The committee further noted that:

> the bar has suggested that security interests could be permitted under judicial supervision. Again, we disagree. Painfully aware of the burdens that have already been placed on the Family Part, we must balance the burdens that imposing yet a new panoply of motions would create. Failing to perceive the need to permit security interests, we conclude that the better course is simply preclude their use.[20]

While the intentions of the committee were laudable, the current economic environment has made it more difficult for attorney and client alike, and it may be time to revisit this recommendation. Many in the bar are still convinced that with proper precautions, securing a fee—for example by means of an attorney charging lien—is a viable method to provide an attorney with a greater assurance of being compensated for services. Indeed it can be well argued that given the issues discussed in this article, including the significant delays in moving cases forward, assurance for payment to an attorney is needed now more than ever. The courts are seeing increasing numbers of cases in which litigants are proceeding *pro se*, such that in several counties, workshops have been designed in order to make attempts facilitate the movement of cases through the system.

Anecdotally, there has been little success in this regard. While the committee voiced concern that allowing an attorney to take a security interest (including a charging lien) could lead to abuse, in fact, the attorney has been given, in a sense, discriminatory treatment *vis a vis* other creditors. Moreover, to the extent that a litigant does not have a true stake in the case, there may be less motivation to take reasonable positions or otherwise negotiate in good faith.

In this author's view, an issue that cannot be ignored is the bench's seemingly distorted view of the efforts that are taken by attorneys in representing their clients and the entitlement to be compensated for these efforts. This was most acutely demonstrated in the recent unpublished case of *McClutchy v. McCultchy*.[21] In that matter, the plaintiff entered into a fee agreement with her divorce counsel, which complied with the requirements of Rule 5:3-5. Following three years of litigation, the action was tried. Both parties had an application for fees as part of their case. Upon completion, the court had counsel submit a one-page summary of total fees less amounts already paid. The summary from the plaintiff's counsel indicated that the plaintiff had paid $46,706 and had an outstanding balance of $101,900.89. Setting aside the court's improper direction to counsel to submit merely a summary of fees (as opposed to an affidavit of services), the trial court's decision from the bench included the following admonition:

> Finally, the issue of counsel fees remains. It is shocking to the court that [t]he cost of [the parties' daughter's] college education ($215,000.00) at a prestigious school (Lehigh University) is exceeded by the cost of the divorce in attorney and expert fees ($230,000), even prior to the trial. The court and everyone reading this opinion should be offended that such a situation has occurred.[22]

Further, the trial court directed:

> The Court will cap the fees at $50,000 to each side. There will be no additional fees requested paid above that figure, which will be the total amount permitted to be collected by each side. No Court enforcement nor collection will be made for amounts beyond this Court's decision of a total $50,000 fee to each party.

While the trial court was reversed by the Appellate Division, the fact remains that the trial court's opinion regarding fees reflects the attitude of the bench in general toward counsel fees.

RECOMMENDATIONS

The vast majority of the matrimonial bar subscribe to the belief that the relationship between lawyer and client in a dissolution action is a unique one and, as a result of the emotional and deeply personal nature of the representation, cannot be treated in the same fashion as other attorney-client relationships. That having been said, there is a concern of a growing resentment that attorneys will be held hostage not by their clients, but by the court in its quest to manage its docket. This, in and of itself, can lead to the decay of the working relationship between attorney and client (not to mention bench and bar), and the ultimate ability of litigants to obtain quality representation. This has not changed since the completion of the report.

The following recommendations are offered for consideration:

1. In recommendation #3 of the final report, the committee advocated for the family part judges to have authority to "direct the liquidation, encumbrance of hypothecation of assets so as to provide the litigants, where equities warrant, a source of resources to fund the litigation."[23]

This recommendation was adopted by the Supreme Court, and is clearly set forth in Rule 5:3-5(c). The rule specifically permitted an award of *prospective* fees (*i.e.*, a *pendente lite* award of fees). This rule must be implemented more frequently.

2. In recommendation #4, the committee sought a prohibition against an attorney taking a security interest in a client's property during the pendency of a matter. Although the practice of taking a mortgage in a client's property appears unseemly, there must be some means by which an attorney can protect an outstanding fee claim. Whether that security is similar to an attorney charging lien, a pledge of assets into an escrow account pending the outcome of the matter, or some other means (which may require legislation), an attorney must be provided more security for the collection of a fee.
3. With regard to an attorney's ability to withdraw from a matter, there are three recommendations:
   a. Rule 5:3-5(d) should be amended to provide that attorneys may be relieved as counsel by right if the request is made within 30 days after attending the matrimonial early settlement panel. This will allow counsel to remain involved in the matter through this important milestone, while not then requiring the attorney to remain in the matter should the litigation take an unforeseen—and costly—turn of events thereafter.
   b. The retainer agreement—which generally provides for an attorney to withdraw if the litigant does not comply with the obligation to pay for services rendered—must be given greater deference.
   c. An attorney should be permitted to withdraw from a matter as of right if a client does not make a payment toward a balance due for a period of 60 days or longer. ■

ENDNOTES

1. Supreme Court of New Jersey, Special Committee on Matrimonial Litigation, Final Report, Feb. 4, 1998, p. 28. Editor's Note: All references to page numbers for the final report corroborate with the report as it appears in Gary Skoloff and Lawrence Cutler, *New Jersey Family Law Practice*, Historical Documents Volume, Appendix G.
2. *Id.* at p. 29.
3. *Id.*
4. *Id*.
5. *Id.* at p. 46.
6. *Id.* at p. 50.
7. *Id.* at p. 52.
8. *Id.* at p. 30.
9. *Id.*
10. Sylvia B. Pressler and Peter G. Veniero, *Rules Governing the Courts of the State of New Jersey,* 2011.
11. *Id*.
12. *Id*, at 30-31.
13. *Id*.
14. 160 N.J. Super. 153, 158-9 (App. Div. 1978).
15. Final Report, at 32.
16. 150 N.J. Super. 474 (App. Div. 1977).
17. Final Report at p. 44.
18. Administrative Office of the Courts Family Practice Survey, February 2011.
19. *Id*. at p. 36.
20. *Id* at p. 41.
21. 2011 WL 6053 (N.J. Super.A.D).
22. *Id.*
23. *Id.* at p. 29.

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