New Jersey Family Lawyer

Newsletter

Volume 22 • Number 2
August 2002

New Jersey Family Lawyer

Volume 22 • Number 2
August 2002

Newsletter

Chair's Column

Thanks for the Memories

by Cary Cheifetz

This is my last column as chair of the section. How fast the time has gone. As I look back on the past year I have tremendous memories and heartfelt thanks for those whose support and efforts made my term successful and full of grace. The torch now passes to **Mike Stanton** who has been a remarkable chair-elect, and whose hard work this past year as my shadow will make him even a more remarkable chair. Best wishes Mike!

I also want to thank **Brian Schwartz** and **Debra Weisberg** for their joint efforts in recruiting active participation in our section's young lawyers group. Brian, Debra and their minions represent the future of our section. They are a talented and hardworking group who are as dedicated as our elders to the section and this practice. They need to continue playing a prominent role within the section. We need to continue showcasing the depth of this section by using their energy on issues that face us in the future.

If the section is to remain vital, we must continue seeking new members. I thank **Candace Scott, Patricia Barbarito** and **Gary Borger** for their efforts this year in formulating a membership drive that will be implemented over the terms of the next few chairs. Membership is the most important issue facing the organized bar and this section. Our voice is only as strong as the demographics of our membership. If we propose to speak for the family bar in a unified voice, then we need to represent a higher proportion of lawyers who practice in our field.

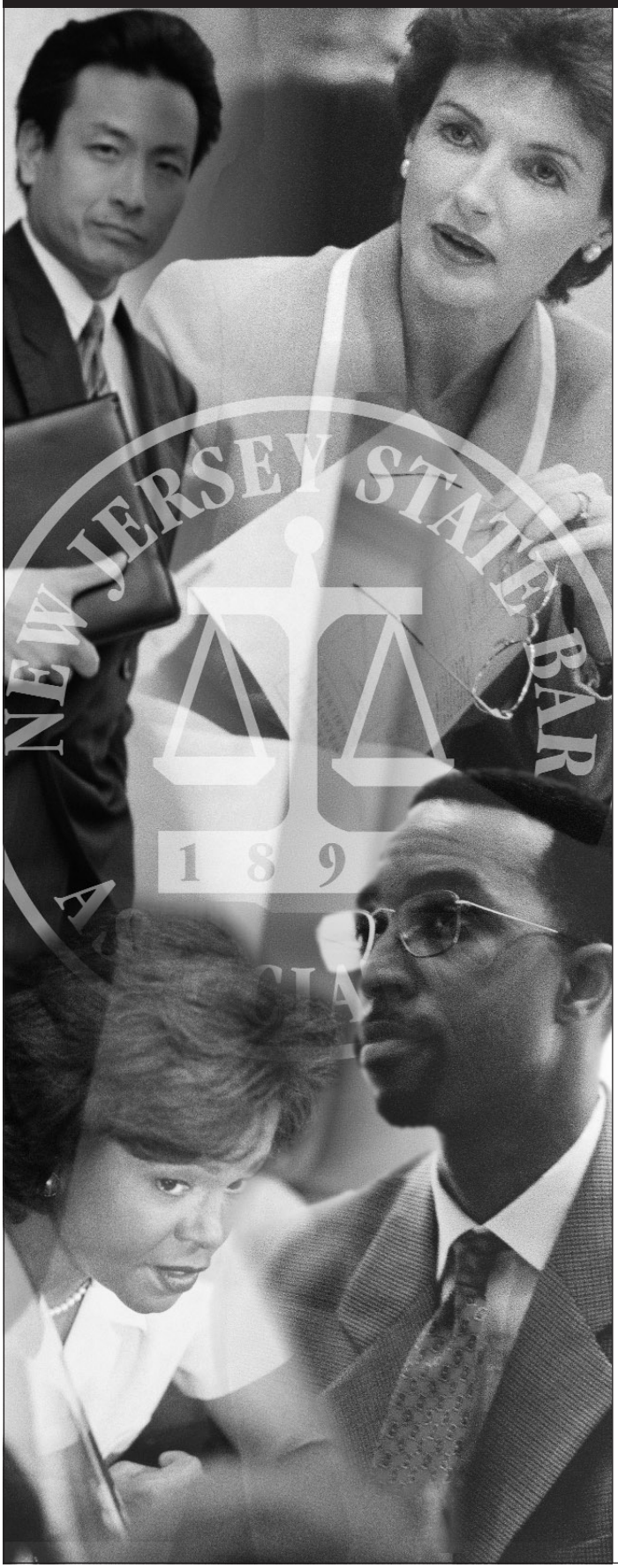
Membership is the most important issue facing the organized bar and this section.... If we propose to speak for the family bar in a unified voice, then we need to represent a higher proportion of lawyers who practice in our field.

Thanks to **Patricia Roe, Ivette Alvarez, Chuck Vuotto** and **Susan Goldring** for their participation in assisting the executive committee to make realistic, practical and technical recommendations on pending legislation. The family bar is in their debt for the tireless effort they make in helping shape public policy for the benefit of ourselves and the general public.

In addition to Mike Stanton, I thank each and every officer for their work during the past year. **John DeBartolo** is commended on the work he did this year for the Bench Bar Conference. Charles Craver, our keynote speaker, was excellent as were the break out sessions. I thank **Madeline Marzano-Lesnevich** for her work on long-range planning. I believe the issues raised in her report will change our section in positive ways over the next three to five years. I also thank

Continued on page 3

THE NJSBA IS WORKING FOR YOU.



The NJSBA successfully lobbied for passage of legislation in 2001 important to lawyers and their clients, including legislation which:

Creates **six Superior court judgeships** to allow for the expansion of the drug court program and provides appropriations for court staff and substance abuse treatments.

Provides retirement benefits for **workers' compensation judges.**

Provides for **public access to government records** and protects certain government records from public disclosures, and establishes the privacy study commission and appropriates $95,000 to the commission.

Prohibits insurers from requiring the filing of a municipal court complaint as a precondition to payment of certain claims.

Revises the rules concerning secured transactions and replaces **chapter 9 of the Uniform Commercial Code.**

Modifies the **Probate Code** with regard to settlement of intestate estates when heirs are missing or unknown.

Eliminates the **corporation business tax** on regular income of S Corporations.

Establishes the crime of **bias intimidation.**

Protects IRA and **higher education tuition savings account** assets and distributions from creditors.

Concerns recovery of Temporary Disability Insurance (TDI) payments for **workers' compensation awards.**

Makes it a crime of the fourth degree to tamper with electronic devices installed in police patrol cars.

Allows **stalking victims** protected by a temporary restraining order, to register to vote, without disclosing their street address.

Criminalizes the use of the Internet and other electronic communication devices to commit harassment or stalking.

Requires a municipality to issue zoning permit within 10 business days.

Establishes the "New Jersey Adult Family Care Act."

New Jersey Family Lawyer

Table of Contents

Chair's Column

Continued from page 1

Bonnie Frost for keeping her sanity during her service as the section's secretary, who was responsible for recording and preparing our meeting minutes.

Thanks to **Judges Graham Ross, Michael Diamond** and **Deanne Wilson** who graciously attended and participated at our meetings even though they don't get paid overtime to do so. Without such judicial participation, the notion of a bench-bar partnership would be an empty vacuum.

Thanks goes to my partner **Lizanne Ceconi** for her tireless work in putting together Charleston. Since April, I have been moved by the comments I still get from those who attended. Lizanne's ability to think outside the box made the trip, as everything she does, a first class event. I say shame on those who don't plan to attend our section's trip to Santa Fe in 2003.

Thank you to my consigliore, **John Paone.** Every email received from you during the past year was thoughtful, on point and much appreciated. I am glad you came out of your "semi-retirement."

Many thanks to my brethren in crime, **Edward O'Donnell** and **Stephen Haller,** the *Fbat Pack,* for the entertainment provided at our annual dinner. I truly believe that evening was special, and that those who attended will be speaking about the feelings of affection we had that night for ourselves and our section for many years to come. I hope those feelings can be marshaled to make our practice better and more civil.

Last but not in any way least, I thank **Lee Hymerling** and **Frank Louis,** our section elders. Frank's continued contributions to the section through the symposium and his writings and Lee's continued contributions to the section through his work in this publication are only the tip of the iceberg. Both leaders tirelessly work behind the scenes and with the section in giving our voice the tone of credible authority. Our section owes both of you a debt that can never be repaid.

Hark, I hear the dogs barking. The caravan is rolling on! As former chair of this section, I hope that I can continue having a meaningful role in the section that will make a difference. *Adieu*! ■

It is with the greatest of regret and much sorrow that we report the death of the Honorable Stephen J. Schaeffer, a family part judge who for many years had been the presiding judge in Hudson County and in more recent times sat in Morris County. Judge Schaeffer was a judge's judge, a sensitive person who cared deeply about the family part. Judge Schaeffer was also a great friend of the bar.

A long-time matrimonial practitioner before he ascended the bench, my earliest memories of Steve were as a participant in the early years of the NJSBA Family Law Section. After his appointment to the bench in 1982, he had a keen interest in the development of the family part. He always recognized, as did our late great Chief Justice Robert Wilentz, that there should exist a partnership between the bench and the bar in the public interest.

Long a member of the Supreme Court Family Part Practice Committee, Judge Schaeffer chaired important subcommittees, including one dealing with the child support guidelines in their formative years. He was also instrumental in an early effort to expand judicial education for new judges assuming the family part bench. I have the most vivid of recollections traveling to his then-courtroom in Jersey City to meet with Judge Schaeffer, Judge Robert A. Fall, Frank Louis and others. Judge Schaeffer always cared about what was best for the family part and for our system of justice.

The Honorable

Stephen J. Schaeffer

by Lee M. Hymerling

In more recent years, Judge Schaeffer was a member of the Supreme Court Complementary Dispute Resolution Committee, first chaired by Justice Marie Garibaldi and later by Justice Stein. As the chair of that committee's family practice part subcommittee, Judge Schaeffer was instrumental in the formation of the pilot program on economic mediation. No issue in recent years has so divided the bar. Carefully, thoughtfully, gingerly Judge Schaeffer, assisted by Judge Fall, helped forge the compromises necessary to create what is becoming an increasingly successful effort. Judge Schaeffer recognized that economic mediation could have a salutary effect assisting litigants, lawyers and the bar in resolving the most difficult of issues. Meeting after meeting took place over dinners in Morristown and elsewhere, and ultimately a pilot program emerged which was eventually embraced by the Supreme Court Complementary Dispute Resolution Committee, the Supreme Court Family Part Practice Committee and the Special Committee on Matrimonial Litigation.

Judge Schaeffer's contribution to the family part went far beyond the committees he chaired and on which he served. He also profoundly affected those with whom he came in contact, be they other judges, lawyers or the public. In preparing this column, I spoke with a number of Judge Schaeffer's judicial colleagues, as well as a number of attorneys who regularly appeared in his court. A theme that ran through the comments of both judges and lawyers was that Judge Schaefer, by his accessability and his attitude, was a mentor in the truest and finest sense of the word. For new judges, Judge Schaeffer stood ever ready to answer questions during the difficult process of making the transition from lawyer to judge. He was a willing source of practical experience and had a through knowledge of the substantive area. To new judges, he encouraged systemic involvement. He counseled young judges to strive to assume leadership positions. And to all of his colleagues, he was a seasoned sounding board ready to discuss even the most difficult of issues.

His knowledge, skill and accessibility as a judge were just as well known to the bar. Although I never appeared in Judge Schaeffer's court, others who regularly appeared were most willing to share their experiences. They sounded the same themes expressed by Judge Schaeffer's judicial colleagues. To many, Judge Schaeffer was a mentor. He was one who knew the law, not only as it was, but also as it should become. He knew the process and was willing to work to make it even better. When counsel entered Judge Schaeffer's court there could be no doubt that he would never duck the hardest of issues. When counsel left Judge Scheaffer's court, there was no doubt that they had appeared before one who was truly a JUDGE in the most idealized view of the concept.

If there are four words that could most mark Judge Schaeffer as one who has influenced the development of our system, they are integrity, commitment, caring and courage. Judge Schaeffer's integrity was beyond question. His commitment to the family part was second to none. His caring nature could not be mistaken. And in his long bout with illness, his courage was nothing short of incredible.

We all know that there are but a few judges who have chosen to make the family part their career. Judge Schaeffer was one of those judges. But he was something more. He was a judge who made a difference and never forgot that he had been a lawyer. Judge Schaeffer was also a proud family man whose family pictures were proudly displayed in his chambers. We thank his family for sharing Steve with us.

Steve Schaeffer will be sorely missed, but his legacy will continue.

We extend to Steve's wife Madeline and family our deepest condolences. We share in your grief and we are proud to honor Steve's memory. ■

Winning a Case by Effective Use of a Parenting Plan

by Mark Biel

Our Supreme Court has made it abundantly clear that when there is a custody dispute which includes issues about allocation of parenting time or visitation, the parties are mandated to submit a custody and parenting time/visitation plan to the court which must be considered when awarding custody and fixing a parenting time or visitation schedule. Notwithstanding the clear dictates of Rule 5:8-5, I am continually amazed, as are a number of judges with whom I have discussed the rule, by how it appears to be honored more in the breach than in the implementation.

RULE 5:8-5

The rule provides as follows:

***

Custody and Parenting Time/Visitation Plans, Recital in Judgment or Order

(a) In any family action in which the parties cannot agree to a custody or parenting time/visitation arrangement, the parties must each 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.

Contents of Plan. The Custody and Parenting Time/Visitation Plan shall include but shall not be limited to the following factors:

(1) Address of the parties.
(2) Employment of the parties.
(3) Type of custody requested with the reasons for selecting the type of custody.
  (a) Joint legal custody with one parent having primary residential care.
  (b) Joint physical custody.
  (c) Sole custody to one parent, parenting time/visitation to the other.
  (d) Other custodial arrangement.
(4) Specific schedule as to parenting time/visitation including, but not limited to, week nights, weekends, vacations, legal holidays, religious holidays, school vacations, birthdays and special occasions (family outings, extracurricular activities and religious services).
(5) Access to medical school records.
(6) Impact if there is to be a contemplated change of residence by a parent.
(7) Participation in making decisions regarding the child(ren).
(8) Any other pertinent information.

(b) The court shall set out in its order or judgment fully and specifically all terms and conditions relating to the award or custody and proper support for the children.

(c) Failure to comply with the provisions of the Custody and Parenting Time/Visitation Plan may result in the dismissal of the non-complying party's pleadings or the imposition of other sanctions, or both. Dismissed pleadings shall be subject to reinstatement upon such condition as the court may order.

The rule is clear that: (a) the timeframe for submitting the plan is no later than 75 days after the last responsive pleading; and (b) the plan is to be submitted to the court as well as adversary counsel (or the other party if that party appears *pro se*); (c) the court is mandated to consider the plan submitted in making its determination. Arguably, this consideration would apply with equal force to a *pendente lite* determination or a final determination; (d) the contents of the plan are, at a minimum, to address the factors set forth in the rule; and (e) failure to comply with the provisions of the custody and parenting time/visitation plan may result in the dismissal of the non-complying party's pleadings or the imposition of other sanctions.

Parenthetically, Rule 5:8-5(c) contains somewhat ambiguous language. Questions have arisen as to whether the term "failure to comply" means failure to comply once the court has ordered the implementation of a plan or whether it means failure to submit a plan in accordance with Rule 5:8-5. Since, however, the remedy involves dismissal of existing pleadings, it can persuasively be argued that it means failure to submit a plan in accordance with the rule.

Luedtke v. Shobert is the first

Always keep in mind that from the court's standpoint the polestar of a parenting plan is the best interests of the children. Accordingly, your proposal should seek to articulate why the children's interests are best served by the plan you are proposing.

reported decision referring to this rule. In that case the Appellate Division remanded the matter for a new hearing, in part because of the failure of the parties to submit the custody and parenting time plan. Judge Harvey Weissbard indicated:

> Further, since this hearing sought to effect a change in residential custody, the Court should have considered the applicability of R. 5:8-5 which requires each party to submit a Custody and Parenting Time/Visitation Plan. This was not done, or, as far as we can see, even considered. The matter must, therefore, be remanded for a new hearing.[1]

CRAFTING THE PLAN: USE OF N.J.S.A. 9:2-4.

It is respectfully suggested that in custody litigation, the crafting of a proposed plan and its submission to the court is of critical importance, and your client's case can be won or lost in great measure based upon what the proposed plan says or doesn't say. If your client is seeking, for example, to be designated the primary residential parent, it is critical to detail in the plan *why* you believe he or she should be so designated. Always keep in mind that from the court's standpoint the polestar of a parenting plan is the best interests of the children. Accordingly, your proposal should seek to articulate why the children's interests are best served by the plan you are proposing.

With respect to major issues involving the lives of the children, including issues of schooling, religious upbringing, health and extracurricular activities, if you believe the parties can have a cooperative relationship respecting those issues you can seek to include the other parent in those decision-making processes as part of your submission. If, however, there is a history of non-cooperation by the other parent, without being overly pejorative, seek to articulate why joint decision making in this particular case would be inappropriate. You should consider discussing one of the significant statutory factors in N.J.S.A. 9:2-4, namely, the parents' ability to agree, communicate and cooperate in matters relating to the child. In that regard, always keep in mind that in rendering a custody award, the court is mandated to consider all of the statutory factors in N.J.S.A. 9:2-4.[2] Thus, you must familiarize yourself with those factors before structuring a plan with your client.

It is my opinion that in presenting a written plan to the court, in most instances more is better. This is your initial opportunity to educate the court about a lot of facts, including the work schedules of each of the parties; available third parties, including extended family members, to provide day care services for the children; the cost of using family members as opposed to paid day care providers, if applicable; the particulars respecting transportation to school and/or extracurricular activities; and significant household issues such as whether children have to share a room in one house as opposed to having their own bedrooms in another house, etc.

If, as a result of employment responsibilities, your client has more flexibility to parent the children, this should be articulated and reference should be made to the factor in N.J.S.A. 9:2-4, namely "the parent's employment responsibilities." If the children are already in a school district in which your client resides and intends to remain, and there is a question as to whether the other party will reside in that school district, the statutory factors set forth in N.J.S.A. 9:2-4, namely "the quality and continuity of the child's education," may be relevant.

Simply stated, try to help the court as much as possible by relating the proposed plan to the statutory factors. While your plan is supposed to be just that — a plan and not a brief — you are not in any manner barred from at least coordinating the plan with the statutory factors. Indeed, Rule 5:8-5 (a)(3) permits articulation of the *reasons* for selecting the type of custody proposed.

If you represent the party seeking primary custody, it is also critical to understand that unless the other parent has demonstrated a pattern of behavior where your client cannot in good conscience allow him or her substantial parenting time, the visitation proposal should be fair, if not generous. Keep in mind that N.J.S.A. 9:2-4 declares that it is the public policy of the state of New Jersey:

> …to assure minor children of *frequent and continuing contact* with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. (emphasis added)

You do not want to submit a proposal that runs afoul of this fundamental public policy statement.

Accordingly, if the parties live in close geographical proximity, for example in the same school district

or in contiguous municipalities, and your client believes the other party should not have overnight parenting time during the school week, you should be very specific about the reasons for such a restriction. Again, try to avoid being pejorative, stressing instead issues of homework and related academic continuity if these are critically important to your client.

Make sure a specific schedule is articulated under Rule 5:8-5(a)(4) regarding vacations, holidays, religious holidays and extended school breaks. If the parties are of different faiths, make sure due deference is given to the right of each party to share religious holidays with the children. Think through very carefully with your client what his or her work schedule will be during extended school breaks, particularly the summer break, before setting forth a position. For example, if the request is that half the summer be spent with your client but your client intends to work every day from 9–5 and leave the children with a day care provider most of the time, this may or may not be appropriate, considering the work schedule of the other party. If the work schedules of the parties are basically indistinguishable, it still makes sense to fairly equally divide the summer. If, however, the other party is unemployed or has the entire summer off as an educator, such division may make little or no sense.

It should also be noted that Rule 5:8-5 applies with equal force to custodial issues involving parenting within the state of New Jersey as well as interstate relocation cases. Indeed, in the recent relocation/removal case of *Baures v. Lewis,*[3] the Supreme Court indicated:

> We reiterate, however, the importance of mutual efforts to develop an alternative visitation scheme that can bridge the physical divide between the non-custodial parent and the child. By mutual [sic] is meant that the non-custodial parent is not free to reject every scheme offered by the custodial parent without advancing other suggestions.[4]

Implicit in that language is the requirement that reciprocal parenting plan proposals are to be made in a removal/relocation case as well, thus clearly implicating Rule 5:8-5.

The rule also permits the submission of "any other pertinent information."[5] It is suggested that such information in crafting a parenting plan may include methodology of telephone communication. In this regard, unfettered and private telephone access should be suggested. It may also include technological communication through video conferencing and email when applicable. Again, our Supreme Court has indicated:

> Innovative technology should be considered when applicable, along with traditional visitation initiatives. In many cases vacations, holidays, school breaks, daily phone calls and e-mail, for example, may sustain a parent/child relationship, as well as alternative weekends.[6]

PROCEDURAL MECHANISMS

Finally, it is necessary to discuss the *procedural* mechanism for the submission of a plan to the court. No lawyer wants to be put in the position of submitting a plan on behalf of a client well in advance of the submission by the other side. This would allow opposing counsel to have your client's plan in hand when preparing its court submission, thus offering them the opportunity to critique and criticize your client's plan in their submission. In my opinion, there are two ways to guard against this occurring.

If your client's plan is ready for submission within the 75-day ambit, and you learn that the other party will not be complying with the Rule 5:8-5 timeframe, you can file a motion with the court indicating that your client's plan is complete and ready for submission. You may then ask the court to enter an order directing that both plans be simultaneously submitted on a certain date, and that if either party fails to submit the plan on or before that date the court will invoke the provisions of Rule 5:8-5(c).

A second alternative would be to submit your client's plan to the court in a sealed envelope, indicating to the court and your adversary that you are not copying opposing counsel with the plan; indicating the deadline under Rule 5:8-5; and suggesting that opposing counsel comply with the rule and that on a date certain the plan be submitted to the court, at which time the respective plans will be exchanged by counsel. Following either of these mechanisms you fully protect the interest of your client by complying with the rule and avoiding the embarrassment (and perhaps the criticism of your client) of being placed in a disadvantageous position.

Finally, I address the issue of who should sign the plan. In my opinion, the best procedure is to have your client execute a consent to the plan, rather than simply submitting the plan to the court signed only by the attorney. Not only does this procedure eliminate potential miscommunication between attorney and client, it provides personal reinforcement of the party's *bona fides.* It also provides the flexibility of presenting portions of the plan in the first person if you deem it appropriate. ■

ENDNOTES

1. 342 N.J. Super. 202, 218 (App. Div. 201).
2. N.J.S.A 9:2-4(f) provides:

   > The court shall specifically place on the record the factors which justify any custody arrangement not agreed to by both parents. *Cf. Terry v. Terry,* 270 N.J. Super. 106, 119 (App. Div. 1994); *Kinsella v. Kinsella,* 150 N.J. 276, 317 (1997).

3. 167 N.J. 91 (2001).
4. 167 N.J. at 117-18.
5. Rule 5:8-5(d)(8).
6. *Id.* at 119.

Mark Biel *is a partner in the Atlantic City firm of Mairone, Biel, Zlotnick & Feinberg, P.A., and a former chair of the Family Law Section.*

The Effective Use of Trial Exhibits

by Peter C. Paras

There is no substitute for preparation when you try a case. You must know your case better than anyone — better than your client, better than the judge and, most importantly, better than your adversary. You must know the weaknesses of your case at least as well as you know its strengths. You must know your case, but also your adversary's case. The only way you can do this is by spending the time to prepare.

Like show and tell in elementary school, exhibits should assist you in telling your story....If presented correctly, exhibits can add a dimension to your case. If presented incorrectly, they can create a disaster.

If you are going to use exhibits, you have to know them, too. You should anticipate which exhibits your adversary will use and you should know them as well as your own.

You cannot assume what's in an exhibit. You must know. If it is an audiotape, you cannot just listen to the *good parts*. You have to review the whole thing. Review a tax return and all the schedules and other attachments, and understand them. If you need help understanding the documents, get it.

The worst feeling you can have as a trial lawyer is when your prized exhibit sinks your case because you did not read the whole document or your stellar cross-examination is completely neutralized because the part of the tape you did not listen to contains a plausible explanation. Never, ever offer an exhibit that you have not completely reviewed and never use an exhibit to impeach a witness if you do not know everything that's in it.

DIRECT EXAMINATION

Direct examination is your opportunity to tell the court about your case. You can tell it your way. It should be presented in the most simple, easy to understand manner possible. Again, preparation is obviously essential.

Like show and tell in elementary school, exhibits should assist you in telling your story. They are audio/visual aids. Exhibits should enhance your storytelling, not detract from it. That is why how you present your exhibits is crucial. If presented correctly, exhibits can add a dimension to your case. If presented incorrectly, they can create a disaster.

Exhibits should help you make your version of the case flow so that the court can understand it more clearly and more quickly. They should be offered at logical points in the testimony to add to the testimony, to give it depth and to strengthen its credibility.

A picture is worth a thousand words, whether it comes in the form of a photograph, an audio tape, a tax return or another type of exhibit. It can enormously enhance the point you are making if handled properly. On the other hand, an exhibit that is not offered at a logical point in the testimony, or one that is not fully understood, can confuse the court, raise more questions than it answers, or even undermine the credibility of your own witness.

Each exhibit must be carefully examined and understood so that it can have a positive effect on your case. If you are lazy, it will hurt you.

CROSS-EXAMINATION

Exhibits are an effective tool to undermine a witness's credibility. If you carefully review your file, you will find all kinds of documents that will provide fertile ground for cross-examination.

Contradictions between testimony and exhibits are common. Certifications filed months (or even years) before are often not reviewed by a witness before he or she testifies. Testimony can often be impeached through the use of an audio or videotape, made surreptitiously, of an unsuspecting liar.

Sometimes contradictions between exhibits are glaring. In a prolonged case, several case information statements may have been filed. Compare the income sections, compare the budgets and compare the asset valuations. Discrepancies are the rule, not the exception.

Frequently exhibits are internally inconsistent. A paragraph at the beginning of a certification may contradict a paragraph near the

end. In case information statements there are three income sections (last year's income, present earned income and expenses and year-to-date income) that are often at odds. Although a small discrepancy might, in itself, be insignificant, the cumulative impact of a series of small discrepancies may create an impression that the witness, although not lying, may be comfortable skirting the truth.

By the same token, prepare your own witnesses to explain these kinds of inconsistencies. Do not leave it to your adversary to point out the discrepancies in your client's documents. Expect your adversary to be at least as diligent as you are. Do not underestimate him or her. Review your client's certifications, case information statements and tax returns and prepare to explain (in his or her direct testimony) seeming disparities. In addition, prepare your witness for the inevitable questions from your adversary about these apparent inconsistencies. Whenever you can soften a blow, you have an opportunity to advance your case. If you miss an opportunity you will damage your case.

THE BALANCING TEST

In deciding whether to use an exhibit, you always have to make a judgment about whether the benefit will outweigh the damage it might cause. In order to make this judgment you must be familiar with the entire exhibit.

That is not to say that you should ignore a damaging exhibit. Your adversary is sure to use it against you. Ignoring an exhibit can damage your case more than a carefully planned acknowledgment and explanation of it. Again, you must employ a balancing test.

PREPARING EXHIBITS FOR USE AT TRIAL

The way exhibits are presented at trial is, to some degree, a matter of style. It is also a function of the preferences of a particular judge. Judges generally appreciate it when a lawyer's case flows well and the exhibits are well integrated into the flow. That's good because that is what you should be striving for.

Judges lose patience with the lawyer who fumbles through his or her exhibits and thumbs through piles of paper with seemingly no defined goal. This is tedious, distracting and certainly not conducive to capturing the court's attention. It obviously will hurt your case.

Some trial lawyers prepare loose-leaf binders containing all (or most) exhibits they intend to use at trial. This provides a condensed and concise package for the court's easy reference. I am told that some judges prefer this method.

Other lawyers prefer to offer exhibits one at a time. This allows the court to focus where you want the court to focus, and keeps your adversary guessing about your strategy or approach.

Providing all exhibits to the court at once (although preferred by some judges) presents a potential problem. Some of the exhibits may be objectionable. Although virtually every judge will tell you that he or she can disregard inadmissible evidence, there is a cumulative effect that inadmissible evidence can have that is hard to quantify. We can all agree, though, that you cannot unring a bell. I would rather try to keep evidence out than rely on a judge to disregard it. I intend no disrespect to the court, but judges are human.

However you present your exhibits, make sure you have enough copies of each. You will need one to mark as an exhibit. This is the one you will show to the witness. You will need one as a courtesy for your adversary. If your adversary does not object, provide the court with a copy if the witness will refer extensively to the exhibit in his or her testimony. Otherwise, the court may not reap the full benefit from the testimony.

Be sure to keep a clean copy for your file. And, of course, you will have a copy, with your highlights and other notations, that you will use while examining the witness.

Pre-marking exhibits, which is now permitted by most judges (in fact, most judges prefer it), helps your case flow better. The disruption in the flow of the testimony that is caused by marking one exhibit at a time can be avoided this way. Remember, exhibits are initially marked for identification. They are not marked in evidence until admitted by the court.

This leads to the question of when to move exhibits into evidence. Some judges have preferences. The old, more traditional method is to mark an exhibit for identification, have the witness identify it (and authenticate it, if necessary) and then offer it in evidence. Objections, argument and rulings on admissibility follow. The effect this method has on the flow of your case is obvious.

My preference is to pre-mark exhibits for identification, use them while examining the witness and offer them all in evidence before resting. Most exhibits will go in without objection. Those that are objected to can be argued about at a time when the flow of the testimony will not be disrupted.

ADMISSIBILITY

You should anticipate problems with the admissibility of exhibits. Most exhibits will go into evidence without incident, but some will present obvious admissibility problems. These problems should be anticipated, and you should prepare to meet the inevitable objection. The Rules of Evidence are a good place to start. The rules and the comments will give you a good indication of whether you can get an exhibit into evidence or not. If an exhibit is important to your case, but presents serious admissibility problems, go beyond the rules and comments in your research and look for a novel approach to get the exhibit in. Do not give up on an

exhibit just because your adversary objected. If the exhibit is important enough to offer, it is probably important enough to look for a way to gain its admission into evidence.

Conversely, if an exhibit you expect your adversary to offer will hurt you, consider whether there are objections that will keep it out. Sometimes there are and sometimes there are not. Think about it. Carefully prepare your objection. Rely on the rules and the comments, and go beyond if necessary.

The most common admissibility problem is the hearsay rule. As the proponent, look for an exception to obtain its admissibility. As the opponent, scrutinize the exceptions to make sure none apply.

Authentication can also pose admissibility problems. Often this involves photographs, tapes or handwriting. Be sure you understand the concept of authentication and be sure you know whether all of the requirements to authenticate an exhibit can be met.

Relevance is another common objection. Be sure you can explain why an exhibit is or is not related to the issues in the case. Even relevant evidence can, under some circumstances, be excluded. For example, is its relevance outweighed by the prejudice it will create?

Remember, you can sometimes use an exhibit productively without getting it into evidence. For example, an exhibit marked for identification can be used to impeach credibility. The exhibit does not have to be offered into evidence. An exhibit can be used to refresh recollection without going into evidence. Sometimes an exhibit that you cannot get into evidence can, nevertheless, be used in a productive way.

Be imaginative. The Rules of Evidence are a treasure trove of ideas. If you read them, you'll find them. If you don't, you won't. It's all about preparation. ■

***Peter C. Paras** is a partner in the firm Paras, Apy & Reiss in Red Bank.*

Paone Receives Tischler Award

The New Jersey State Bar Association Family Law Section selected matrimonial attorney John P. Paone Jr. to receive the 2002 Tischler Award. The award is made annually to the person who has made a substantial impact upon the development of family law and the legal profession.

Paone, 45, heads the divorce and family law firm of Paone & Zaleski in Woodbridge. He served as the 1995-96 chair of the New Jersey State Bar Association's Family Law Section. Since being admitted to the bar in 1982, he has been appointed by the New Jersey Supreme Court as a member of several committees concerning the practice of family law. He is a frequent lecturer and author on topics such as domestic violence, equitable distribution and child custody.

Paone was in the first class of attorneys to be designated certified matrimonial law attorneys by the New Jersey Supreme Court in 1998. He resides in Rumson with his wife Roseann and two children. The award was presented at the Family Law Section's annual dinner on April 18, 2002, at The Newark Club in Newark.

Providing Expert Opinion to the Court

Custody Evaluators v. Treating Mental Health Professionals

by Andrew P. Musetto

In child custody disputes as in many areas of complex law, courts, when faced with conflicting information and issues, often turn to experts. Pursuant to New Jersey Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Expert witnesses, therefore, clearly differ from fact witnesses who can only testify as to personal knowledge.[1] Experts, in contrast, are given much latitude as to what testimony they may give. For example, they may testify about subjects or opinions gained through their investigation or experience. Quite often, expert opinion is admitted based upon evidence which would otherwise be inadmissible. Pursuant to Rule 702 (which is substantially similar to the Federal Rule 702 regarding expert witnesses) experts are permitted to testify as to any scientific, technical or other specialized knowledge which will assist the judge or trier of fact to understand the evidence or determine an issue. An expert is qualified by skill, experience, training or education to offer opinions which may help the court decide a material issue.

N.J.R.E. 702 provides for expert testimony that will be admissible if it "assists the trier of fact to understand the evidence or to determine a fact in issue."

In New Jersey there are three basic requirements for the admission of expert testimony:

1. The intended testimony must concern a subject matter that is beyond the ken of an average juror;
2. The field testified to must be a state-of-the-art about which an expert's testimony could be sufficiently reliable; and
3. The witness must have sufficient expertise to offer the intended testimony.[2]

It is based upon that broad standard, that expert testimony is admissible or inadmissible to the trier of facts.

N.J.R.E. 702 provides for expert testimony that will be admissible if it "assists the trier of fact to understand the evidence or to determine a fact in issue." In *State v. Barry,*[3] the Supreme Court held that

> The true test of admissibility of [expert] testimony is whether the witnesses offered as expert have peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience as any aid to the…jury in determining the questions at issue
>
> Testing the admissibility of expert testimony by focusing not only on the jury's comprehension of the subject matter but also on whether the specific proffered testimony will aid the jury in resolving factual issues has been a reoccurring theme in all of our cases.[4]

Experts, no matter how well credited or esteemed, are not automatically permitted to offer trial testimony. Relying upon the federal decisions of *Frye v. U.S.*[5] and *Daubert v. Merrell Dow Pharmaceuticals*[6] standards, New Jersey formulated its own basis upon which expert testimony is admissible. To be admissible, the opinions offered must be sound, must be subject to scientific scrutiny and peer review, and must be sufficiently or generally accepted by the professional or scientific population.[7]

Clearly, a qualified expert can assist a judge or jury in understanding a fact in evidence. Specifically, in

child custody cases a great majority of determination as to the custody arrangements for a child will be based upon the testimony of experts. In matters such as these, experts would include several types of mental health professionals (MHP), such as psychiatrists, psychologist and clinical social workers. Based upon the testimony of these professionals, a judge, in child custody matters, would be more likely to understand a fact in issue (*e.g.*, a child's reluctance to see an estranged parent), or to determine a fact at issue (*e.g.,* whether a parent's mental health history affects his or her ability to parent). Quite clearly, the evidence or knowledge possessed by an average person would not assist a court to determine these issues. Rather, such evidence is based upon specialized knowledge gained by mental health professionals, those experts qualified to reach conclusions such as these.

Routine custody determinations in the course of a divorce action do not require expert testimony.[8] However, the court indicated that where expert testimony "would be helpful; it is desirable even in an ordinary case."[9] This statement reiterates the permissive application of Rule 702. A duly qualified expert can help the court understand some of the salient issues in a custody case, such as: the child's emotional and psychological needs; the validity and liability of a child's preference and how these needs change throughout the course of development; the dynamics of the parents' interaction in a divorce; the relevance of a parent's psychopathology (if any) to parenting; and the nature and quality of a child's bond with each parent.

On the part of the MHP, the key to assisting the court is competence. In child custody matters, competence refers to adequate knowledge of the field of child development, family dynamics in custody and divorce, adequate and reliable data, a sound methodology, and a sufficient understanding of the psycholegal issues[10] to be addressed. In order to be relied upon by the court, the expert must also be unbiased — unaligned with the interests of either parent and unattached to personal bias (as opposed to scientifically sound knowledge) regarding a specific custody arrangement. As courts need reliable evidence, the expert promises competence by providing it.

The purpose of this article is to distill the essence of what it means to be a forensic expert (custody evaluator) and to clarify how that role and undertaking differs from the testimony of a treating MHP, which is a different kind of expert. Confusion of the roles and responsibilities disservices the court and families involved in child custody disputes, a most sensitive and important area of family law.

[W]hereas evaluation of psycholegal issues (*e.g.,* the best interests of the child) is the focus of custody work, treatment is the objective of clinical work.

What are the differences between an evaluator and a treating MHP?[11] The first lies in their different purposes and scope of inquiry. In a child custody evaluation, the purpose is to provide evaluative information to the court about a child, the child's parents, the relationship and quality of caretaking between each parent and child, the emotional and psychosocial needs of the child, and the compatibility between what a child needs and what each parent has to offer.[12] The evaluative information is collected and analyzed using a sound methodology drawn from the behavioral sciences (raising alternative hypotheses about what arrangement might be best for a child, collecting relevant data, confirming or disconfirming each hypothesis). Similarly the interpretation of the data is formed from known professional literature about children and families in divorce and child custody disputes.[13]

In contrast, a treating MHP (psychiatrist, psychologist, clinical social worker and others) may also have specialized knowledge not possessed by most people, and therefore valuable to the court (*e.g.,* a litigant's diagnosis and prognosis), but the clinician does not have complete information about the psycholegal issues of a custody case (*e.g.,* comparative information about parental fitness). Treating professionals can, however, offer opinions about mental disorders and provide facts and observations about their patients. In addition, therapy provides a basis for certain clinical opinions, such as the history provided by the patient, response to therapy, mood, thought patterns, and observed behavior, but not about the other parent and usually not about parental capacity.[14] Consequently, whereas evaluation of psycholegal issues (*e.g.,* the best interests of the child) is the focus of custody work, treatment is the objective of clinical work.

As the purposes of evaluation and treatment are different, so are the scope and methods of gathering information, the second difference. In order to maximize the validity and strength of the conclusions, information in child custody evaluations is drawn from several sources: structured interviews (to collect similar data about each side), self-report data (each parent's viewpoint and custody plan), standardized psychological testing (such as personality functioning, parent-child relationships, parenting stress) that is relevant directly or indirectly to the psycholegal issues, collateral interview data and record review (to assure the

accuracy and reliability of self report), and direct observational data (such as parent child interviews).[15] Using a standard format with each parent guards against any inclination to stop the collection of information prematurely or to focus only on the findings that support one side or the evaluator's hunches or biases, and it helps provide systematic comparison of the litigants' responses, which are examined for consistency. In short, it promotes objectivity.

Forensic experts and treating MHPs, additionally, approach their work with different mindsets and duties, the third and fourth distinctions. Skeptical and investigative, the custody evaluator is objective and detached, with an empathic understanding of the litigants but dispassionate as to the psycholegal issues. The mind of the clinician, in contrast, is allied with his or her patient. It is a caring professional relationship characterized by acceptance, warmth and empathy. Additionally, the custody evaluator owes a duty to the court, a duty to provide relevant, objective, and helpful information, regardless of which parent is favored or disfavored. The MHP has a duty to his or her patients, to do good or at least not to do harm, to walk with them as they struggle to understand themselves and to find the answers to their conflicts and disappointments from within themselves.

Privilege and confidentiality, a fifth distinction, also differ with each expert. In custody evaluations, the information is not privileged — whatever the evaluator learns may appear in the report, although the information may be protected by the attorney-client and work-product privileges, if the evaluator is working on behalf of one attorney and one side and not court appointed. In treatment, confidentiality belongs to the patient and may not be breached without consent or court order.

The scope of inquiry, a sixth difference, also varies in each case. In custody evaluations, the psycholegal issues as defined by statute and case law and as formulated in the professional or scientific literature determine the scope of inquiry. Litigants are required to submit custody plans and follow the established procedures of the forensic expert. The evaluator follows a set agenda and method of gathering data. In treatment, the patient sets the agenda and, for the most part, the pace of therapy.

Competence, arguably the linchpin for every expert's value to the court, forms a seventh difference. The evaluator must be competent in forensic assessment and understand the psycholegal issues. Critical in this venue are systematic data collection, the ability to consider different custody plans, and the skill to employ a multi-source and multi-method approach as explained above. The treating professional understands diagnosis, appropriate and effective interventions for each disorder, and how to help motivate patients to recognize their problems and have the courage to change. The former is using his or her competence to help the court, the latter to relieve suffering and promote healthy living.

Eighth, the search for truth forms a different path in each case. Forensic evaluators try to validate the historical truth of the litigants' positions and assertions (*e.g.,* who had what responsibility for child care throughout a child's life). Treating professionals work with what the client perceives to be true (*e.g.,* his or her perception of being favored or disfavored by either parent) and how the patient feels and reacts to his or her world. A clinician does not say to a patient who feels unfairly treated by a parent, "Prove it!" Instead, the professional works from where the patient is and trusts that the connective emotional experience of therapy will yield a more accurate and constructive recall by the patient. In custody evaluations, virtually everything has to be corroborated and nothing is taken for granted.

It should be clear by now that the roles, basis for evaluation and testimony, competence, duty, mindset, scope of inquiry, and relationship of patient or litigant to the professional differ significantly. Accordingly, treating MHPs cannot offer opinions on psycholegal issues but only on information that can reasonably be derived through treatment. Ordinarily, an opinion about parental fitness is not an aspect of treatment but of forensic assessment only. Further, treating MHPs do not have an adequate basis for such an opinion or sufficient certainty that whatever opinion he or she might have is accurate. For an opinion about a psycholegal issue must be based on more than just, "My patient wouldn't lie." To conduct therapy, additionally, clinicians are not required to understand psycholegal issues, such as a child's developmental needs and whether or not a parent can adequately meet those needs, even when the patient appears to be a good parent. This is especially true since a MHP ordinarily does not directly observe the relationship between the other parent and child, and therefore cannot evaluate it.

How, then, can the therapist know what he or she has to offer? How often is a treating MHP willing and able to offer opinions that criticize or impeach his or her client? And if the treating MHP did, this author offers that this is, perhaps, a violation of the duty to protect and preserve the therapeutic relationship and, therefore, destructive of the goals of therapy. In addition, the author suggests that it is unlikely that treatment could proceed after a therapist tells the court that a patient is unable to control his or her anger toward a former spouse so that it interferes with parenting.

The differences between a forensic evaluator and a treating professional are not just academic or theoretical, nor are they a matter of style or personal preference. Rather, they are memorialized in various professional standards and

ethical codes of conduct among the mental health professions. Even if not always a strict ethical requirement, the guidelines are aspirational and filled with admonishment. The Ethical Principles of Psychologists and Code of Conduct, for example, state, "In most circumstance, psychologists avoid performing multiple and potentially conflicting roles in forensic matters."[16] That same organization's *Guidelines for Child Custody Evaluations in Divorce Proceedings* provides:

> Psychologists generally avoid doing a child custody evaluation in a case in which the psychologist served in a therapeutic role for the child or his or her immediate family or has had other involvement that may compromise the psychologist's objectivity. This should not, however, preclude the psychologist from testifying in the case as a fact witness concerning treatment of the child.[17]

The Association of Family and Conciliation Courts, a multidisciplinary organization of mental health professionals, states:

> A person who has been a mediator or a therapist for any or all members of the family should not perform a custody evaluation because the previous knowledge and relationship may render him or her incapable of being completely neutral and incapable of having unbiased objectivity.[18]

Similarly, the *Practice Parameters for Child Custody Evaluation* by the American Academy of Child and Adolescent Psychiatry emphasize the "differences between performing child custody evaluation and engaging in traditional clinical practice.…"The parameters further provide:

> Performing a forensic evaluation expands and complicates the clinician's familiar role of diagnosing and treating psychiatric illness and raises the important issues of competence, agency, and ethics. It is extremely important for the clinician to understand the differences in roles and to keep these roles separate. Wearing 'two hats' — therapist and forensic evaluator — with a family is inappropriate and complicates both the therapy and the evaluation.[19]

Finally, the *Specialty Guidelines for Psychologist Custody/Visitation Evaluations* promulgated by the New Jersey Board of Psychological Examiners state:

> Under no circumstances should a treating psychologist agree to assume the role of evaluator…If the psychologist is now or has been a therapist for any member of the family, the psychologist does not assume the role of evaluator in a custody case. It is ordinarily a conflict of interest to become the therapist for any member of the family during or after completion of the evaluation. Psychologists resist testifying in court in any custody case where they are or have been the therapist for any member of the family, except with the consent of that individual. If a subpoena to testify is issued by a judge, the psychologist avoids making recommendations regarding custody or visitation.[20]

In summary, discredit and peril awaits the MHP who confuses the roles and responsibilities of a forensic evaluator and a treating clinician. The court, litigants, and their children are equally poorly served when this distinction is misunderstood or ignored. When the court qualifies an expert it has the right to assume that the expert is competent and knows the limits of his or her testimony, the professional's value to the court, and which master he or she serves. ■

ENDNOTES

1. *See* New Jersey Rule of Evidence 701.
2. *See Dehanes v. Rothman,* 158 N.J. 90, 100 (1999) (*citing State v. Kelly,* 97 N.J. 178, 208 (1984)).
3. *In State v. Barry,* 140 N.J. 280, 291 (1995).
4. *Id.*
5. 293 F. 1013, 1129-30 (D.C. Cir. 1923). "*Frye* requires the court to ascertain whether the expert's methods and procedures have gained general acceptance in the relevant professional community to assess its reliability. *Daubert* requires federal courts to determine whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning properly can be applied to the facts in issue; considering, among other things, peer review." D.W. Shuman & S.W. Greenberg: The role of ethical norms in the admissibility of expert testimony. *The Judges' Journal,* Winter 1998, p. 8.
6. 113 S. Ct. 2786 (1993).
7. *See State v. Harvey,* 151 N.J. 117 (1997); *State v. Davis,* 96 N.J. 611 (1984); *Rubanick v. Witco Chemical Corp.,* 125 N.J. 421 (1991); *State v. Marcus,* 294 N.J. Super. 267 (App. Div. 1996).
8. *Wist v. Wist,* 101 N.J. 509 (1985).
9. *Id.* at 514.
10. *See* N.J.S.A. 9:2-4.
11. These differences are explained more fully in S.A. Greenberg & D.W. Shuman: Irreconcilable conflict between therapeutic and forensic roles. *Professional Psychology: Research and. Practice,* 28, 50-57.
12. J.W. Gould. "Scientifically crafted child custody evlauations. Part two: A paradigm for forensic evaluation of child custody determination. *Family and Conciliation Courts Review.* Vol. 37, No. 2, April 1999, pp. 159-78.
13. *Id.*
14. *Id.* at 2.
15. *Id.* at 3, pp. 161-62.
16. *Ethical Principles of Psychologists and Code of Conduct,* American Psychological Association, December 1992.
17. *Guidelines for Child Custody Evaluations in Divorce Proceedings,* American Psychological Association, July 1994.
18. *Model Standards of Practice for Child Custody Evaluation,* Association of Family Conciliation Courts.
19. *Practice Parameters for Child Custody Evaluation,* American Academy of Child and Adolescent Psychiatry, 1997.
20. *Specialty Guidelines for Psychologists: Custody/Visitation Evaluations,* New Jersey Board of Psychological Examiners, 1993.

***Andrew P. Musetto, Ph.D.,** is a partner with Psychological Services Associates, PA, in Haddonfield.*

Your membership in the New Jersey State Bar Association entitles you to these great benefits…

- Discounts of up to 35 percent on continuing education seminars and products offered by the Institute for Continuing Legal Education (ICLE).
- Advocacy for lawyers before the Legislature and Court.
- Networking and educational opportunities through sections, divisions and standing and special committees.
- A subscription to New Jersey Lawyer, the Magazine, the bimonthly NJSBA journal, and Bar Communiqué, the NJSBA's new quarterly newsletter.
- A discounted subscription rate for New Jersey Lawyer, the Weekly Newspaper.
- A discount on ABA law office practice management books.
- A $40 discount on computer training courses, including word processing, database management and spreadsheets, for both lawyers and support staff members through PC Ed.
- Special discounts from Lexis, MBNA America, Airborne Express, Avis and National car rental.
- Life, medical, dental, disability and long-term care insurance through the National Association Services Administrators.

Plus much more!

Facts:

- **Alcohol is the most widely used and destructive drug in America.**
- **Cocaine use causes marked personality changes; users become impatient, suspicious and have difficulty concentrating.**
- **Marijuana affects memory, concentration and ambition.**
- **Early intervention with alcohol and drug problems most often leads to complete recovery.**
- **Attorneys can and do suffer from alcohol and other drug abuse problems.**

NJLAP wants to help. You only need to call.
1.800.246.5527

Free, confidential help is available for you or a lawyer you know who has problems with alcohol or drugs. Assessment sessions are available to help define the problem and to recommend a helping hand.
Our conversations are understanding of your need for confidentiality.

NEW JERSEY LAWYERS ASSISTANCE PROGRAM

New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901
1.800.24NJLAP
1.800.246.5527

NEW JERSEY STATE BAR ASSOCIATION
New Jersey Law Center
One Constitution Square
New Brunswick, New Jersey 08901-1500
(732) 249-5000

PRSRT STD
U.S. Postage
PAID
Permit 412
MIDLAND, MI 48642

Another Service For:

NEW JERSEY FAMILY LAW SECTION

Your Section Enrollment: 1,170