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CHAIR'S COLUMN

Could this be a Better Way?

by Ivette R. Alvarez

How many times have you had a case where the standard 25-page or more financial Interrogatories and notice to produce are requested of your client, or you request them of the other side, without giving it a second thought? Or where discovery demands are almost completely unrelated to the facts of the case? Or better yet, where the probability that the demands would shed any light on what has to be investigated are minuscule?

A very experienced family law judge once said to my adversary at the initial case management conference, when he objected to my request for tailored discovery: "Why? I have never seen anything good come out of a standard set of interrogatories."

Sad to say, we all rely on issuing standard interrogatories and notices to produce in most of our cases. It is not out of ill motive or intent to harass. It happens because of the increasingly fast pace of our practice, and our ever-increasing need to act defensively for ourselves and our clients. But there may be a better way.

Where no active assets are being valued, or where there is no issue of cash flow or hidden assets, standard but over-broad discovery demands, while annoying, can generally be quickly disposed of with a "not applicable" response. It is, however, in the asset valuation or cash flow case where real injustices can happen if discovery is not well thought out and executed. Every day courts order business valuations without adequate consideration to their costs, not just in dollars but in effort and time as well. If discovery of a business is overly broad, marital assets are wasted; more importantly, business operations are unnecessarily disrupted.

We can all agree it doesn't make sense under any circumstance to have an expert demand documentation necessary to complete 100 percent testing (more than is required in a certified audit), *e.g.* all supporting documentation for all deposits into business accounts right down to a $37 item; testing immaterial items, *e.g.* all the

income from the single candy machine at the automobile business site; disregarding valuation theory and procedures and using a biased testing procedure, *e.g.* in a medical practice including in the sample only those receivables that can be arbitrated with the patient's insurance carrier; requesting documentation to re-perform all audit procedures on regulated transactions already audited by a third party, *e.g.* re-audit a trust account audited by an underwriter; or asking for exhaustive documentation on a one percent interest in a business. Yet, these wasteful events happen all too frequently.

In cases involving asset valuation or cash flow, there must be a concerted effort by the attorneys and the court, working together, to strike the right balance. This is what a case management conference is supposed to accomplish. Yet many of these are handled in a *pro forma* fashion, and often judges are not even involved.

In valuation and cash flow cases, it is best to get your forensic expert in as soon as possible to identify areas that need to be investigated and/or where there is exposure. Often, clients balk at having to retain an expert so early in the game. This is the first point where reason must prevail. Clients must be made to understand that attorneys are not financial experts, and it is efficient and cost effective to bring the expert in early.

But it is at the initial case management conference, for a valuation and cash flow case, that the forensic expert's appearance is invaluable. At the onset of the case, after seeing only minimal documentation, or sometimes none at all, it is the forensic expert who is in the best position to assist the attorneys and the court in determining what documents are needed and insuring forensic procedures stay focused. Having the forensic experts at the first case management confer-

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ence will afford the court the opportunity to ask questions and have the experts identify required documents with an explanation of why they are needed.

The forensic experts can also provide input about realistic timelines, procedures to be followed, scope of testing and costs for the discovery to be undertaken. For example, in a case where hidden assets were alleged, after discussion with the experts the court may select a court-ordered asset search over tracing hundreds of deposits to their source, saving the parties considerable time, effort and forensic fees.

Most importantly, it is at the first case management conference with the forensic experts that the court can begin to prevent runaway discovery. The court can require the experts cooperate with each other in defining the scope of discovery, and that they share their work papers as they go along. This sharing avoids duplicate procedures and excessive testing. However, like the attorneys, the forensic experts need to be able to protect themselves from initially limiting their discovery requirements. If the results of the procedures, based on the discovery requested and shared, are inconclusive or inadequate to support an opinion, they must be permitted to request expanded discovery. At each subsequent conference the court can weigh the costs versus benefits of the additional procedures, thus insuring that they do not result in diminishing returns. The clients will appreciate the savings, since, after all, you can always do more but you can't go back and do less!

If we believe this may be a better way, we now only have to figure out how to get the forensic experts to the first case management conference if our client has no way to retain them. This may be a situation where a limited retainer is useful. ■

SENIOR EDITOR'S COLUMN

by William M. Schreiber

Trial is not only the last resort in resolving marital disputes, it is the least preferable to the best interest of all concerned. Alternative dispute resolution is the recent name given to what matrimonial lawyers have been doing for years. Recent developments and innovations have fine-tuned and honed our skills, as well as given us new approaches to solve old problems. Calendars clogged with cases, combined with litigants' desires to solve their own disputes, have fueled the interest in new dispute resolution techniques.

The first article in this issue of *New Jersey Family Lawyer*, prepared by members of the Jersey Shore Collaborative Law Group, describes a new approach to resolving marital disputes. The collaborative approach is not appropriate for every case, but for those cases where cooperation is possible, it can lessen the divisiveness and reduce the cost of a marital dissolution.

The use of mediation has grown exponentially with the number of divorce cases, and our second article in this issue analyzes the role of a mediator and the limitation on testimony of the mediator if a trial becomes necessary. The next article discusses alternative dispute resolution/mediation in general.

The final article deals with the relatively recent phenomenon of parent coordinators. These individuals ease the burden on the court and reduce the cost of litigation. Their use may also lessen the trauma of divorce on the children, by resolving parenting issues without the involvement of lawyers and courts.

These articles should help all practitioners contemplate new ways to solve old problems. We hope they are informative and helpful for all in the practice of family law. ■

New Jersey Family Lawyer

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A New Approach to an Old Problem: Collaborative Law

by Linda Piff, Jeff J. Horn, Steven P. Monaghan, Ann Marie O'Hare, Suzanne Jorgensen and Sharon Beskin Goodman

On Dec. 12, 2005, the Advisory Committee on Attorney Ethics issued Opinion 699, approving collaborative practice as a dispute resolution process for matrimonial matters. This opinion now paves the way for New Jersey family law practitioners to join their colleagues in numerous sister states who have incorporated collaborative law as an effective method of resolving family cases.

In the New Jersey Judiciary's fiscal year running from July 2004 to June 2005, there were 64,252 divorce actions filed. Of those, 30,107 represented new divorce filings and 34,145 represented matters being reopened to the court for post-judgment proceedings.[1] For the years preceding the 2004/2005 fiscal year, the total numbers are roughly equivalent, with 60,943 matters opened in 2000/2001, 64,184 matters opened in 2001/2002, 64,799 matters opened in 2002/2003, and 64,723 matters opened in 2003/2004.

As is apparent from the most recently completed fiscal year, for every new divorce filed there is at least one divorced family returning to the court system for post-judgment proceedings. This fact alone supports the search for improvements to the divorce process. After all, a final judgment of divorce, in light of these statistics, can hardly be considered final. In the continuing search for a better way, the collaborative law model holds great promise, both for resolving present divorce disputes and for teaching litigants a more elegant way to handle future disputes without court intervention.

All family law practitioners have experienced the devastating effects of divorce litigation on families, and that every case, with few exceptions, is going to be resolved by an agreement. For many cases, this agreement only comes after a great investment of time and money in litigation, with numerous court appearances, countless hours spent waiting at the courthouse, unnecessary discovery, and agreements coming months into the process, and often on the eve of trial.

The most devastating consequence of litigation, however, is what it does to the families. Litigation is commenced by making accusations of fault (although the facts have no real bearing on the ultimate issues), and all too often the pain continues throughout the case. Painful personal issues are laid bare in a public forum. Each party probes every raw nerve of the other in their opposing certifications and pleadings, often in harsh and brutal language.

The simple fact is that this offers a very curious process to resolve a family dispute.

Family law clients come to their attorneys when the level of stress in their home is at its breaking point. They are about to make one of the most difficult and important decisions in their lives. The adversarial process within the courts offers them a process in which they are pitted as adversaries and told to personally attack one another to achieve the desired result. During the process they learn that a *fair* agreement is one in which both parties are equally dissatisfied with the terms.

While the adversarial process may serve the parties well in many different types of civil disputes, it would seem counter-intuitive for it to be embraced by families who must continue in a relationship, often raising children together, after the conclusion of the case. The essence of collaborative law is the belief that it is in the best interest of families to avoid this adversarial framework in effectuating the dissolution of the marriage. Therefore, collaborative practice takes a different approach.

A collaborative divorce is an integrated cross-disciplinary system for problem solving that requires collaborative lawyers to coordinate their work with other collaborative professionals who specialize in addressing the emotional and financial challenges in a divorce, with a commitment to resolving the issues outside of litigation. This professional team could involve the attorneys for the parties, mental health professionals acting as coaches for the parties, mental health professionals as child specialists, and financial specialists, in any configuration that addresses the parties' particular needs. This article not only explains the various roles of the attorneys, financial specialists, mental health professionals, but also represents the essence of collaborative law, as the members of the Jersey Shore Collaborative Law Group collaboratively prepared the article.

At the outset, the issue of whether attorneys, accountants and therapists could officially work together collaboratively had to be addressed. The Jersey Shore Collaborative Law Group sought an advisory opinion on this issue. Opinion 699 confirms that a

group of professionals from various disciplines may work together to promote and educate the public about collaborative law. Providing information about, and advocacy of, the collaborative law process does not constitute engaging in the practice of law. Also, since clients engage each professional independently and no fees are shared, the collaborative law group is not considered a *law firm*.

The opinion also concludes that the practice of collaborative law itself does not violate ethical rules. Collaborative law's requirement that both attorneys withdraw if negotiations fail, represents a permissible limitation on the scope of representation offered to the client. This limitation in scope is reasonable provided the attorney does not believe at the outset that collaborative law will fail. To determine whether there is "a significant possibility that an impasse will result or the collaborative process will fail," the attorney must rely on his or her knowledge and experience, and also be fully informed about the relationship between the parties.

In addition, the attorney must obtain the client's informed consent to participate in the collaborative process. To obtain informed consent, the attorney must disclose to the client the risks and consequences if the collaborative process fails and both attorneys must withdraw, and compare these with alternative processes for resolution of the dispute.

A basic tenet of collaborative law is that the parties and their counsel sign a participation agreement, which confirms the parties' agreement to participate in the collaborative law process rather than a litigation process, and their understanding that their lawyers are disqualified from representing them in any contested legal process. Based on Opinion 699, the prudent collaborative law practitioner will also send each client an informed consent letter, which compares in detail the collaborative process with litigation and other alternative dispute resolution methods like mediation.

At its core, collaborative practice is a commitment to two principles that are absent in the litigation paradigm: 1) a commitment that while advocating for clients, team members will work as part of a team to seek solutions in a cooperative effort that not only furthers the interests of an individual client, but the family as a whole; and 2) the parties commit not to resort to litigation, and should the collaborative process fail in resolving the case, and either party seeks judicial intervention by the filing of a pleading with the court, all professionals, including both lawyers, are precluded from any further involvement.

These principles may seem in variance with how attorneys have been trained, and how they view themselves, as advocates. In the collaborative process, the divorce team expressly works together in the analysis, reasoning and problem solving. The attorney is not merely the advocate of one.The attorney still acts as a legal counselor for his or her client, and helps the client understand the law, communicate in the negotiation, identify issues, and suggest options. The attorney's overall focus, however, is in the creation of a positive context for settlement for the family as a whole, the arrangement of an organized framework in order to reach the agreement, and the identification of creative solutions.

As family law practitioners, these skills are not foreign, they are relying upon to be effective in four-way conferences, and they are the skills that ultimately have lead to the settlement of cases in litigation. Collaborative law, however, puts these principles at the core of the representation, and requires attorneys to primarily rely upon these skills throughout the case, and to make it the focus. It is not an easy shift for some, and, like becoming a skilled mediator, it requires a measure of training in order for attorneys to redefine themselves and their roles as more than mere advocates for a client's positions.

The commitment to avoid litigation, and the preclusion of the attorneys from being involved in the litigation, invests all parties in the negotiation of a final result. Lawyers, by training and experience, look to the court as a way to resolve an impasse. Very often, when stalled in the negotiations in a case, attorneys look to the *pendente lite* motion, the matrimonial early settlement panel, or conferences with the judge as a way to provide unreasonable adversaries (or sometimes their own unreasonable clients) with a dose of reality. Attorneys can utilize the litigation to set the parameters of the case, provide a supposed objective guideline for negotiations and positions, and for a solution to an impasse.

In collaborative law, there is no walking away from the table without significant consequences. The parties need to retain new counsel, and essentially address the problems anew in litigation.Any impasse must be dealt with immediately and collectively, and the solution, which will invariably be found later in the litigation after the pain and expense, must be found at the bargaining table. The wall that keeps the collaborative lawyer out of the litigation keeps the lawyers and the parties at the table, and puts the emphasis on finding the solution to the often difficult issues.

In the divorce process, some of the most critical decisions involve the financial situation of the parties. The financial decisions agreed to by the parties will have a lasting impact on the entire family and extend far beyond the process of divorce. The collaborative approach is solution-oriented and focuses on meeting the immediate and long-term individual and family financial goals. During the divorce process, the complexities of the financial matters may require the parties to engage the services of a financial specialist. By using a financial specialist such as a certified public accountant or certified financial planner, clients will be better prepared to make well-informed decisions regarding the financial matters of their divorce.

The financial specialist works with the clients and the other members of their collaborative team to assess the family's financial situa-

tion and assist in reaching a settlement of the financial matters in the case. They serve as facilitators of open and honest discussion regarding financial matters, to resolve issues and to develop a plan for equitable distribution and support that is fair and reasonable.

The services required of the financial specialist will vary with each case. A financial specialist may provide assistance in preparation of marital balance sheets or net assets available for equitable distribution. This includes the separation of marital assets and liabilities from those assets and liabilities that are non-marital or immune from equitable distribution.

As in any case, the determination of the value of certain assets such as businesses and pensions is necessary to resolve all equitable distribution issues. But rather than advocate for either side in a collaborative divorce, the financial specialist can recommend creative plans for equitable distribution that optimize the investments and corresponding earnings potential of the parties to meet current needs as well as plans for the future, which are in the best interest of all parties.

The expert can prepare a cash flow analysis and lifestyle analysis of the parties, including projections of future cash flows available to meet lifestyle needs, as well as recommend alimony and child support with the goal of maximizing the cash flow available to the family as well as both parties individually. Additionally, assessing the insurance needs of the parties (life, health, disability) and making recommendations for securing the appropriate level of coverage currently, as well as future step-downs as financial obligations change, may be of assistance in resolving the case.

The most important role of the financial specialist in the collaborative law process is educating clients, not only about their current finances but also about planning for their financial life post-divorce. The financial specialist's guidance will allow the clients to base their decisions on fact instead of emotion, offering alternatives that optimize the individuals' and the family financial position at the time of the divorce and well into the future. By using a financial specialist in the collaborative process to assist clients, it creates win-win scenarios that meet everyone's needs.

Another key party to collaborative law paradigm is the mental health professional. It is possible to have a good divorce, which results in a opportunity for a good life and a new beginning for the family. A good divorce[2] is one in which both the adults emerge at least as emotionally well as they were before the divorce. A good divorce has three goals: 1) keeping the family a family (even as the structure changes, they are still a family); 2) minimizing the negative effects on the children; and 3) integrating the divorce into the participants life in a healthy way.

The goal of collaborative law is to help the divorcing couple/family achieve the good divorce. The mental health professional or divorce coach works with the family to establish the foundation upon which the family is able to achieve these goals. The divorce coach guides the family down the pathway to the good divorce.

In this respect, the divorce coach is different from sending a client to see a therapist. A divorce coach is a licensed mental health professional who has extensive background and experience with divorce-related issues, child development, and, particularly, the needs of children of divorce. In addition, the coach has specialized training in mediation and collaborative law.

The coach's knowledge of problem-solving skills assists in communicating the issues and needs the participants are having difficulty articulating. In order to help improve the communication between the divorcing spouses, the coach guides them in understanding the issues and helps the parents communicate their opinions and feelings in their own words. This clear communication assists in reducing misunderstandings in the present and in the future. The divorcing parents will learn to speak more clearly and directly with their family. This helps to build the foundation for the good divorce and improve the quality of the participants' co-parenting skills.

With encouragement, parents will learn how to look for solutions rather than feeling stuck in the problem. The divorce coach helps them feel empowered, and they begin to acknowledge their own resources and problem-solving skills. With guidance from the coach, the participants are encouraged to be optimistic and experience the courage to make it through, with strength, this difficult transition. The coach works with the participants to unlock their inner skills to assist them in abiding their commitment to the good divorce.

The role of the child specialist is also filled by a mental health professional. Another element of the good divorce is one in which the parents divorce each other, but do not require the children to divorce one parent. This specialist looks to safeguard the children's emotional and physical needs, while recognizing the impact of the parental divorce on them.

When a family goes through a divorce, all of its members are affected, but the impact on the children is not a primary focus within the adversarial process. The divorce process can be so overwhelming that it may be difficult for parents to be as effective as they were (or aspired to be) prior to the divorce. The child specialist speaks with the children regarding their concerns. Do they feel caught in the middle between their parents? Do they feel responsible for the divorce? The child specialist assesses and addresses the impact of the divorce on the children. With this in mind, the specialist brings information back to the parents with the goal of helping the parents assist the children through the process.

With knowledge of child development, the specialist can address how the divorce process is affecting the children at their particular

age, and whether the children are stuck and/or regressing. Moreover, the specialist can suggest methods and techniques to support the children so they can continue to develop successfully. This knowledge can also improve the parenting skills of each parent, and of the co-parenting team for the long-term goal of successful parenting and co-parenting during and post-divorce.

Children can and will survive divorce, as long as their parents allow them to survive. With the guidance of the child specialist, who has the skills and knowledge base to help parents help their children, one can achieve a good divorce.

Following the recent issuance of Advisory Opinion 699 by the Advisory Committee on Attorney Ethics, collaborative law can now be said to fall among the panoply of complementary dispute resolution processes authorized by Rule 1:40, *et. seq*.[3] As such, it is a modality of dispute resolution that attorneys in New Jersey "have a responsibility to become familiar with"[4] to better serve their clients.

Various anecdotal statistics are bandied about concerning how many litigated matters are resolved through settlement. Lawyers and judges put the percentage of cases that eventually settle anywhere between 80 and 99 percent. The *Star Ledger* has reported that of the more than 30,000 divorces resolved in the 2002/2003 court year, there were only 414 divorce trials.[5] Leaving aside the implications concerning what it means to be a matrimonial lawyer,[6] the conclusion bespeaks the hard facts that the time, effort and money spent preparing for trial is vastly out of proportion in comparison with the number of cases actually brought to trial. This, until now, was the inexorable fact of divorcing in New Jersey that the majority of the lawyers' and litigants' time, effort and fees were spent on an exercise designed to prepare for the remotest of outcomes: the divorce trial.

With the advent of collaborative law, the main participants are freed from the burden of preparing for an unlikely contingent event (*i.e.,* trial) and are thus unfettered to focus 100 percent of their efforts on resolution of the dispute. The allure of this model becomes increasingly apparent as one considers the studies of the collaborative law process, and the realization unfolds, that the type of time, effort and preparation useful in resolving matters is (in may ways) altogether different than that focused upon preparation for trial. This thought is perhaps best summed up by Albert Einstein, who famously declared: "You cannot simultaneously prevent and prepare for war."

As the above statistics show, in family law litigation, winning only sets one up to lose. But just as no war has ever left the world a peaceful place, the divorce wars attorneys have engaged in as litigators are only a precursor of battles to come.[7] The supposed loser in the battle simply lies in wait to prove he or she was wronged.

The battle is endless. The parties can no longer stand to be in the same courtroom, let alone work together in the best interests of their children.

Discovering collaborative practice is a new option for divorcing couples. It is an alternative to divorce that allows a less adversarial approach and permits the client to be involved in the problem solving that will benefit the entire family. This was considered a novel idea for New Jersey family lawyers. Imagine a fair and equitable result for clients without costly and lengthy litigation.

The concept of collaborative practice was developed by Stuart Webb, an attorney who is a family law practitioner in Minnesota. Webb developed the concept of collaborative law in 1990.[8] This concept was not new to family lawyers in the United States but it is new to New Jersey. Legal, mental health and financial professionals in over 40 states have adopted the collaborative practice model. Today, there are more than 170 practice groups across the United States, Canada, Austria, Switzerland, Australia, Ireland and the United Kingdom.[9]

Collaborative law practice can help individuals stay in charge of their own divorce and make new rules. Not every case will be appropriate for collaborative law, nor will every client be interested in avoiding the adversarial process. However, the authors believe even staunch litigators have to acknowledge that collaborative law will be making inroads in the way family law cases are being resolved in New Jersey.

Divorce will always remain a significant life event. Collaborative law, the authors believe, can lead clients and their families to a compassionate ending and a healthy new beginning. ■

ENDNOTES

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The Dos and Don'ts of Mediation and Arbitration

by Amy Zylman Shimalla and Amy Wechsler

In light of best practices and the time constraints placed on attorneys and litigants to conclude their matters, it is imperative that all avenues of resolution be explored. To that end, mediation and arbitration should be discussed in every case, and attorneys and clients should give serious consideration to how either option might be used. The following are some suggestions regarding what to do and what not to do when exploring and utilizing these forms of dispute resolution.

MEDIATION

1. Do advise clients of the availability of mediation (and arbitration) during your initial meeting. Pursuant to Rule 1:40-1, all attorneys have an affirmative responsibility to advise clients of the availability of complementary dispute resolution programs as a means of resolving their cases. Quite often, mediation may be the best means to the end the client wishes to achieve, particularly when the client's goals may not fit neatly into established legal precedent. For instance, the client who seeks a disproportionate share of marital assets in equitable distribution may be more successful in achieving that result in mediation than in litigation, and may be willing to make significant support concessions to obtain it. Parties may want one spouse to maintain the marital residence until the children go off to college or a disproportionate distribution of assets. They may seek a delayed distribution of assets.

Mediation can assist in attempting to meet the parties' overriding goals. A supporting spouse may want a guaranteed end date for paying alimony on what otherwise would be a permanent alimony situation, but is willing to make significant concessions on other issues in order to achieve this compromise.

In mediation, the parties and the mediator discuss each party's goals and explore the possible resolutions to each and every issue. Mediation encourages creative solutions geared toward reaching these goals, as well as the needs of the entire family. Problems are *mutualized* rather than presented as fault-based, which may serve only to further polarize and alienate the parties. Mediation is very different from the typical adversarial relationship in which each party's attorney vigorously advocates for his or her own client's best-case scenario. If a client wants an outcome the attorney does not believe is likely to be achieved through a litigious process, mediation may be the better route to pursue.

2. Do refer to mediation in your retainer agreement. If a client comes to you and has pursued mediation or wishes to pursue mediation, address this in your retainer agreement. Clients who participate in mediation may want to limit the scope of discovery. If the client does not want to pursue full or formal discovery, and seeks to have counsel provide limited representation, it is critical that the attorney clearly spell out those limits in the retainer agreement. This will help avoid the kind of challenge raised in *Lerner v. Laufer*,[1] in which a client who participated in mediation limited the scope of her attorney's role and waived discovery. She later claimed, however, that her attorney had been remiss in failing to obtain full disclosure. Ultimately, the New Jersey Supreme Court found for the attorney, but made clear that to protect against such claims, attorneys should clearly set forth the limits of representation in their retainer agreement.

3. Do be willing to use mediation as a tool in your cases at any stage of your representation. If parties do not initially participate in mediation, it still may present a viable problem-solving option at any point in litigation when the parties find themselves at an impasse. Perhaps you have a difficult client, or there is a difficult party on the other side. Perhaps opposing counsel is ill-informed. Your adversary may be unreasonably combative to the point where your client is placed on the defensive and reacts negatively to any suggestion that comes from the other side. A case can take an entirely new path with a mediator who can neutralize a difficult adversary or moderate a contentious relationship between adversaries. A mediator can help present the issues in a non-adversarial way.

4. Do not choose a mediator without knowing his or her qualifications and mediation style. Just as there are different attorneys, there are different mediators with varying backgrounds, approaches and styles. Choose a mediator whose style will be most effective in your case, given the personalities of the clients, the complexity of the issues and whether you think a more facilitative or a

more directive approach is appropriate. If you trust the selection of the mediator, your client will be more willing to trust in, and to empower, the mediator to facilitate the resolution of the issues. Get to know the mediators in your area so you can have a range of choices when you begin discussing appropriate mediators for any given case.

Ask about the mediator's training and experience. There is no certification or licensing of mediators in New Jersey. Anyone can hang a shingle that says "mediator." Obtaining a certificate of completion of courses to qualify for the roster of economic mediators does not provide an assurance as to the experience or ability of the mediator. The New Jersey Association of Professional Mediators (NJAPM) has the only accreditation process in New Jersey by which professionals in various fields can become accredited divorce and family mediators. Accreditation by NJAPM requires a professional background, significant mediation training, documentation of substantial mediation experience, submission of memoranda of understanding, references and peer review.

5. Do make sure the mediator has both clients sign an agreement to mediate. The parties should enter into a written agreement setting forth how the mediator will conduct the sessions and what is expected of the parties, and confirming that the mediation is a confidential process. While the Uniform Mediation Act, at N.J.S.A. 2A:23C-4b, prevents the mediator and the parties from disclosing communications made in the mediation, it is still important to state this in a writing signed by the parties, so they are reassured that they can make suggestions, propose solutions and discuss ideas without fearing their words will appear in a motion certification or be used during cross-examination at trial. When clients bring attorneys or financial advisors to mediation sessions, make sure the mediator has every participant sign the confidentiality provisions of the mediation agreement. Ask for a copy of the signed mediation agreement for your file.

6. Do not send a client to mediation unprepared. Before a client begins mediation, explain the law and your view of the possible range of results in the three major areas of the case: custody/parenting time, equitable distribution and support. Regarding custody and parenting time, help gather information about children's needs and schedules, the parties' schedules and the parties' parenting roles. The client should consider what options for a parenting schedule would work for the children, including vacation schedules, holidays, transportation arrangements, etc.

Regarding equitable distribution and support, review information about incomes, assets and liabilities. Clients should prepare a list of assets and debts, and have back-up documentation so they are prepared to discuss equitable distribution. Use the case information statement or other similar form that helps the client present the data in an organized way. Discuss how assets were acquired and how they have been maintained, and educate your client about the difference between assets that are subject to equitable distribution and those that are immune.

Review tax returns, and have the client complete a budget to review with you so he or she is prepared to address support issues.

Prepare the client for the process, too. Clients should not expect mediation to be free of contention. Parties are expected to conduct themselves responsibly and respectfully, but the fact is that some couples argue, cry, holler and insult each other in mediation. The mediator may not be able to prevent this from happening, but your clients should know that the mediator will handle it and get the parties back on track.

Clients also should not expect mediation to take only one or two sessions. The process may take several sessions, depending on how prepared the clients are, the need to involve any experts and the readiness of parties to compromise and agree.

7. Do not sit by and allow the mediation to be unsuccessful. If you learn from your client (or from the mediator) that mediation is not going well, do what you can to support the process. Suggest that you attend with your client, and that the other party also attend with counsel. Quite often, bringing attorneys into the process when it is not going well will help move toward a final resolution. Having both attorneys present may allow the issue to be resolved far more effectively than having the parties leave the session, consult with counsel and then come back to another session or multiple sessions, without reaching closure on an issue. Clients in mediation have an investment in the process. Do what you can to back them up and make it work.

8. Do suggest neutral experts, when necessary. Utilizing the services of a neutral expert, such as a forensic accountant or a custody evaluator, within the mediation process can expedite a resolution with controlled expenses. It also allows the attorney to control, to some extent, the experts who become involved in the case. Experts may be willing to work within a mediation to do a look-see or down and dirty analysis at a reduced rate from what a full written evaluation would cost.

When using any kind of expert within the mediation process, remember to clarify at the outset whether the expert's report and findings can be disclosed if the matter does not settle in mediation.

9. Do advise your client along the way. Suggest to the client that he or she contact you after each mediation session so you can review what has been accomplished and give advice and direction before the parties reconvene with the mediator.

10. Do not seek to undo what the parties have agreed to in

mediation. If the parties are successful in mediation and reach an agreement, you should certainly advise your client of where he or she could have done better (or worse) if the case were to be litigated. Mediation is a process of self-determination and compromise. Where the mediated result is blatantly unfair to a client, you must advise against finalizing the result, in which case, you may want to suggest that the parties return to mediation, with attorneys. However, if the parties have worked hard and achieved a result they both believe is reasonable, do not destroy it by changing the language of clauses they may have worked hard to draft. To the extent possible, preserve the language of the memorandum of understanding when finalizing the marital settlement agreement.

If you believe the mediator missed something, either by way of detail or clarity, have the parties address this in a mediation session, rather than draft your own language, which may not be acceptable to the other side. When the mediator has prepared a comprehensive memorandum of understanding, you may want to consider a wrap-around marital agreement, which adds boilerplate language to the agreement without disturbing the essential terms of the important agreements set forth in the memorandum.

11. Do utilize the mediation process to finalize the details. Once an agreement is achieved and you are the process of finalizing the marital agreement, if difficulties arise in finalizing the language allow the parties, or the parties and counsel, to return to mediation to finalize that language rather than letting the agreement unravel.

12. Do not attempt to call the mediator as a witness if the case proceeds to litigation. When the parties enter into mediation they sign an agreement to mediate whereby they waive the right to call the mediator as a witness. Mediation is a confidential process, and the guarantee that the mediator, and his or her records, will not be called as a witness, or used as evidence against a party, allows the parties to have open and frank discussions about the issues. The New Jersey Supreme Court recently addressed this issue in *State v. Williams*,[2] upholding the mediation privilege.

13. Do utilize mediation for post-judgment issues. Post-judgment issues might include cleanup issues following the entry of a judgment pursuant to a marital agreement or following a trial. Even more likely, post-judgment issues may include problems that arise later in a case surrounding parenting time difficulties, changes in custody or recalculation of child support due to the passage of time or other modifications of support as a result of changed circumstances; allocation of college cost, and adjustment in child support associated with a child going to college. These are all issues that can result in extensive motions and, ultimately, often plenary hearings that may not be scheduled for many months. Often, these issues can be resolved more expeditiously through mediation.

14. Do know the law. Read Rule 1:40, and N.J.S.A. 2A:23A-1, *et seq.* (the Uniform Mediation Act). If you are advising your clients about the availability of mediation, and, especially if your clients participate in mediation, you should be familiar with the court rule and the statute that govern the process.

ARBITRATION

There are cases that cannot be mediated and may not be appropriate for litigation. This may be true because of the relationship between the parties or when there are issues you do not wish to bring before the court. Sometimes a matter requires adjudication faster than the courts can accommodate, or, conversely, sometimes a case needs more time than best practices limitations will allow. For any of these reasons, parties might pursue arbitration as a means to adjudicate a case. Arbitration is more like litigation than any other form of alternative dispute resolution. Parties testify, present evidence and a third party makes decisions on the issues presented. In the event arbitration is an avenue you decide to pursue, the following are some suggested dos and don'ts.

1. Do carefully select your arbitrator. Just as there are many types of lawyers, judges, and mediators, there are different types and styles of arbitration. It is important that you either know the person or know someone who has utilized this person's services, so you can determine whether or he or she will be effective in your case. It is critical that your arbitrator will be organized, efficient, effective, decisive, thorough and neutral. The court rules provide training requirements for arbitrators in civil cases, but there are no specific requirements in family matters.

2. Do have a pre-hearing conference. During a pre-hearing conference—either in person or via conference call— you should take part in setting out the rules of the arbitration. You must identify the issues the arbitrator will address to establish the scope of the arbitration, determine what evidence rules will apply, determine whether the arbitrator is bound by established precedent, provide for any additional discovery, and establish clear time frames for all steps of the process.

It is critical to define the scope of the arbitration. One of the grounds on which an arbitration award may be overturned is if the arbitrator exceeded his or her authority. Take steps at the beginning of the process to avoid confusion that would jeopardize the finality of the results.

3. Do lay out the terms agreed upon in a signed arbitration agreement. In the arbitration agreement you can spell out: where the hearings will take place, whether they will be on the record, whether the rules of evidence will apply, what time frames must be followed, all witnesses who will testify, any additional discovery to be

exchanged, whether and how counsel will stipulate to facts and exhibits, the dates and times when hearings will take place, whether pretrial briefs will be submitted, whether and when summations and proposed findings of fact and conclusions of law will be submitted, and a clear and prompt timetable for when the arbitrator's award will be submitted.

4. Do not neglect to specify whether the arbitration will be binding. Keep in mind that you cannot proceed directly to the Appellate Division if you are not happy with the arbitrator's award. Rather, there must be a motion to finalize the award in response to which the objecting party may object, and thereafter, the matter can proceed to judicial review.[3] Make sure to specify in the order referring the matter to arbitration (or the arbitration agreement if the matter is proceeding to arbitration and no action has yet been filed in the courts) whether the arbitration will be binding or non-binding. Remember, however, that even if the arbitrator's award is to be binding, custody decisions are not binding on the courts, which cannot cede their authority on custody matters to third parties.[4]

Judges are not to simply rubberstamp an arbitrator's findings or decision regarding custody, but this does not mean custody matters should be avoided in arbitration. The record of the proceedings will assist the judge in determining whether to affirm, modify or vacate the custody provisions of the arbitration award.

5. Do establish what the arbitration costs will be and how they will be paid. Your clients must know how the arbitrator will charge. If there is to be an initial retainer, determine who will pay it, and whether the payment will be with prejudice or subject to later determination by the arbitrator. If you are using a court reporter (see below), include allocation of that cost in the agreement, too. Establish whether the arbitrator will decide an allocation of the arbitration fees as part of the award. Whatever the arrangement will be, make sure it is clearly described up front.

6. Do brief your issues. You are utilizing the services of an arbitrator who may or may not be fully educated on the issues of your case. Take the opportunity to brief the issues and advance your client's positions to the arbitrator, just as you would when preparing for a trial.

7. Do not rely on your memory or your notes to document the process. If at all possible, agree to have a court reporter at all of the arbitration hearings. It will aid you in writing your summation. Moreover, if there is any disagreement regarding whether the arbitrator acted improperly during the proceedings or clearly erred in his or her findings regarding the facts presented, a transcript will be invaluable.

8. Do submit a written summation. This document can be utilized by the arbitrator when he or she is preparing the award.

9. Do treat the arbitration as you would a trial. Prepare your client. Prepare your exhibits. Know the law and know your facts. Prepare for cross-examination.

10. Do schedule your hearing dates for full, consecutive days whenever possible. One of the reasons to avoid a trial in court is that it is nearly impossible to get full days of trial time, or to schedule days either consecutively or within a short period of time.

11. Do incorporate the hearing dates into a consent order, filed with the court. A consent order makes it far more likely that you will keep to your schedule. Not only is this enforceable, but, because it is a court order, if you are scheduled for a court appearance in another matter you are more likely to convince the judge to excuse you so you can attend the prescheduled and court-ordered arbitration hearings.

12. Do spell out as many details of the arbitration in your final judgment as possible. Litigants may elect to have a final divorce judgment entered, which provides that the parties will resolve their issues in binding arbitration. Make sure the final judgment specifies time frames and as many other details as possible regarding how the arbitration will proceed. Do not let the case languish just because you do not have court-imposed deadlines. If one party fails to abide by the terms of the final judgment (or subsequent consent order) that specify how the parties must proceed to arbitration, the other party can bring a motion to enforce litigant's rights to compel compliance.

13. Do not allow details to derail the decision to arbitrate. On the other hand, while it is advisable to settle details in the final judgment, some cases are best served by first having a more bare-bones provision that does little more than mandate the arbitration, identify the arbitrator and specify whether or not it is binding. Negotiating the procedural rules of the arbitration may be difficult, and could delay entry of the judgment, or even unravel the parties' agreement to resolve the case through arbitration. An experienced arbitrator can help sort out the procedural details once the parties are legally bound to participate in the process.

14. Do know the law. Before committing a client to arbitration, make sure you have, at a minimum, reviewed the governing rules and statutes, particularly N.J.S.A.2A:24-1, *et seq.* ■

ENDNOTES

1. 359 N.J. Super. 201 (App. Div. 2003).
2. 184 N.J. 432 (2005).
3. *Weinstock v. Weinstock*, 377 N.J. Super. 182 (App. Div. 2005).
4. *P.T., A.T. and H.T. v. M.S.*, 325 N.J. Super. 193 (App. Div. 1999).

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Lehr v. Afflitto and its Impact on Matrimonial and Mediation Practice

by Hanan M. Isaacs

New Jersey leads the nation in family law, as well as in mediation policy and practice. On Jan. 19, 2006, the Appellate Division rendered its decision in *Lehr v. Afflitto*.[1] This landmark case is sure to be cited nationally, as it successfully fuses family law and mediation policy. *Lehr* is the culmination of a series of recent legal developments.

In *Lerner v. Laufer*,[2] the Appellate Division highlighted important distinctions between litigated and mediated dispute resolution, while acknowledging that the litigants' self-determination was at the heart of both. The *Lerner* case permitted parties to negotiate a settlement upon less than a full exchange of information, and insulated attorneys from a litigant's claims of professional negligence when the attorney-client relationship has been appropriately restricted under RPC 1.2(c), as amended after the decision.

RPC 1.2(c) states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

Self-determination has always been a hallmark of mediation in New Jersey and nationally. The New Jersey Supreme Court Standards of Conduct for Mediators in Court-Connected Programs, Standard I states that "mediation is based on the fundamental principle of [party] self-determination" and ABA, AAA, and ACR Model Standards of Conduct for Mediators, Standard I ("Self-Determination") further recognize this important principle. The *Lerner* decision takes this one-step further, by recognizing that self-determination is a core concept in divorce litigation, as well. The Court cited Appendix XVIII to the Rules of Court, Statement of Client Rights and Responsibilities in Civil Family Actions, Section A(10), which states that "Clients have the right to make the final decision as to whether, when, and how to settle their cases and as to economic and other positions to be taken with respect to issues in the case," in support of its conclusions.

In *State v. Williams*,[3] a criminal law decision, the New Jersey Supreme Court considered the limits of mediation confidentiality. In *Williams*, the defendant asserted that the mediator had heard exculpatory admissions by the alleged victim in the case. The trial court had determined that Rule 1:40-4(c) does not permit an exception to the rule against mediator testimony, even when balanced against the accused's Sixth Amendment right to defend himself at trial.

The Appellate Division affirmed the trial court's exclusionary ruling. The Supreme Court granted certification on that issue 10 days after Acting Governor Richard Codey signed the Uniform Mediation Act (UMA-NJ) into law.[4]

Even though the case arose prior to the UMA-NJ's effective date, the Supreme Court grounded its Rule 1:40-4(c) constitutional analysis on the UMA-NJ's balancing test for evidentiary use of mediation communications. The Supreme Court of New Jersey was the first state high court in the country to construe the UMA. In its 5-2 decision upholding the trial court's ruling, the Supreme Court held that Williams' need for the mediator's testimony did not outweigh the public interest in mediation confidentiality. The dissenting opinion did not disagree with the majority on statutory analysis grounds, but rather based its decision on its determination that the defendant had made a sufficient showing of need to overcome the general prohibition on mediator testimony.

The UMA-NJ took effect on Nov. 22, 2004, and applies to all agreements to mediate made on or after that date. It creates a set of privileges against disclosure of mediation communications. These privileges are the heart and soul of the law, which is unique in New Jersey's legal history.

The National Conference of Commissions on Uniform State Law (NCCUSL) and the American Bar Association took five years to develop the bill template. The drafters of UMA-NJ took two more years to customize it to New Jersey's unique legal and mediation cultures. UMA-NJ, therefore, represents the product of many thousands of professional work hours, arduous discussion, debate, and multiple revisions by the national and state dispute resolution communities.

The UMA-NJ transformed New Jersey law, which previously gave no confidentiality protection and no statutory privilege for mediation communications in the private sec-

tor; and only limited protection in the court-referred setting. The new law protects confidentiality of communications and creates enforceable privileges for all participants and the mediator.

The UMA-NJ:

- Broadly defines the mediation process and protects mediation communications, for the maximum protection of participants, their representatives, and the mediator;
- Advises parties that they have the right to create their own rules of confidentiality and exceptions to privilege;
- Explicitly provides that any writings signed by the parties are not privileged or confidential, for example the mediation retainer agreements and signed settlement agreements;
- Establishes other important exceptions to privilege, such as when a party sues the mediator or another professional who participates in the mediation, or when communications amount to a physical threat, or present evidence of a plan to commit a crime, or evidence of child abuse;
- Creates a Tony Soprano waiver and preclusion of privilege for organized crime activities that take place in a mediator's office;
- Prohibits mediators' substantive reports to the court (unless the parties expressly agree otherwise), but allows process reports about the status of mediation, whether settlement was reached, and attendance of parties and counsel;
- Codifies that parties' contractually agreed to confidentiality provisions, as well as pre-existing confidentiality rules or laws, shall be incorporated into the mediation process. For example, Rule 1:40-4(c), which makes virtually all mediation communications protected and non-admissible, would continue to govern court-connected mediations. However, the parties could agree to modify that rule;
- Requires a mediator to enquire and report about possible conflicts of interest, which, once disclosed, the parties are then permitted to ignore; and
- Permits attorneys or anyone else designated by a party to accompany the party and participate in the mediation. (Clearly, however, the mediator retains control of the proceedings, and unruly non-party participants may be invited to leave, or the mediator may cancel the process.)

LEHR V. AFFLITTO: ITS MEANING AND SIGNIFICANCE

Today, it is the rare family part dissolution case that goes to trial. Some cases are settled by counsel or a third-party mediated settlement is reached early in the litigation, other cases are litigated up through (and sometimes beyond) matrimonial early settlement panel only to settle on the eve of trial. The *Lehr* case was destined to be one of the settled ones, until it was not.

Lehr arose from a divorce proceeding that commenced in 2002 between Karin Lehr and John Afflitto, after a 22-year marriage that produced two children, then ages 15 and 10. The family part referred the couple to economic mediation, following matrimonial early settlement panel, under the then-existing mediation pilot program in Morris County.

The parties had several meetings with the court-appointed mediator, Sanford Kahan. Counsel for both litigants attended a portion of the sessions, but the parties allegedly reached a final settlement in mediation, without their attorneys present. The mediator sent a letter to the lawyers outlining the proposed settlement on 13 issues, but listed three major financial issues that remained unresolved. Left unresolved were: 1) the parties' respective contributions toward the children's college costs; 2) the amount of the father's child support; and 3) payment of interim marital expenses through to final judgment.

At some point, Mr. Afflitto countered that he rejected the settlement altogether. The trial court nevertheless accepted the settlement as outlined in Kahan's letter, and put through the divorce. Afflitto appealed, arguing that there was no settlement; the trial court erred when it reviewed and relied upon the mediator's letter, which was protected from disclosure by the Supreme Court's confidentiality rule;[5] and that no settlement could occur unless the review attorneys drafted and the parties signed the ultimate settlement agreement.

The UMA-NJ played no part in the first appeal, because it was not yet in effect.

On the initial appeal, the Appellate Division, without addressing the mediation confidentiality argument, remanded the case for a *Harrington* hearing,[6] regarding whether the parties had, in fact, settled their case. During the remand hearing, Lehr's counsel called the mediator to testify. The mediator testified that his letter was not a settlement agreement. Nevertheless, after testimony by both parties and both legal counsel regarding the mediation sessions and what the parties did or did not agree to, the trial judge found that "there was an agreement and the agreement was [supposed] to be reduced to writing." Thirteen out of 16 was good enough.

When the case returned to the Appellate Division, the panel stated that the mediator's subpoena and testimony were "troubling," as confidentiality of mediation proceedings "is a matter of great public and systemic importance." They said: "Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs the need for confidentiality," which embraces the

UMA-NJ standard.

In his opinion for the three-judge appellate panel, the Honorable Robert Fall, J.A.D., wrote that New Jersey has a strong policy favoring protection of mediation communications from disclosure, and held, consistent with the UMA-NJ, that a party's need for testimony ordinarily does not outweigh the need to maintain mediation confidentiality, absent an express waiver by all of the parties and also by the mediator.

The appellate panel said that, although the case arose before the UMA-NJ became law, its analytical framework was appropriate to determine whether to pierce the mediator's privilege and allow the use of mediation communications in a subsequent litigation proceeding.

Rule 1:40-4(c) provides that no mediation communication may be used in a subsequent proceeding, and that mediators are prohibited from testifying in subsequent proceedings. The UMA-NJ provides a privilege for parties, third-party participants, and mediators to refuse to disclose, as well as prevent others from disclosing, mediation communications, unless all agree in writing to a waiver or a court finds that the need for the information substantially outweighs the need to protect the communications.

The Appellate Division turned to the New Jersey Supreme Court's recent decision in *State v. Williams* for the proposition that, as a general rule, mediators are prevented from testifying in a court proceeding related to the mediated case. Confidentiality is central to encouraging parties to participate in mediation, because parties expect that nothing they say will be used against them in a later court proceeding.

The *Lehr* court said that a mediator's after-the-fact testimony would damage the process and bring into question the mediator's impartiality: "Applying these principles and guidelines, we conclude that since there was no express waiver of the confidentiality provisions of R. 1:40-4(c), the trial court erred in permitting Kahan to testify at the *Harrington* hearing." The Appellate Division also said, consistent with its UMA-NJ analysis: "When balancing the need for the mediator's testimony with the interest in confidentiality, it is clear that the need for Kahan's testimony did not substantially outweigh the private and public interests in protecting confidentiality."

The *Lehr* court lamented the fact that alternative dispute resolution had failed to bring the parties together in this case. The court said that: "The advent of mediation and other alternative dispute resolution methods as tools to assist parties in resolving their disputes as early as possible and with the least amount of financial and emotional strain is an admirable and worthwhile effort of the court system. Ultimately, however, in an adversarial system with limited resources, the success of mediation is dependent on the good faith, reasonableness and willingness of the litigants to participate."

Finally, while the UMA-NJ technically was not before the *Lehr* court, since the facts of the case arose before the UMA-NJ was signed into law, the Appellate Division missed a golden opportunity to explain and apply the most relevant section of the law to this matter of importance. Specifically, N.J.S.A. 2A:23C-6(b)(2) establishes an *exception* to its privilege provisions, when a party seeks to offer a mediation communication in a contract enforcement proceeding, such as a *Harrington* hearing. In that context, either party is permitted to testify about mediation communications, without both parties consenting to a waiver, and each party is entitled to elicit the other party's testimony about such communications.

It makes no sense to require both parties to agree to a waiver before such testimony may be taken, because only the enforcing party has the motivation to testify or compel the other party's testimony. The resisting party should not be permitted to control the testimonial flow for both sides, and the law so holds.

Under the cited UMA-NJ provision, and for the very policy reasons recognized by the Supreme Court in *Williams* and the Appellate Division in *Lehr*, only the mediator may refuse to provide such testimony. Although this author thinks it is never a good idea to do so, the mediator may testify to mediation communications in that setting on a voluntary basis.

Thus, the *Lehr* court got the right results, but arguably for the wrong reasons. The court's Rule 1:40-4(c) analysis was substantially stronger. However, once the UMA-NJ became law, the Rules of Court and Rules of Evidence should yield to the Legislature's declarations of privilege, as they have since time immemorial.

CONCLUSION

The *Lehr* case stands for the important proposition that settlements are not complete until *all* major issues are resolved; 13 out of 16 are not enough to mandate full and final settlement. Said the court, "[F]inancial issues in a matrimonial case are, by their nature, interrelated....It is clear that 'the termination of a marriage involves an economic mosaic comprised of equitable distribution, alimony[,] and child support[,] and...these financial components interface.'"[7]

The *Lehr* court's directives about settlement have become even more important since the publication—and then unpublication—of *Costanza v. Clemente*,[8] which cited Rule 5:7-8 (as did *Lehr*) for the proposition that bifurcation of issues is the rarest of exceptions, and that written settlement agreements should accompany final judgments of divorce, Rule 4:42-1(a)(4) and (b).

In short, *Lehr* gave a major boost to the sanctity of confidential mediation communications, ruling that a mediator is prohibited from testifying in subsequent proceedings without an express waiver from all the parties, and unless the mediator also consents.

Lehr was not appealed to our

Supreme Court. In the author's view, the Supreme Court would not have disturbed the Appellate Division's handiwork, even if an appeal had been filed. *Lehr* supports the idea that mediation is not ancillary to litigation, but rather exists as a free-standing proceeding that must be respected and protected according to its internal rules and logic. The trial courts should order disclosure of mediation communications in after-litigated matters only in the rarest of cases and for good cause shown.

Based on *Laufer*, *Williams*, *Lehr*, and the UMA-NJ, the author believes it should now be standard New Jersey practice that mediators and parties must have a written and signed agreement to mediate before mediation starts. The UMA-NJ sets forth broad outlines and guidance regarding mediation privilege and confidentiality, but anticipates that parties and the mediator will fill in the significant blanks in a customized way. To avoid foreseeable problems down the road, agreements to mediate should provide parties, third parties (especially experts retained for the mediation), lawyers, and trial judges with a clear understanding of everyone's intentions with regard to mediation confidentiality and privilege.

As in many other areas of life and law, so too in divorce mediation: An ounce of prevention is worth many pounds of cure. ■

ENDNOTES

1. 382 N.J. Super. 376 (App. Div. 2006).
2. 359 N.J. Super. 201 (App. Div.), 177 N.J. 223 (2003).
3. 184 N.J. 432 (2005).
4. N.J.S.A. 2A:23C-1, *et seq.*
5. Rule 1:40-4(c).
6. *Harrington v. Harrington*, 281 N.J. Super. 39 (App. Div.), *certif. denied*, 142 N.J. 455 (1995).
7. *Koelble v. Koelble*, 261 N.J. Super. 190, 192 (App. Div. 1992). *See also Lynn v. Lynn*, 165 N.J. Super. 328, 342 (App. Div.) (noting the necessary interrelationship between property distribution, alimony and child support), *certif. denied*, 81 N.J. 52 (1979).
8. A-0545004T5 (App. Div., March 27, 2006).

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To Decide or Not to Decide: The Practical Approach to Implementation of the Parent Coordination Process

by Madeline Marzano-Lesnevich and Sarah J. Tremml

Family law practitioners in New Jersey have no doubt, over the past several years, become very familiar with the family court's reliance on parent coordination, therapeutic monitoring, reunification therapy, custody evaluations, or, in the case of high-conflict custody litigation, even a *guardian ad litem* appointed for the benefit of the children involved. Common practice among practitioners is to suggest the clients voluntarily appoint by consent one of the foregoing individuals.

The newest of these services being utilized both by the family court itself and by the individual parties is the parent coordinator. Even when the court and/or the attorneys encourage clients to rely on the services of a parent coordinator the role often is not well defined, especially in the absence of a formal rule of court governing the scope, duties, and obligations of a parent coordinator in the same way that a law guardian or a *guardian ad litem* is regulated.[1]

Family law attorneys should choose to implement the services of a parent coordinator where it is likely that their clients will benefit from a neutral third party who will become intimately familiar with the details of their conflict, who will be able to oversee the day-to-day execution of their parenting plan, who will be able to expeditiously resolve conflict, who will provide solutions when either parent is non-compliant with previously reached agreements or court orders, and who will be a source of continuing intervention for the parties in their quest to be cooperative and to learn to co-parent their children.

Specific factors family law attorneys should look for when advising their clients to consent to a parent coordinator, or when counseling a client with regard to a court-appointed parent coordinator are:

- The number of cases in which the parent coordinator has made recommendations to the court;
- Whether the parent coordinator has been called to testify in other cases, especially high-conflict post-judgment cases[2];
- What type of track record the parent coordinator has with regard to making decisions about schooling, parenting time, medical decisions, etc.;
- Whether the parent coordinator is temperamentally suited to the client;
- Whether the attorneys believe the parent coordinator can help effectuate a compromise in their specific clients or with their specific set of facts; and
- How the parent coordinator chooses to communicate with the parties (*e.g.* via telephone, letter, email, in-office visits, etc.) and whether this method of communication is something with which the clients are comfortable or proficient.

The question remains, however, how should family law practitioners explain to their clients the role of a parent coordinator? How do practitioners go about illustrating to already emotionally embroiled clients how this new individual may impact a current or future custody dispute, or, in the best of circumstances, how the same individual can mitigate the need for protracted pre-judgment and ongoing post-judgment litigation?

DEFINING THE ROLE OF THE PARENT COORDINATOR

The first and most logical of steps would be to *properly* define what a parent coordinator actually is. Referring to the Guidelines for Parenting Coordination, published by the Association of Family Conciliation Courts (AFCC) Task Force on Parenting Coordination, the definition of parent coordination is:

> A child focused alternative dispute resolution (ADR) process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parents and/or the court, making decisions within the scope of the court order or appointment contract.[3]

Once the working definition of a parent coordinator has been pro-

vided to the parties by their attorneys, the next, and more difficult steps, especially for the practitioners involved, are to analyze whether a parent coordinator can be of use to the parties, what the scope of the parent coordinator's authority will be and how that scope will be memorialized.

In May 2005, due to the disparity in the utilization of the parent coordination process among the different states, and even within family courts in one state, the AFCC developed Guidelines for Parenting Coordination which addresses integral issues relating to the parent coordination process. The intent of AFCC in crafting the guidelines is clear from the introduction section, which specifically states:

> These Guidelines are aspirational in nature and offer guidance in best practices, qualifications, training and ethical obligations for PCs. Although they are not intended to create legal rules or standards of liability, they do provide very specific and detailed recommendations for training and best practices because of the expressed need for guidelines for program development and training. It is understood that each jurisdiction may vary in its practices; however, for parenting coordination to be accepted as a credible professional role, certain minimum guidelines of conduct and best practices must be articulated and followed.[4]

The AFCC's goal—to more effectively provide a scope within which the parent coordinator, the attorneys, and the parents involved in the process could operate—should be the goal of all courts utilizing the parent coordination process as a tool for high-conflict custody and parenting time cases.

In New Jersey, the AFCC's rules for parent coordinators have not yet been adopted, and are not yet relied upon by the judges presiding in the family part. Nonetheless, many judges and family law practitioners alike have begun to reference such rules when crafting current parent coordinator orders, consent orders, etc. Parent coordinators themselves have begun relying on the ethical and legal implications of the AFCC rules when crafting their retainer agreements, and many have begun crafting their own consent orders for parties to sign if no court order is in place dictating the terms of the parent coordinator's appointment.

ESTABLISHING THE SCOPE OF THE PARENT COORDINATOR'S DECISION-MAKING AUTHORITY

Often, in addition to evaluating the parent coordinator personally, the most difficult of tasks for an attorney when advising a client is explaining the actual scope of the parent coordinator's decision-making authority. It is an area where many clients and practitioners alike often do not recognize the overstepping of boundaries that have been carefully crafted in the New Jersey Rules of Court and in prior judicial decisions.

It is a well-settled principle in New Jersey that once a court has made a determination regarding custody, either after a hearing on the issue or after the entry of a settlement agreement at the time of final judgment, modification of that custodial arrangement can only be effectuated by a court with competent jurisdiction over the matter, and should only be done after one party moves for a change in the custodial or parenting time arrangement.

With the rise of parent coordinators aiding the parties during their post-litigation attempts to co-parent, it is often necessary for the carefully crafted language of the marital settlement agreements to be modified as time goes on, the children get older, and the circumstances surrounding the original agreements change.

While it is accepted among the family law community that parent coordinators have the authority to make changes to the parenting time agreements—such as modifying the holiday and visitation schedules and implementing the enrollment of children in extracurricular activities, etc.—just where should clients and their lawyers be drawing the line on this authority?

It has been emphasized by the courts of New Jersey that custody is an issues that is imperative to settle through consent by the parties or through the judicial system itself. The court has, in several cases, reiterated the core principle that where custody and parenting time are issues, a hearing should be held by the court to determine what is in the best interests of the child.[5] Moreover, it was a belief of the Appellate Division that the court should never abrogate its authority to fulfill a function imposed by statutory law and governed by the Rules of Court.[6]

One of the most puzzling issues for family law attorneys is to decipher when and if a parent coordinator's recommendations are *recommendations* or *variations* to the existing parenting time schedule, or whether the recommended changes are in fact *changes* in custody. In order for a change of custody to take place after the initial custody award has been entered by the court setting forth the initial custody award, the party seeking the change must meet the long-defined standard of change of circumstances set forth in *Lepis v. Lepis.*[7]

Often, as noted above, if the court appoints the parent coordinator it will also simultaneously enter an order appointing a parent coordinator. This is a form template used by several courts in and around New Jersey to define the role of the parent coordinator, the scope of the services to be provided, the method by which the parties may challenge recommendations by the parent coordinator, and the financial obligations of each party. It has now become customary in the community for parent coordinators to ask parties to agree to the entry of the order or a consent order setting out specific guidelines for the parenting coordination process and the method by

which the parent coordinator will make decisions and/or recommendations.[8]

The New Jersey courts have been very explicit in their direction regarding the involvement of mental health professionals in custody matters. In the 1999 case of *P.T. v. M.S.*,[9] the Appellate Division clearly addressed the issue of a court's deference of its decision-making power to the reunification therapist appointed to work with the parties and subject children.[10] The court, in *Fusco v. Fusco*, *supra*, adamantly stated that the court cannot make a decision on custody based on conflicting certifications and expert recommendations "without an evidential basis, without examination and cross-examination of lay and expert witnesses and without a statement of reasons is untenable in the extreme."[11] As recently as the Appellate Division's 2005 decision in the case of *Entress v. Entress*,[12] the New Jersey courts have strictly enforced the notion that it is unacceptable for a judge to make a determination regarding custody based on the testimony or representations of a mental health expert involved in the matter without having an evidential hearing on the merits of the application for modification.

Based on the prevailing case law, and the fact that the model rules/guidelines for parent coordinators will likely be ratified and/or reduced to a rule of court, it is necessary for attorneys to understand the fine lines that often arise in the parent coordination process, and to ensure that those lines are being enforced. The parent coordinator guidelines are very clear in providing the following guidance:

- Specifying that a parent coordinator (referred to as a PC throughout the guidelines) shall be impartial and objective (Guideline II, page 5);
- PCs shall at all times promote the best interests of the children and shall assist the parties in promoting those interests (Guideline VI, pages 6-7);
- PCs shall properly communicate with parties, counsel, the court and other relevant individuals to ensure that the children's safety and well being are consistently promoted (Guideline X, pages 11-12); and
- Confining the PC's decision-making power to the scope provided by the court, but clearly outlining that the PC's power is limited to that on minor changes of parenting time/access schedules (Guideline XI, pages 13-15).[13]

Therefore, clauses a practitioner should look for in a parent coordinator's retainer agreement, or should include in a consent order for the services, should include the following:

> RECOMMENDATIONS: The Parent Coordinator will make recommendations to the parties (and their respective attorneys) directly. If either party disputes the recommendations or the other party's compliance with the recommendation, the Parent Coordinator's report/recommendations and any attached documents may accompany either party's application to the Court, and may be admissible in evidence in any court proceedings that may follow (emphasis added).[14]

Or

> If we are not able resolve our disputes, we will present the dispute to the PC, who will offer a recommendation, with her reasons, in writing, if either parent asks for it in writing. *The PC's recommendation will become binding unless the party who does not agree with the recommendation moves before a court of competent jurisdiction for an order terminating or modifying the recommendation.* We understand that we have the option of striking the bold language and replacing it with: The PC's recommendation will remain a recommendation until the party who agrees with it moves before a Court of competent jurisdiction for an order enforcing the recommendation.[15]

And

> REPORT TO THE COURT: Upon request of the Court and on notice to both parties, the Parent Coordinator shall report to the Court and all parties any needs for the children's therapy or plaintiff/defendant's therapy, the recalcitrance of either party, a suggested parenting plan, or other matters deemed relevant to a decision by the Court.[16]

CONCLUSION

Based on all of the above, counseling clients on the benefits, or detriments of involving a parent coordinator in their case is no small task. Although at first glance it seems like a great idea to involve a neutral, third party who can undoubtedly address the issues between the parties on a day-to-day basis, thereby reliving the possibility of post-judgment litigation and easing the burden for practitioners, appointing a parent coordinator is not always the best option.

Often there are issues a parent coordinator cannot solve, either practically or legally. It is simply another matter of representing clients with reasonable diligence[17] when adequately considering the pros and cons of consenting to a parent coordinator for a specific case. ■

ENDNOTES

1. New Jersey Rule of Court 5:7 & 5:8.
2. In New Jersey there are no requirements, including qualifications or training, for parent coordinators. In other states, including Vermont, specific training is required. Some states, like Oregon, North Carolina and Colorado, specify that parent coordinators must have psychology, mental health, legal or other specialized training. Parent Coordination Implementation Issues, AFCC Task Force on Parenting Coordination, Version 16, Revised April 30, 2003.
3. Guidelines for Parenting Coordination, AFCC Task Force on Parenting Coordina-

tion, May 2005. www.afccnet.org.
4. *Id.*
5. *Fusco v. Fusco*, 186 N.J. Super. 321 (1982).
6. *Mackowski v. Mackowski*¸ 317 N.J. Super. 8 (App. Div. 1998).
7. 83 N.J. 139 (1980).
8. States with parent coordination processes already implemented have similar form orders as those in New Jersey, and many of the states ensure that the parent coordinator's decision-making authority is defined clearly enough to avoid having a parent coordinator make decisions regarding custody changes, relocation, and in some cases, even religion. Parent Coordination Implementation Issues, AFCC Task Force on Parenting Coordination, Version 16, Revised April 30, 2003.
9. 325 N.J. Super. 193.
10. "The burden of decision making in the face of such a conflict is one of the heaviest any judge faces…For a discussion of the important role of independent expert evaluation to assist the court in custody and visitation cases," *see Kinsella v. Kinsella,* 150 N.J. 276, 318-20, 328. Nevertheless, we cannot allow experts to shoulder excess responsibility or authority, nor trial judges to cede their responsibility and authority. The court must not abdicate its decision making role to an expert." *See Matter of Guardianship of J.C.* 129, N.J. 1, 22 (1992)" (emphasis added). *P.T. v. M.S.*, 325 N.J. Super. at 216.
11. *See* 186 N.J. Super. at 327.
12. 376 N.J. Super. 125.
13. Guidelines for Parenting Coordination, *supra.*
14. Order appointing a parent coordinator, Bergen County Superior Court, Family Part, distributed by Hon. Ellen L. Koblitz, P.J.F.P.
15. Sample language from a retainer agreement from Mary Ann Stokes, Esq. of Cohn Lifland Pearlman Hermann & Knopf, LLP.
16. Order appointing a parent coordinator, *supra.*
17. R.P.C. 1-3.

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