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CHAIR'S COLUMN

The Difficulty of Practicing Family Law

Part I: What's Next?

by Bonnie Frost

The family law attorney is involved in a segment of the profession that is fraught with stress each and every day. Not only do we deal with clients who are going through a tremendous upheaval in their lives, but we must also maintain our composure while maintaining our ethics.

In law school, we were taught that except for a few exceptions, the lawyer-client privilege was sacrosanct. Going hand in hand with that, our ethical duty was to our client, not to third parties. Yes, we have to be truthful to the court and treat our adversaries with respect, but we had been taught to maintain our client's confidences at all costs. Recent times have changed that, and have made it difficult in many instances to maintain our client's confidences.

In 2003, our ethics rules were changed to eliminate the appearance of impropriety, and also to increase the responsibility placed upon lawyers to disclose information that previously would have been kept confidential.

After admonishing attorneys that they shall not reveal confidences obtained during the course of their representation, RPC 1:6 then requires that a lawyer disclose to the

> proper authorities, as soon as, and to the extent that lawyer reasonably believes necessary to prevent the client or another person: (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another.

In addition, if a lawyer reveals that information to the proper authorities, then the lawyer also may reveal the information to the person threatened to the extent that lawyer reasonably believes is necessary to protect

that person from death, substantial bodily harm, substantial financial injury or substantial property loss.

All of us can understand why we should reveal a potential crime or the threat that a client might inflict substantial physical harm on another. But we must also reveal information that we have that might have a substantial impact on the financial interest or property of another. This is troubling.

Surely this provision arose in 2003, in part, in response to the Enron scandal and other corporate abus-

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es that were found to defraud investors. Fraud trumped confidentiality. The Sarbanes Oxley Act of 2002[1] was the precursor, it seems, for our ethics changes. In Sarbanes-Oxley, the act provides that "if an attorney believes that outside disclosure is necessary to protect investors," then the rules permit the attorney to reveal to the Securities and Exchange Commission (SEC), without his or her client's approval, confidential information obtained in the course of the representation.

The mandatory disclosure requirement of RPC 1.6(b)(1) applies only when consequences of non-disclosure would be severe. There must be more than a remote possibility of a harm occurring.[2] In *A v. B*, a law firm had

New Jersey Family Lawyer

Table of Contents

been hired to represent a husband and a wife in their estate plan under which each left his or her estate to the other or to the other spouse's "issue." The firm later found out that the husband had an illegitimate child to whom, if the wife predeceased the husband, her estate would pass. Of course, the wife did not know about the child. The court held that disclosure by the law firm was not mandated by RPC 1:6(b)(1) because "the possible inheritance was too remote to constitute an injury requiring mandatory disclosure." The court did not look at the fact that the will was executed under false assumptions, rather it looked at the consequences of the terms of the will.

What does this have to do with family lawyers?

Consider this scenario. You and your adversary have negotiated an agreement you believe is very favorable to your client and imposes severe financial consequences on the other spouse, *i.e.*, you understand the tax consequences of a settlement where the other attorney and client do not. Can you sit by quietly since you think you are not required to do the other attorney's job? Or, are you now under the duty to reveal your reasonable belief to the court, and then to the adverse attorney and client, that this agreement will result in substantial financial harm to the other party? Or, is it enough to just get out of the case so that you do not destroy the confidential relationship with your client, and let someone else face this dilemma? Or, is it similar to *A. v. B.,* where the false assumption by the uninformed spouse seems to have little role in the decision?

This was one of several scenarios we posed to a panel of family lawyers and Justice Jaynee LaVecchia at the New Jersey State Bar Association's Annual Meeting in Atlantic City in May 2005. Justice LaVecchia advised that this rule was one the Supreme Court knew would generate discussion and possibly concerns. She stated that she would bring our comments back to the full court for their consideration.

Now, however, another federal act has intruded into that privilege. I wonder if more state requirements will not be far behind. The revamping of the Bankruptcy Code which takes effect this month (October 2005) requires that a debtor's attorney must certify to his or her client's ability to fulfill his or her repayment agreements, and subjects the attorney to sanctions if factual inaccuracies result in a client's filing being dismissed or converted to a Chapter 13. Doesn't this mean that the attorney has to now become a financial sleuth and investigate the client's finances personally, and not just rely on his or her representations?

Are family lawyers next? Will we have to be able to certify that our client's representations are true on the case information statement? One would hope not, but as more and more legislation intrudes on this once inviolate area of our relationship with our client, one can only wonder—what's next? ■

ENDNOTES

1. Public Law 107-204.
2. *A v. B.*, 158 N.J. 51, 57 (1999).

FROM THE EDITOR-IN CHIEF EMERITUS

The Uniform Court Day Proposal—A Plea for Judicial Discretion

by Lee M. Hymerling

Last December, the New Jersey State Bar Association, through its general council and board of trustees, announced its support that there be adopted a statewide uniform court day, from 9 a.m. to 4 p.m. The justification for the proposal is that creating such uniformity would improve the quality of life of attorneys and somehow improve the administration of justice. In its press release announcing the bar's endorsement of the proposal, then-NJSBA President Edwin J. McCreedy commented that the adoption of a uniform court day was "...essential to the improvement of the quality of life of attorneys, and necessary to improve the interest of justice in New Jersey." I do not question the sincerity of the bar's position, and I compliment Bruce Chase (whose article on the subject also appears in this issue of *New Jersey Family Lawyer*) for his articulate advocacy of what I conceive would be a system that would harm the enormous progress in calendar control that our courts has made in recent years. There are other ways to improve the quality of life of the trial bar.

Rather than a uniform 9 a.m. to 4 p.m. court day...I suggest it would be better to rely upon judicial discretion of our state's judiciary under the watchful eyes of our presiding judges, assignments judges, the Judicial Council, the Administrative Office of the Courts, the Supreme Court's practice committees, and ultimately, the Supreme Court itself.

Rather than a uniform 9 a.m. to 4 p.m. court day with a lunch recess from 12:30 until 1:30 p.m., I suggest it would be better to rely upon judicial discretion of our state's judiciary under the watchful eyes of our presiding judges, assignments judges, the Judicial Council, the Administrative Office of the Courts, the Supreme Court's practice committees, and ultimately, the Supreme Court itself. Put another way, we should continue to rely upon the judicial discretion of well-meaning and dedicated judges. In dealing with this issue, as with so many others, the focus must be placed foremost upon what is in the public's interest.

As I begin my analysis, let me emphasize that the job of a trial practitioner is not easy. It is fraught with great stress. Often we are called upon to juggle the pressures of multiple court appearances with our office commitments. Often we must balance our professional with our personal responsibilities. And occasionally we are confronted with lack of judicial empathy for the burdens that we must daily confront. But a uniform court day is not a panacea, nor is it a desirable way to confront the malaise of many who appear in the courts.

My perspective on the issue has been influenced by my experiences over the more than 35 years, since my admission to the bar in 1969. In large measure, my experiences have been in the family part primarily in the South Jersey counties. By and large, I have found a sensitive bench, mindful of the problems of practicing lawyers while at the same time mindful of the need to move calendars.

I acknowledge that different courts and judges begin and end at differing times. My experience has been that most courts begin at 9 a.m., although some begin at 8:30 a.m. or earlier. My experience has been that, under normal circumstances, the court day in most courthouses ends at 4:30 p.m., but sometimes either later or earlier, depending upon the court's calendar and the exigencies of particular matters on the calendar on a particular day. In Bruce Chase's article he notes that in years gone by, "Occasionally, an industrious and hard-working jurist would suggest a conference at 8:30 a.m., during a lunch break or after 4 p.m.," but that that was regarded as a "special scheduling." Implicit in his commentary is that today the calendar is handled differently. He comments that today, scheduling "…seems to depend solely upon the discretion and whim of the particular judge assigned to your case…."

I have never regarded, either in

times gone by or today, early morning sessions as particularly "special." Instead, I regarded such listings as part of what I felt was accepted and acceptable practice. I believe that these decisions should be left to the judges involved. I have confidence in the discretion and simple decency of those who sit on the bench.

There is no division in the New Jersey judicial system that is more burdened than is the family part. Recent statistics drawn from the state judiciary's website reveal that although backlogs are shrinking, the family part hears literally hundreds of thousands of matters each year. Indeed, the recently released statistics covering the July 2004-June 2005 court year reveal that during that time span, 379,818 family part matters were added while 381,070 matters were resolved. In dissolution alone, statewide, 30,107 new matters were added, while 30,310 matters were resolved. A total of 34,145 old matters were reopened and 34,004 matters were resolved. The numbers are staggering, and, because of their importance and the reality that few of us have a perception of the number and variety of matters the family part addresses, I suggest a review of the 2004-2005 statewide caseload profile from the judiciary's website, which can be found at www.judiciary.state.nj.us/ quant/5yrmenu3.pdf.

These statistics demonstrate that by resolving so many matters promptly, our system must be doing something right. The stellar performance of our system is a demonstration that as a result of hard work by the bench and its administrative staff and the bar, our system operates efficiently and effectively. Not that long ago, the public complained that divorces lasted too long and, as the result, cost too much. A combination of best practices and hard work by judges and lawyers alike has addressed what was the public's justified concern.

There is never a time when one could argue that the family part and family part judges do not work hard—probably harder than do their colleagues in any other division. By definition, they are forced to manage their time wisely, recognizing that both judicial resources as well as judicial time come at a premium.

It has long been my opinion that the public is best served by innovative scheduling, which by my definition can mean beginning before 9 a.m., but rarely needs to mean that anything should last far beyond 4:30 p.m., except for good reason.

I know it to be the practice of a number of judges who sit in South Jersey to routinely hear uncontested matters before beginning the remainder of their calendar. This serves many purposes. It rewards counsel and litigants for resolving matters without a significant amount of judicial time. It allows uncontested divorces to proceed before the commencement of a judge's regular calendar. The system works well and should not be disturbed. Is it not better for summary matters to be heard and resolved before more complicated matters demand a judge's attention? Why should lengthy trials be interrupted by uncontested divorces?

Similarly, if a judge is willing to begin his or her day with a chambers conference, why should that be treated as something special? I believe judges who calendar such conferences will be sympathetic to those with daycare or other commitments that make such early listings inconvenient or impractical.

I have similarly found it beneficial that in some counties the early settlement panel list is called early in order for panelists, counsel and litigants alike to be sent to the panel rooms. I certainly view as desirable calling motion lists early rather than later.

I shudder to think that there would ever be a time when judges would be forced to report to their presiding judge or to the Administrative Office of the Courts starting early or working late. Would not such a reporting requirement be a likely corollary to the standard court day proposal? Should not judicial commitment be regarded as something to be commended rather than something that should be scrutinized?

What is it that I fear were a 9 a.m.–to-4 p.m. edict to emerge? I believe that backlogs will increase, and with it the cost, both social and economic, of litigation. I believe that rather than making the lives of the practicing bar better, with the proposed standard court day we would be subject to increased criticism from the public in general and by our clients in particular, because one thing cannot be questioned. Judges, and most especially family part judges, cannot and should not be expected to do more in less time. Quality justice is time and labor intensive. There are no shortcuts. We should not delude ourselves that the progress that has been achieved can be continued allocating less time to the process. Hours recommended in New Brunswick should not dictate starting times in Salem, Elizabeth or Belvedere. Certainly in some areas, the clock is of critical importance. Plane and train schedules must, by definition, be fixed. That is less true here.

We all well know that it is impossible to predict how long a particular motion hearing or trial will last. We also know that one of the scourges of our profession has been the reality of administrative adjournments because a particular motion calendar is perceived by a faceless case manager to be full. That practice, almost universally condemned, would become more common were the court day to be confined to the six working hours those who propose a uniform court day have suggested. Sad but true, rather than aiding the public and the bar, in my view a uniform court day would jeopardize the case management process best practices has sought to achieve.

But what about the quality of life

of family lawyers and the bar as a whole? There is no doubt that practicing in 2005 is more challenging than practicing in the early 1970s, when I began. For starters, the practice has become difficult because there are more judges hearing more cases involving more complex issues. Today, rather than in the 1970s, our courts are burdened by proceedings not even conceived of several decades ago. As will be seen from the chart attached, this past court year the family parts in our 15 vicinages disposed of 59,006 domestic violence matters alone. True, there are more judges, but also true, there continues to be an insufficient number of judges.

Sometimes I yearn for the time when I appeared in a particular county before a single or a small number of judges. Now, as an in-court lawyer, my time is pulled between many judges, some of whom admittedly follow different practices. To my way of thinking, the longer day is a better day because it allows more things to be accomplished and hopefully resolved.

While I disagree with the concept of a uniform court day, and believe that it would make life more difficult rather than easier for those of us who toil in the vineyard of the family part, I suggest that there are several informal rules that should govern the calendaring of matters. Four such rules are described below:

1. Motions in a particular county or vicinage should begin at a uniform starting time with the court, whenever possible, beginning at the scheduled time. That time should appear in the body of all filed motions and in whatever computer-generated notices follow. Each judge's chambers should be receptive to inquiries as to starting times so that problems do not arise.
2. Summary matters such as uncontested divorces should be calendared for the beginning of either the morning or afternoon sessions on non-motion days. Preference should be given to those who have resolved their matters.
3. In calendaring of trials and plenary hearings, the court should promptly notify counsel in advance if a matter will not be reached.
4. Judges should remain sensitive to the individual problems and time conflicts that burden busy practitioners.

Were there to be adherence to these four general rules, I believe we would be able to enjoy a satisfactory quality of life while still assuring our courts will meet their goals of promptly dispensing justice.

We as lawyers must understand, particularly in the family part, that we do not see the full ambit of what the court does. Most of us know and live in the world of dissolution, but know little about delinquency, abuse, families in crisis, termination of parental rights, and abuse and neglect. Some of us have the notion that at the core of the family court is divorce practice. Indeed, dissolution practice only amounts to less than 20 percent of the family part's work. As we focus on the pressures of our professional lives, we should also focus on the enormous pressures of a system in which so few must do so much.

Rather than adhering to a 9 a.m. to 4 p.m. regimen, I suggest that we should do what we have done in the past. We should rely upon the common sense of the bench. We should assume that our court's calendaring decisions are not made on whim, but, instead, with the best interests of the public in mind.

In this column I have long advocated the principle of judicial discretion. I have done so whether the issue focused upon attempts to limit discretion by rule or legislation. Judicial discretion lies at the root of equity jurisprudence. We should trust that our judges will be reasonable in their calendaring of matters. If an individual judge strays, I believe that there exist adequate ways to address the problem. Usually, when there is good bench/bar communication, problems should be able to be solved.

Does this mean that there cannot be experimentation? Long ago, I advocated staggering listing of motions. Long ago, I advocated increased use of telephone conferencing. Long ago, I believed that enhanced bench/bar communication could solve most problems.

Progress has been made in the way our system handles its caseload. I do not believe that a shortened court day would be in the public interest. If an initiative is not in the public interest, by definition it cannot be in the best interest of the bar. ■

The Uniform Court Day—The Time is Now

by Bruce E. Chase

When I began practicing law in 1978, the court day began at 9 a.m. and ended at 4 p.m. Whether in Law or Chancery, whether your case was venued in Passaic, Middlesex, Bergen or Cape May county, this was the *court day*. Without checking the Rules of Court, and, in fact, without looking at one's file or the court's scheduling notice, an attorney simply knew that the case would begin at 9 a.m. We could also rely upon the fact that there would be a lunch break from 12:30 to 1:30 p.m. We relied upon these unwritten time standards both in our professional lives and in our personal lives. We scheduled appointments around them; we made plans, both personal and professional, in reliance upon this schedule.

Occasionally an industrious and hard-working jurist would suggest a conference at 8:30 a.m., during the lunch break, or after 4 p.m. But this *special* scheduling was the exception rather than the rule. More often than not, the jurist recommending this special scheduling was often doing so in order to assist counsel, not to extend the regular court day. Certainly, in rare instances, *de facto* extensions of the court day, both before 9 a.m. and after 4 p.m., also occurred; for example, when necessary to complete the testimony of a witness, or to accommodate an expert's schedule, or to expedite a jury trial. In a civil jury case the author tried many years ago, the judge completed his jury instructions minutes before 4 p.m. on a Friday. He asked the jury whether it wanted to begin deliberations or return on Monday; the jury returned with its verdict after 7 p.m.

So, when did the traditional, standard court day change? How did it change? Why did it change? Should it have changed?

Those of us who prepare business contracts or commercial leases are familiar with the term "business day"; it has a generally accepted meaning. Similarly, those of us who have children of school age know the meaning of the term "school day." Although we are told that the court's goal is uniformity throughout the vicinages, there is no Rule of Court, no Administrative Office of the Courts (AOC) directive, no standard that allows an attorney to know with any certainty when the court day begins and when it ends?

Surprisingly, in a system that has expressed its intention to promote uniformity throughout the state's court system, the court day begins and ends differently depending upon where you are and who you are before. Apparently, if the court day is to begin before 9 a.m. or end after 4 p.m., it seems to depend solely upon the discretion of the particular judge assigned to your case. Some judges begin their court day at 8, 8:15, 8:30, 8:45, or 9; some recess for lunch at 12:30, others at 12:45 and, some, not at all. Some judges end their court day at 4 p.m., while others schedule conferences that begin at 4 and 4:30. Still others will routinely continue a court proceeding past 5 p.m. Anecdotally, the author has heard of a judge who scheduled a conference on a Saturday! Personally, the author has participated in a trial in which the court day ended at 5 p.m., although the judge courteously advised counsel in advance of the intention to do so and made certain that counsels' personal obligations were accommodated.

Certainly, if a judge is of a mind to extend the court day, there is no rule or AOC directive prohibiting that jurist from scheduling early, late, or Saturday proceedings.

In September 2000, the Supreme Court adopted a revolutionary collection of new rules governing practice in the Law Division. These rules resulted from the work of the Conference of Civil Presiding Judges as a result of the report of the New Jersey Judiciary Strategic Planning Committee to the Supreme Court in March 1998. The rules were officially denominated "best practices." Throughout the state, the practicing bar reacted cautiously to these best practices, which not only imposed new, overly restricted time limitations, but also provided for extreme measures if these restricted time limitations were violated.

In defending these new rules, the bar was told that the term "best" in "best practices" meant that the new rules were developed from an examination of practices and procedures throughout the 21 vicinages. We were told that best practices were in reality *uniform* practices.

As the practicing bar continued its efforts to modify best practices and make them more attorney- and litigant-friendly, I wondered why only the Conference of Civil Presiding Judges could recommend these new best practices. What about input from the practicing bar, those who toil in the trenches each day, who are most affected by the rules of practice? Should not the

organized bar also be able to present uniform practices it feels are appropriate to the fair and equitable administration of justice?

The organized bar's involvement in best practices, both before and after their implementation, primarily focused upon civil practice. My thoughts became more directed toward the possibility of uniformity in areas of judicial administration, thinking about simple procedures to deal with administrative problems that could make practice more uniform and more predictable throughout the state.

Pursuing these thoughts, I began drafting three separate uniform rules, hoping to present, first to the Bergen County Bar Association, and then to the New Jersey State Bar Association (NJSBA).[1] The first of these three uniform rules, and to date the most successful, was the uniform court day, my spin of a best or uniform practice rule.

As best practices was implemented, it appeared to many that judges, vicinages, divisions and parts were being evaluated, in part, by the number of cases disposed. Rather than a concern only for quality justice, there was also a focus upon numbers justice. At the same time, increased judicial vacancies resulted in rather burdensome caseloads. To deal with the focus on numbers and increased caseloads, some judges began an expansion of the court day. Some judges began scheduling uncontested divorce cases at 8:30 a.m. Others scheduled their entire calendar (case management conferences, early settlement panel and trial) at 8:30 or 8:45 a.m., while others (by my count, still the majority except in the family part) begin at 9 a.m.

If uniformity is the goal of the AOC and the genesis of best practices, how can we not have a uniform, system-wide, starting and ending time for our court day? Should all courts not begin the day at the same time? In fact, judges in the same vicinage, in the same division, and in the same part, start the court day at different times, some at 8:30, some at 8:45 and some at 9. Can this possibly be economically efficient from the perspective of the court?

If the court day for some judges begins before 9 a.m, and ends after 4 p.m. (sometimes well after), not only will our professional lives be affected, but our personal lives and quality of life will also be adversely affected. If the business of the court, throughout our state, begins at 9 a.m. and ends at 4 p.m., attorneys will be able to attend to the practice of law, return phone calls, prepare cases for the following day, complete discovery, and otherwise attend to matters other than the one presently before the court. Unfortunately, this extension of the day carries over into attorneys' personal lives. It interferes with the ability to schedule office time and other commitments with certainty. It interferes with child-rearing responsibilities and parent-core obligation. It further erodes free time and adversely affects personal lives.

In mid-2002, the Bergen County Bar Association unanimously adopted a resolution calling for the Supreme Court of New Jersey to consider and adopt the uniform court day. In the fall of 2002, the general counsel of the New Jersey State Bar Association adopted a resolution also calling for the Supreme Court to adopt the uniform court day. As required by the NJSBA bylaws, the trustees of the state bar considered the resolution of its general counsel and adopted its own resolution that was presented to the Supreme Court. The resolution was then discussed during a semi-annual meeting between the NJSBA Executive Committee and the Supreme Court. It was reported that the Supreme Court considered the proposal impractical. In 2004, the general counsel of the NJSBA again considered the issue and again adopted a resolution approving the uniform court day and asking the Supreme Court to adopt it as a rule of court. Again, the NJSBA Board of Trustees considered the issue and adopted a second resolution supporting the uniform court day, and again presented it to the Supreme Court. Again, it was discussed during a semi-annual meeting of the NJSBA and the Supreme Court. The matter was referred to the Judicial Counsel, a committee consisting of all assignment judges, all chairs of the various presiding judges committees, a representative of the trial court administrators, the director of the Administrative Office of the Courts and the chief justice.

The bar-sponsored proposed rule acknowledges that there are circumstances that arise for which special scheduling allowances must be made. Therefore, the proposed rule allows for early and late proceedings upon special circumstances, but only upon consent of counsel.

In a system that is committed to uniformity throughout the vicinages, there can be no doubt; the time for the uniform court day is now. ■

ENDNOTE

1. The other two proposed bar-sponsored uniform rules are titled the Uniform Staggered Start Rule, and the Uniform Trial Conflict Adjournment Rule. Neither proposal has engendered much attention, although recently the Conference of Presiding Judges presented a proposed, statewide policy establishing a procedure to deal with inter-vicinage competing trial date conflicts.

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FROM THE EDITOR-IN-CHIEF

Overbay v. Overbay: A Rethinking of the Application of *Miller's* Imputation of Income

by Mark H. Sobel

It was only a matter of time before some imaginative family lawyer would seek to utilize *Miller v Miller*[1] for imputation of income from the other side of the fence. Thus, in *Overbay v. Overbay*,[2] the Appellate Division addressed the issue of the imputation of income from assets held by the recipient of alimony. However, what might first appear to be a logical extension of *Miller,* or even a required conclusion, did not take place in *Overbay*.[3]

In *Miller*, the Supreme Court of New Jersey determined that imputation of income from the assets of the payor was appropriate, rather than utilization of the actual income derived from those assets, for the purpose of analyzing alimony obligations. In that case, a post-judgment motion to modify alimony was filed. It was observed by the Court that the ex-husband's investment portfolio contained a significant amount of investments that produced little current income but had significant appreciation in stock value. The Supreme Court noted that the ex-husband's investment portfolio could be characterized as follows:

> The majority of plaintiff's [ex-husband's] investments fall into the growth category, making him equity rich but 'alimony poor.'

The Court determined that imputation of a hypothetical income from the ex-husband's investments was appropriate for the alimony calculation. The Court used the Moody's composite index on A-rated corporate bonds over a five-year period as the appropriate standard for such imputation. Thus, the holding in *Miller* was that while Mr. Miller could choose his own investment strategy, for the purpose of an alimony determination his hypothetical income, rather than his actual income, would be used by the Court. It would seem as a logical progression of the above principle, in the event the disadvantaged spouse (the spouse seeking alimony) also had assets upon which a small rate of return was received, imputation under the *Miller* standard might be appropriate and result in a downward adjustment of alimony.

Within the confines of family practice, it is a somewhat well-known strategic imperative that when representing the financially advantaged spouse, it is important to limit, to the extent possible, the equitable distribution provided to the supported spouse of assets which cannot or do not provide a rate of return. The classic asset that falls within this definition is normally the marital home. Thus, where individuals have a substantial amount of their marital worth in their marital home (as is often the case), counsel representing the financially advantaged spouse seeks to avoid the double whammy of having the supported spouse receive the marital home and having to pay perhaps an enhanced support award to allow for that party to remain in that marital home. A hidden, but persistent and pervasive, detriment to the payor is that the supported spouse's primary asset by way of equitable distribution (the marital home) provides no ongoing income, and thus cannot ameliorate the alimony requirement.

Predicated upon the above strategic imperative, the battle lines are often drawn around the issue of the sale of the marital home, thereby jettisoning this non-income-producing marital asset and replacing it with a more modest dwelling requiring less ongoing support and, in addition, utilizing some of the remaining equity in the former home to invest in actual income-producing assets. As the value of homes in New Jersey has increased exponentially over the last several years, this area of dispute has become a significant area of disagreement. In a somewhat subtle resolution of this dilemma, practitioners, with adherence to *Miller*, have allowed for the retention of the marital home by the disadvantaged spouse, but also provided for some imputation of income on this non-income-producing asset. In such a way, neither party receives the entire strategic benefit of this issue and both parties share, to some extent, in the true economic realities post-divorce.

The Appellate Division's opinion in *Overbay* seemingly has altered that strategic balance by providing the disadvantaged spouse with an opportunity to keep the house and the alimony, too. In *Overbay,* the defendant wife had received a substantial (in excess of $1 million) inheritance, which the parties agreed was not subject to equitable distribution. The issue then became what, if any, income from that exempt asset was an appropriate consideration for the alimony deter-

mination. Under the specific facts of that case, the defendant had invested approximately 86 percent of the total amount in cash or cash-equivalents. As a result, the court found that the actual rate of return from the defendant's investment portfolio was approximately two percent. Recognizing the extremely low rate of return on those investment assets, the trial court, utilizing the doctrine set forth in *Miller v. Miller*, determined that the imputation of income was an appropriate result whether the party was the payor or the payee. The trial court then used the same standard set forth in *Miller* to determine a rate of return on this investment portfolio. Predicated upon that determination, a lower-then-otherwise alimony order was entered.

The Appellate Division reversed the trial court as to this issue, stating:

> Unfortunately, by rigidly applying the formula used in *Miller* to the facts of this case, the trial court effectively deprived Mrs. Overbay of the opportunity to control her investment options. Because the trial court determined that Mrs. Overbay's reasonable needs were $96,000 per year, and because it imputed investment income to her in the amount of $80,000 per year, she will be forced to pursue a more aggressive investment strategy that will subject her capital to greater risk. (Emphasis in opinion).

The Appellate Division held that to require Mrs. Overbay to either so invest as she had previously not, or impute the income to her as if she had, was an inequitable result. Yet previously, when addressing the imputation of income of the payor, our Supreme Court in *Miller* determined:

> We emphasize that our holding today does not suggest that plaintiff must actually invest all of the substantial assets in choice long-term corporate bonds....we do not intend to deprive [Mr. Miller] of the opportunity to control his investment options.

Thus, unlike Mrs. Overbay, while Mr. Miller can also chose his own investment strategy, the cost to him for pursuing it was the imputation of income as if he had pursued a income-driven path. While in both instances the courts were clear to indicate that the parties may individually choose their own investment strategies, for Mr. Miller there was a cost associated with that, while for Mrs. Overbay there was not. Seemingly the court in *Overbay* focused upon the fact that Mr. Miller was "an experienced investor who gained great knowledge of financial matters through his employment at Merrill Lynch." Mrs. Overbay did not have that experience, and had testified that "it was always very important to her to maintain the principal and not let anything happen to it."

The above seeming distinction places family lawyers with the unenviable task of attempting to determine just how sophisticated an investor must be regarding that particular asset before imputation of income is appropriate. Does trading on an e-trade account at home on the computer qualify? Does working in a financial institution or having a financial background qualify? Does merely making a substantial amount of money in financial investments qualify? The distinction apparently becomes one that is not economically based, but rather subject to a myriad of factual issues and disputes.

Furthermore, does the experience have to be centered on the type of asset for which imputation of income is sought? If imputation of stocks or stock-equivalents is being sought, must that person be a savvy financial investor? If imputation of income is being sought because the individual owns a variety of shore homes, does experience in real estate qualify for imputation of income? If the person has a significant collection, whether a baseball card collection, a doll collection or jewelry, does experience in that area qualify for imputation of income?

Since the Court's decision in *Miller*, family lawyers have been discussing just how far the analysis can be carried. In essence, all assets are fungible; *i.e.*, they have a fair market value that can be determined in dollars. Thus, any asset has the potential to either become an income-producing asset or be turned into an asset that is income producing. Assets normally found in a marital estate, such as jewelry, might be argued to be appropriately classified as either an asset for which imputation of income is appropriate or and asset which should be sold and converted into income-producing assets. Real estate, perhaps inherited from parents or grandparents, which has laid fallow for a number of years, might similarly be so considered. Even vacation time shares may be subject to such an analysis.

The Appellate Division's recent opinion in *Overbay* is illustrative of the fact that not only will different parties, dealing with the same potential asset (stocks and bonds) be treated differently, but that different assets are likely to receive disparate treatment regarding imputation of income. This is an area that family practitioners must not overlook. There are often assets in a marital estate that are both non-income-producing and have substantial value. When such assets exist, it is incumbent upon the lawyer to examine the mix of those assets and determine whether an argument can be made for imputation of income for purposes of alimony and support. The opinions in *Miller* and *Overbay* provide different points of emphasis, depending upon the specific factual parameters. Such differences are the exact type of distinctions where schooled advocates can provide the most beneficial results for their clients. ■

ENDNOTES

1. 160 N.J. 408 (1999).
2. 376 N.J. Super. 99 (App. Div. 2005).
3. For an excellent review of the history of imputation, see the article by Robert Durst which follows.

The Imputation of Income: Whether and When

by Robert J. Durst II

The imputation of income to either a payor or payee spouse has become an increasingly common issue in matrimonial cases. In some cases, the imputation of greater income (and, correspondingly, a higher support award) is sought with regard to a payor spouse who is presently unemployed and/or allegedly underemployed. In virtually every case involving an unemployed recipient of alimony, arguments are made that income should be imputed to that person, often without regard to their age, their work history or the parties' respective roles throughout the marriage. A virtual cottage industry of employment and vocational experts has sprung up to support or defend the imputation of income claims and defenses. This article will offer the proposition that such testimony is, as a matter of law, irrelevant, and should be barred by the trial court.[1]

FIFTY YEARS BEFORE OUR SUPREME COURT

The imputation of income in the context of alimony/child support issues has been before our Supreme Court in varying factual contexts, but with remarkable consistency in concept over 50 years.

Three cases (*Bonanno v. Bonanno*,[2] *Khalaf v. Khalaf*,[3] and *Caplan v. Caplan*[4]) best exemplify our high Court's consideration of this issue at 20- and 35-year intervals over the past 55 years.

In *Bonanno, supra*, the Court considered whether it should impute income to an unemployed payor. In an opinion that obviously predated our current divorce code by over 20 years, and cites to now-archaic doctrines such as the Married Woman's Act,[5] the Court held that:

> while the husband's current income is the primary fund looked to for his wife's support...his *earning capacity* or prospective earnings... his *ability to earn... are relevant matters* to be considered[6] (emphasis added)

Citing to an even earlier case, *Robins v. Robins*,[7] the Court held that:

> If it were not otherwise, a husband, by deliberate intent or disinclination to work, might defeat or avoid his marital obligation of support.

Thus, as will be discussed further, it has long been (75 years per *Robins* and 50+ years per *Bonanno*) a tenant of our law that the Court may impute income to a payor who was "disinclined" to work.

Some 21 years later, our high Court considered the imputation of income with regard to a recipient of alimony.

In *Khalaf v. Khalaf*, s*upra,* the Court addressed whether income should be imputed to Mrs. Khalaf (the recipient of alimony) because she had a "potential capacity" to earn.[8] The facts of *Khalaf* were that the parties had been married for approximately 30 years. Mrs. Khalaf had not worked outside the home for approximately 26 years, except to own and operate a yarn shop, which she had "pursued as a hobby." Mr. Khalaf was a dentist earning sufficient income to maintain an 11-room family residence, two cars and a country club membership.

The Court held that, under those circumstances and contrary to Mr. Khalaf's assertions, Mrs. Khalaf should not have income imputed to her. They observed that she did not work before the divorce, that she is entitled to maintain the marital lifestyle, and that Mr. Khalaf's income was reasonably able to maintain the marital lifestyle.[9]

The Court noted that it was faced with:

> a woman who for twenty-six years of her life had been married to the defendant and who had geared her whole lifestyle to maintaining her household and rearing a family.

The Court then concluded that they should not "... turn back the clock and ask her to get a job and develop a career."[10]

In 2005, the high Court considered the case of *Caplan v. Caplan*.[11] Although *Caplan* is the most instructive decision to date on "above guidelines child support," it also contains an extensive discussion of the imputation of income. Under the facts of *Caplan*, the payor husband was admittedly able to meet his support obligations with unearned income, and without the imputation of earned income. However, the Court concluded that it was unfair to use only unearned income in consideration of a person's ability to pay child support, since one or both parents would thereby have the ability to decrease

their respective responsibility for the children's needs by simply not working and avoiding imputation of income principals. Finding that Mr. Caplan was "unemployed voluntarily,"[12] the Court concluded that:

> ... the imputation of income to one or both parents *who have voluntarily remained underemployed or unemployed,* without just cause, will promote a fair and just (result).[13] (emphasis added).

Thus, in three distinctly different factual contexts over the span of 55 years, our Supreme Court has seemingly grounded any consideration of imputing income to a party on whether or not the person's underemployment is deliberate (*Bonanno*), consistent with or a continuation of the marital *status quo* and not a voluntary divorce-related reduction in income (*Khalaf*), or involuntary (*Caplan*).

The guidance provided by these three Supreme Court beacons spaced two decades and three decades apart is that the underlying consideration as to whether income should be imputed to either a payor or a payee depends upon good faith, voluntariness and *status quo*.

THE APPELLATE DIVISION

There are a variety of Appellate Division cases on the imputation of income.[14] However, *Dorfman v. Dorfman*, and *Bencivenga v. Bencivenga* seem to best exemplify a continuation of the underlying premise enunciated by our Supreme Court in *Bonanno*, *Khalaf* and *Caplan*.

In *Dorfman*, the payor husband was an accountant whose partnership in and employment by an accounting firm was terminated post-judgment. The husband made an application to modify an existing support order; this prayer for relief was denied by the trial court, which had observed that he had "earned between $90,000 and $120,000 in the past 5 years," and, therefore, imputed "about $100,000 a year"[15] to him. The Appellate Division found that "the flaw in imputing an annual gross income...to defendant (was) the lack of a finding by the motion judge that defendant was...*voluntarily* underemployed."[16]

The court cited to Appendix IX-A regarding the Child Support Guidelines provision that:

> If the court finds that either parent is, *without just cause, voluntarily* underemployed or unemployed, it shall impute income to that parent. (emphasis added)

The court held that:

> such (*voluntary* underemployment) *is requisite,* before considering imputation of income"[17] (emphasis added)

In *Bencivenga,* a mother of the children was paying support to her former husband, the father of the children. The mother had remarried and was now the stay-at-home mother of two children of her second marriage. Her first husband sought an order imputing income to the wife and compelling her to continue the payment of child support to the children of her first marriage. The Appellate Division held that "consideration must be given to the reasons for the unemployment."[18] The court further stated that "employment as a mother and care giver is different in quality from voluntary unemployment."[19] Although not citing the Supreme Court's 1971 decision in *Khalaf*, the concept of a person choosing to be unemployed in order to be a full-time parent and caretaker of children is very similar in *Khalaf* and *Bencivenga*. Although considering persons in opposite roles (in *Khalaf,* the recipient, and in *Bencivenga,* the payor), the common concept is that absence from the job market due to child care responsibilities is not the type of "voluntary" unemployment that justifies an imputation of income.

THE TRIAL COURTS

There are two instructive reported trial court decisions written 10 years apart by then-Judge Conrad Krafte. In *Arribi v. Arribi*,[20] Judge Krafte considered a payor's application for a modification of child support as a result of unemployment. Judge Krafte observed that the "pervading philosophy" in such cases is clear:

> One cannot find himself in, and *choose to* remain in, a position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one's family.[21] (emphasis added)

Ten years later, Judge Krafte considered the imputation of income to a recipient spouse in *Gertcher v. Gertcher*.[22] Citing *Bonanno*, *supra*, and his earlier decision in *Arribi, supra*, Judge Krafte found that the court should impute income to a voluntarily unemployed recipient spouse the same as it would to a voluntarily unemployed payor. In both cases, the determinative analysis was voluntary versus involuntary unemployment.

THE EXTENSION OF INTENTION AND VOLUNTARINESS

In 1999, our Supreme Court in *Miller v. Miller*,[23] increased a payor's unearned income by imputing a higher rate of return on his investment portfolio. In 2005, the Appellate Division was asked to consider a "*Miller* imputation" in *Overbay v. Overbay*.[24] The court, much as our Supreme Court and other Appellate Division panels have done with regard to earned income, explored Mrs. Overbay's motivation. Finding there was no showing that she had deliberately manipulated her investments to reduce her income and enhance her alimony, the Appellate Division did not impute additional unearned income to Mrs. Overbay, finding instead that there is no suggestion that she had avoided more aggressive investment strategy solely to reduce her earnings.[25]

WHAT DOES IT ALL MEAN?

What can be derived from an analysis of this long, factually varied,

but remarkably consistent, history of Supreme Court, Appellate Division and trial court cases addressing the imputation of income to both payors and recipients of support?

First, the threshold consideration in any imputation of income consideration must be a person's motivation taken in the context of the marital history/*status quo*. Persons who have abstained from or surrendered employment to serve, for example, as a homemaker and caretaker for children, may not be considered voluntarily unemployed and, therefore, as a matter of law, may not have income imputed to them. For the recipient spouse, support for this proposition can best be found in *Khalaf*, s*upra*, in which the Supreme Court observed that it could not now "turn back the clock" and ask a person who had devoted her life to be a spouse, homemaker and caretaker of children to obtain employment. Similarly, the Appellate Division in *Bencivenga*, *supra*, clearly states that "employment as a mother and care giver is not voluntary unemployment"[26] and, therefore, cannot give rise to an imputation of income.

Second, motivation, *status quo* and voluntariness are issues equally applicable to earned and unearned income. The court's rationale in *Overbay*, *supra*, unequivocally supports the concept that the *Miller* imputation of unearned income to a person's asset portfolio must be analyzed and implemented in the context of the party's motivation and past practices.

Finally, what should be expected of competent trial counsel when faced with or making an imputation of income argument? It is surely the person seeking an imputation of income to the opposing party (regardless of whether that party is the payor or recipient of alimony or support) who must establish that the opposing party is voluntarily underemployed or unemployed. If there has been a history of that party being out of active employment, proofs should be proffered demonstrating that the parties had the expectation or agreement that the person would return to outside employment as the children attained a certain age or schooling milestone, that the terminated/unemployed person has or has not made diligent efforts to seek re-employment even if in an alternative field and/or that the decreased earnings capacity is not consistent with the marital history and is, instead, a litigation-related tactic.

When representing the person who has not worked outside the home and has, instead, been the full-time spouse and/or caretaker of the children, the relevant concepts in the above-referenced holdings should be analyzed in the factual context of the particular case. If, in fact, the opposing party has sufficient income to pay an appropriate amount of support and the supported party has never been expected to seek outside employment (for example Mrs. Khalaf), a request for that party to submit him or herself to an employment evaluation may be resisted as a matter of law on a pre-trial motion *in limine*. If the facts are not sufficiently undisputed to support a pre-trial ruling barring a claim of imputation, a motion should be made at the conclusion of trial testimony to strike the expert's report and any arguments asserting an imputation of income if evidence is not presented that would distinguish the matter from the above-referenced holdings. ■

ENDNOTES

1. This article will not address the sufficiency of employability or vocational evaluation testimony on the basis of the expertise of the evaluator, the necessity of providing a proper foundation to support such opinion testimony and/or the validity of the methodology used by some employability/ vocational experts. Experience, however, shows that, in fact, many such experts' conclusions are *naked opinions* neither supported by proper foundation or reached by way of established and acknowledged methodology. Such issues are subjects for another day and another article. Suffice to say that counsel should always examine employment and vocational expert reports with a critical eye to determine whether or not they are premised upon a sound factual foundation and utilize a reliable methodology.
2. 4 N.J. 268 (1950).
3. 58 N.J. 63 (1971).
4. 182 N.J. 250 (2005).
5. Then N.J.S. 37:2-1.
6. *Bonnano* at 275.
7. *Khalaf* at 69.
8. *Id.* at 69.
9. *Id.* at 70.
10. *Caplan v. Caplan*, 182 N.J. 250 (2005).
11. *Id.* at 267.
12. *Id.* at 268.
13. *See, for example, Lynn v. Lynn*, 165 N.J. Super. 328 (App. Div. 1979); *Mowery v. Mowery*, 38 N.J. Super. 92 (App. Div. 1955); *Bencivenga v. Bencivenga*, 254 N.J. Super. 328 (App. Div. 1992) and *Dorfman v. Dorfman*, 315 N.J. Super. 511 (App. Div. 1998).
14. *Dorfman* at 516.
15. *Id* . at 516 (emphasis added).
16. *Id.* at 516 (emphasis added).
17. *Bencivenga* at 36.
18. *Id.* at 36.
19. 186 N.J. Super. 116 (Ch. Div. 1982).
20. *Arribi* at 970.
21. 262 N.J. Super. 176 (Ch. Div. 1992).
22. 160 N.J. 408 (1999).
23. 376 N.J. Super. 99 (App. Div. 2005).
24. *Overbay*, at 112.
25. *Id.* at 112.
26. *Dorfman* at 36.

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Divorce Mediation in New Jersey

What are the Revised Rules of the New Road?

by Hanan M. Isaacs

Mediation, whether court-connected or private, involves facilitated negotiations by an impartial third party. The mediator helps disputing parties reach voluntary, fully informed, and mutually acceptable results. Mediation attendance may be voluntary or court mandated. However, the outcome is binding only if the parties reach agreement and incorporate their settlement terms into contracts or court documents.

This article will discuss the ethical standards and limits of the New Jersey mediator's role. It will also compare and contrast the identified bodies of governing rules and standards for New Jersey mediators and raise certain ethics issues that are novel and unresolved at this point in the professional growth and development of mediation in New Jersey.

SOURCES OF MEDIATION STANDARDS AND ETHICS

New Jersey professional mediators now have four key sources for ethical guidance and best practices. These are:

1. The New Jersey's Uniform Mediation Act (UMA-NJ) at N.J.S.A. 2A:23C-1, *et seq*., signed into law on November 22, 2004.
2. The New Jersey Association of Professional Mediators' (NJAPM) Code of Professional Ethics, published at www.njapm.org.
3. The New Jersey Supreme Court's Standards of Conduct for Mediators in Court-Connected Programs (Supreme Court standards), published on February 16, 2000, and available on the New Jersey Judiciary's website, www.judiciary.state.nj.us/services/cdr.htm.
4. Rule 1:40-4(a) through (g), Rules Governing the Courts of the State of New Jersey.

Among these varied bodies of ethics rules and standards, the UMA now stands in front of the pack. It represents the most sweeping declaration of mediation public policy in New Jersey's history, and, with limited exception not important to discuss here, purports to govern both private and court-referred mediations. The Supreme Court has yet to agree to some of the UMA's provisions, although the Court is unlikely to challenge the most controversial sections of the law, namely the Legislature's creation of a series of privileges against disclosure of mediation communications.

The standards and rules governing court-connected complementary dispute resolution (CDR) programs, identified as items 3 and 4 above, cover self-determination of the parties, mediator impartiality, mediator conflicts of interest, mediator competence, confidentiality of mediation communications, mediator qualification and training, termination of the mediation process, and mediator compensation. They prioritize relevant principles for mediators, legal counsel, and parties, and answer questions of fundamental importance to all of the players.

The UMA-NJ may have superseded some of those identified standards, policies and rules, in whole or in part, but most of them remain intact, as discussed below.

NJAPM's Code of Professional Ethics is binding on its members and, like the Supreme Court's standards, tells NJAPM's accredited professional mediators (APMs) exactly what is expected of them. However, unlike the Court's standards, NJAPM's bylaws expressly make APMs subject to investigation and discipline, upon consumer complaint, for breach of the code.

QUALITY OF THE MEDIATION PROCESS, IMPARTIALITY, DISCLOSURE OF CONFLICTS, FUTURE ASSOCIATIONS

Apart from requiring mediators to remain impartial, protective of mediation communications, and free from undisclosed conflicts of interest, the UMA-NJ is silent regarding the quality of the mediation process itself. While not directly discussing or describing quality of process issues, NJAPM's Code of Professional Ethics gets there through the back door. It describes the role of the mediator, expected training, disclosure of conflicts, future associations by and between mediators and former mediation clients, parties' encouragement to obtain independent counsel, and the contents of a memorandum of understanding. However, it is in the section titled "Mediation Retainer Agreement" that NJAPM elaborates on what it takes to provide a fair and impartial process, largely by

describing what is and is not to be included in both the retainer agreement and in the mediation process it describes. It includes:

- Advisability of obtaining independent legal counsel.
- Requirement of full and voluntary disclosure, failing which mediation will be terminated.
- Possible referral to other professionals, in addition to legal counsel.
- Voluntariness of party participation.
- Confidentiality of process, within legal limits, and no subpoena of the mediator or mediation records in after-litigation.
- The duty to proceed at all times in good faith, and the mediator's ability to terminate based on a party or the parties' lack of good faith, lack of understanding, or "for any other reason deemed appropriate by the mediator."

The Rules of Court discuss issues of compensation, confidentiality, the specific process of conducting and terminating mediations, integration of the mediation process with the underlying litigation, and mediator (and arbitrator) training and qualification requirements. However, the Supreme Court chose to leave the quality of process issues to its separately published standards.

Principle I of the Court's standards emphasizes the consensual nature of mediation, that mediation is a facilitative (rather than a directive or outcome-driven) process, and that the mediator must honor the parties' need for self-determination, full information, and informed consent.

Principle II requires the mediator to conduct mediation sessions impartially, and to disclose to parties and counsel "any circumstances bearing on possible bias, prejudice, or lack of impartiality." NJAPM has a similar disclosure requirement concerning "prior associations" as they may bear on partiality. NJAPM's code provision is comprehensive and well written.

Principle III deals with conflicts of interest, reasonably known, that could have a bearing on impartiality. The mediator is permitted to continue the assignment, with consent by all parties, except if the mediator believes that continuing the process would cast doubt on the integrity of the process, in which case the mediator should withdraw.

NJAPM's code requirements on conflicts cover prior associations (already discussed), plus an admonition that a mediator must not function in his or her underlying professional capacity, if he or she has one, such as a lawyer, therapist, accountant, or other professional, for "either or both of the parties at any time during the mediation." This is a helpful and appropriate warning, and a reminder that mediators should serve as facilitators and not as subject matter experts, even (and perhaps especially) if they have such subject matter expertise. This is a matter of professional self-discipline, as we often are tempted to solve the puzzle for our mediation clients, or to serve as their one-stop-shop-arama.

UMA-NJ is much more comprehensive and demanding in terms of the mediator's duty to explore and disclose all reasonably discoverable sources of possible bias. N.J.S.A. 2A:23C-9 requires the prospective mediator to:

- Make reasonable inquiry to determine "any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator," including financial or personal interests in the mediation outcome "and an existing or past relationship with a mediation party or foreseeable participant in the mediation." This provision puts an additional burden on the mediator, as it requires due diligence, and goes beyond NJAPM's code and the Supreme Court's standards. UMA-NJ encourages wider disclosure than has ever been the case in New Jersey before.
- Disclose any such known fact to the mediation parties as soon as practicable before accepting the assignment, a continuing duty throughout the mediation. NJAPM's code carries the same continuing obligation; the Supreme Court's standards do not.

It should be noted here that, unlike judicial or arbitral decision-making, the mediator's possible bias may be a threat to the integrity of the facilitated process, but it is not typically a direct threat to the outcome. Nevertheless, a prospective mediator's early, accurate, and continuing disclosures are good for the public and clearly the right thing to do.

Regarding the question of the limits of initial or continuing disclosure: The author believes there are none; disclose every conceivable relevant bias, association, and connection; put them, and the parties' and their legal counsels' waiver of them, in writing; and send a copy to the parties and legal counsel. If you lose the business, then you lose it.

The author has found that legal counsel and parties appreciate full disclosure. It gives people confidence to know how much integrity mediators actually have. The disclosure rules should be used, among other things, to make a point of mediators' scrupulous honesty and candor.

Importantly, the New Jersey Legislature chose to insert a provision in the conflicts and disclosures section of UMA-NJ that requires a mediator's impartiality, "notwithstanding disclosure of [actual or potential conflicts]."[1] In other words, mediators should not only appear impartial, but should *be* impartial. Whenever a mediator cannot so conduct a mediation, he or she must immediately withdraw.

This precise issue came up in the Appellate Division in the case of *Lerner v. Laufer*,[2] a case in which

NJAPM participated as a friend of the court. In that case, Mrs. Lerner, a former client, sued William Laufer, an attorney and certified New Jersey matrimonial specialist, for legal malpractice, alleging that his failure to protect her interests in a mediated settlement agreement had cost her millions of dollars. The trial court threw out Mrs. Lerner's case on summary judgment. On appeal, one of her many losing arguments was that the mediator had numerous conflicts of interest, which her lawyer did not discover, and that the mediator never should have served.

The author argued to the Appellate Division that the mere fact of known conflicts of interest does not preclude one's service as a mediator. The argument relied on the reporters' notes to the National Conference of Commissioners on Uniform State Laws (NCCUSL),[3] which stated that the person who knows the parties best, and who may have known conflicts of interest, could be the ideal mediator for those parties.

In fact, that was true in the case of the Lerner couple's mediator, a lawyer who was a personal friend to both of them, who had represented each of them in multiple business transactions, and in whom both parties had a lot of trust. It was difficult to accept Mrs. Lerner's position that she did not know the range of personal contacts the mediator had with each of the parties over the years, or that such information, if truly unknown, would have made any difference to her.

Principle III and Rule 1:40-4(c) also govern future associations between mediators and former mediation clients. It is fully joined by NJAPM's code provision on the same topic, and has exactly the same restrictions:

In the same or related matters involving the same parties, the mediator shall never take on an adversarial role, in any capacity.

Within six months from the termination of mediation, in an unrelated matter, the mediator may take on a professional role for one of the parties to the previous mediation, but only with written consent of the other mediation party or parties.

After six months, no consent is required in the immediately preceding example.

Subject to UMA-NJ's new principles of disclosure based on public policy, Principle III, Rule 1:40-4(c), and NJAPM's code, all provide that a mediator shall not be drawn into an adversarial proceeding as a witness, and may not represent or provide professional services to any mediation party in the same or any related matter.

Importantly, in child custody and parenting time matters, Rule 1:40-5 also prohibits a mediator from later acting as an evaluator for any court-ordered report, or from making any recommendations to the court regarding custody or parenting time.[4]

PRIVILEGE, CONFIDENTIALITY, AND THEIR LIMITS: THE UNIFORM MEDIATION ACT

Among the standards, practice, and legal rules discussed above, only the UMA-NJ has created a set of privileges against disclosure of mediation communications. These privileges are the heart and soul of the UMA-NJ, which is a unique 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, built upon arduous discussion, debate and multiple revisions by the national and state dispute resolution communities.

UMA-NJ represents a significant change in New Jersey law, which previously gave *no* confidentiality protection and *no* statutory privilege regarding mediation communications in the private sector, 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. It also:

- Broadly defines both the mediation process and protected 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, such as mediation retainer agreements and signed settlement agreements arising out of mediation;
- 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), in which the Supreme Court declares virtually all mediation communications protected and non-admissible, would continue to govern court-connected mediations, subject to the parties' agreement to modify those rules, and further

subject to possible public policy overrides contained in the UMA-NJ itself (discussed further below).
- Requires mediators' due diligence and reportage 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.)

The author believes that mediators now have an obligation to present these privilege and confidentiality rules and their exceptions to mediation parties and their legal counsel and any non-party participants at the beginning of mediation, in an understandable way, both orally and in writing.

Mediation is built on the twin concepts of self-determination and informed consent, and the mediator must honor both values for the mediation process to be deemed fair and impartial.

UMA-NJ substantially modernizes and strengthens the dispute resolution field in New Jersey. It sets out clear rules of the road for parties and their attorneys, mediators, and trial judges, many of whom have come to expect privacy in the mediation process.

UMA-NJ now generally prevents mediation communications from leaking into later judicial or arbitration proceedings, while simultaneously permitting or requiring use of such communications in narrow circumstances when required by public policy, such as in criminal or child abuse proceedings (unless, in the latter case, Department of Youth and Family Services is a party to the mediation).

The new law is of vital importance to New Jersey's citizens, many of whom have voiced deep and abiding concerns about the costs and delays of the adversarial system. The New Jersey court system has come to rely upon the mediation community to keep cases out of the system, to help clear up case backlogs within the system, and to winnow out newly filed cases that will not require hands-on case management, judicial intervention, or a jury trial.

UMA-NJ supports mediation as a triage tool, one that allows judges and lawyers to identify cases that will and will not yield to a mediator's kinder and gentler intervention. Parties, their legal counsel, mediators, and trial judges now have a uniform set of rules governing confidentiality of communications, so that everyone understands the rules from the get-go, whether or not mediation participants end up in court.

The New Jersey Supreme Court historically has accepted the New Jersey Legislature's statutory creation of evidentiary privileges, and it should be expected that UMA-NJ's created privileges will be treated no differently. However, to the extent that UMA-NJ contains other material at variance with the Court's own rules (both standards of conduct and rules of court), and to preserve uniformity between private sector and court-based mediations, it would be helpful if the Supreme Court agreed to adopt UMA-NJ as is. The Supreme Court has been very supportive of mediation policy and practice for the past 20 years. The author is optimistic that the justices and the committees that report to them will endorse UMA-NJ as court policy.

New Jersey was the third state to pass the UMA, behind Nebraska and Illinois. Ohio's governor signed the UMA into law in January 2005, and Washington state did so in May 2005. According to NCCUSL's website, www.nccusl.org, a total of 12 jurisdictions may introduce this legislation in 2005. Many will look to New Jersey as a model jurisdiction for passage of this legislation, based on the high degree of bipartisan support experienced in New Jersey, and the fact that both houses of the Legislature passed the bill without a single dissenting vote.

NJAPM's Code of Professional Ethics requires accredited members to include specific confidentiality language in standard retainer agreements. This is a stellar idea. Mediators should protect the parties and themselves to the maximum possible extent. NJAPM enjoins mediators to disclose:

> [t]he confidentiality of the mediation process and the agreement that neither party shall subpoena either the mediator or any records pertaining to the mediation process, in the event the parties engage in subsequent litigation. The parties shall also be advised of the limits of confidentiality, including the mediator's duty and obligations regarding the best interests of children.

Now that UMA-NJ is the law, NJAPM's Code of Professional Ethics should be expanded considerably, as there are now many more nuances to consider under the law. For example, the current code does not reference confidentiality as extended to non-party participants, including expert witnesses. This is a glaring hole, in light of UMA-NJ. Also, NJAPM's code should expressly consider that the parties may wish to negotiate for their own confidentiality rules, that may run counter to the directives of the code, and perhaps even to those of the UMA-NJ. N.J.S.A. 2A:23C-5(a) permits parties to expressly waive their privileges, and N.J.S.A. 2A:23C-8 permits parties to waive or modify confidentiality rules. Here is an excellent example of parties' self-determination rights extending to the mediation process itself, and not simply to mediated outcomes. As with all self-determination issues, mediators must disclose parties' rights, in this case to process determination, before parties' decisions will be deemed the product of informed consent.

The best time to take care of these vital process details is up front, in writing, and at the time of the initial mediation retention. If the parties' process decisions change at any point during mediation, then the changes should also be recorded and signed. This puts additional pressure on the mediation community to conform to the dictates of public policy, but that is precisely what the New Jersey Legislature intended to do with UMA-NJ.

Before UMA-NJ, no statutes or common law principles governed confidentiality of mediation communications in the private sector; Principle V and Rule 1:40-4(b) confine themselves to confidentiality in court-connected cases only. Before UMA-NJ, orders of referral signed by a superior court judge covered these issues reasonably well. Following UMA-NJ's passage, however, that is no longer true. Court-referred mediators should repeat and incorporate the principles and rules of court language by reference into retainer agreements, record whether or not the parties chose to modify that language, and attend to signatures by the mediator, the parties, and any non-party participants (including expert witnesses). The mediator should make it clear under these policies and rules (unless the parties agree to modify them) that the parties' mediation communications are probably inadmissible in any future court proceedings, with three exceptions.

The first exception, under Rule 1:40-4(c), involves a party's communication of proposed criminal or illegal conduct "likely to result in death or serious bodily harm." The mediator must disclose this information to appropriate authorities if he or she reasonably believes that reporting will prevent a person's serious bodily injury or death. RPC 1.6(b) and 1.6(c) are instructive by analogy. RPC 1.6(b) requires lawyers to divulge clients' otherwise confidential information to "proper authorities" to prevent substantial bodily injury, death, or substantial property loss. RPC 1.6(c) permits lawyers in those circumstances to notify the threatened person. The author believes mediators have at least the option—and perhaps the duty—to notify people (including mediation participants) of threats of serious bodily injury or death. The mediator has no obligation to report threats of substantial property loss to the authorities or to possibly affected people. As discussed below in connection with the UMA-NJ, the author believes the mediator should have no such duty.

The second limit on Rule 1:40-4(c) confidentiality is that a party is permitted to establish proof of a mediation communication "by independent evidence." While the rule is silent regarding whether the independent evidence must have been known and available before a party's disclosure, it appears that a mediation communication could lead to a post-mediation search for evidence to prove what would otherwise be inadmissible. UMA-NJ makes the same point in N.J.S.A. 2A:23C-4(c), as follows:

> Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in mediation.

If the parties do not like that outcome, they are free to negotiate for other confidentiality rules under N.J.S.A. 2A:23C-8.

The third exception is more complicated. Consistent with Standard V, the mediator must advise the parties of "the limits and bounds of confidentiality and non-disclosure" before mediation begins. The mediator's early disclosure encourages the parties to communicate openly, but not so much as to damage their case if mediation fails. The mediator's disclosure also encourages good behavior. Moreover, under developing standards of New Jersey mediation practice, a mediator's failure to give parties and nonparty participants their "mediation *Miranda* warnings" might amount to professional negligence. Mediators must learn the rules, their exceptions, and the ways in which the parties may lawfully modify them. Mediators must teach these to clients, their legal counsel, and their experts. The explanations should be clear, and the agreements should be in writing, duly signed by all, and with copies for all.

Under the UMA-NJ, N.J.S.A. 2A:23C-6, mediators, parties, or nonparty participants are all subject to compelled testimony. This law will supersede contrary confidentiality provisions in private mediation settings, as well as in relevant rules of court and standards, as follows:

- A threat or statement of a plan to inflict bodily injury or commit a crime is not privileged. While the standards and rules of court do not presently require or permit mediator disclosure of threatened property crimes, evidence of a mediation communication indicating stated intention to commit a property crime would clearly be admissible in a criminal trial under UMA-NJ. The standards and court rules *do* anticipate mediator disclosure to lawful authorities (and presumably to an intended victim as well) to prevent bodily injury or death. Should the standards and court rules mandate mediator disclosure of property crimes? If that were to happen, then parties would see mediators as an arm of law enforcement, parties' legitimate interests in privacy would be regularly thwarted, and mediation would likely fail as a systemic alternative to divorce litigation (*see Sheridan* discussion, below).
- N.J.S.A. 2A:23C-6(b) provides, on a showing of good cause before the trial court, that a mediator, a party, or a nonparty participant may be required to disclose mediation communica-

tions in a criminal case. The trial judge must determine, following an in camera hearing, "that the evidence is not otherwise available, [and] that [the proponent's] need for the evidence...substantially outweighs the interest in protecting [mediation] confidentiality."

- With the exception of the mediator (who maintains a right unique in all of privilege law to assert a non-testimonial privilege—even if the parties request the mediator's waiver of the privilege), a party or nonparty participant also may be required to testify in a proceeding on the issue of whether a settlement was in fact reached in mediation.[5] When parties disagree on whether settlement was reached, or about the content of settlement, this provision allows parties to call mediation witnesses to an enforcement proceeding, with the exception of the mediator—unless the mediator also agrees to waive the privilege (surely not a typical occurrence).
- The New Jersey Supreme Court is now considering *State v. Carl Williams*[6] a matter of federal constitutional magnitude and a UMA case of first impression nationally. Mr. Williams, a defendant in a superior court aggravated assault case, wanted the mediator to testify for the defense. The alleged victim, while in municipal court mediation, had admitted to picking up a shovel during a fight in which the defendant cut the alleged victim with a machete. The mediator had heard that admission, and was prepared to testify for the defense, which would have been key self-defense evidence. The trial judge heard the mediator's proposed testimony in camera, and then barred the mediator from testifying before the jury. The trial judge found that Supreme Court Rule 1:40-4(c) does not permit an exception to the rule against mediator testimony, even when balanced against a defendant's Sixth Amendment right to defend himself at trial. The Appellate Division affirmed. The Supreme Court granted certification on the mediator testimony issue 10 days after the UMA-NJ became law. The Supreme Court also granted *amicus curiae* status to the New Jersey mediation community, to brief the Supreme Court on this important issue. The Supreme Court decision will weigh the needs of mediation participants for privacy against the needs of a criminally accused person for relevant and material evidence. The author believes the Court should uphold the UMA-NJ's balancing test and, regardless of the actual effect on Mr. Williams individually, should keep the evidentiary threshold high to prevent random invasion of mediation confidentiality.
- Some parties go to mediation precisely to avoid what are colloquially referred to as *Sheridan* problems.[7] Under UMA-NJ, mediators now have an obligation to warn counsel and their clients in these situations that:

  A. They have the right to create their own binding confidentiality rules, to the maximum extent allowed by law, incorporating New Jersey Supreme Court Rule 1:40-4(c), and including penalty provisions for breach (which may not be enforceable as a matter of public policy).
  B. Their confidentiality rules and the UMA-NJ's privilege rules may be abrogated against their wishes if criminal proceedings commence; no mediator and no mediation participant is protected at that point from having to disclose mediation communications. The risk of Internal Revenue Service or other tax authority's detection and prosecution may be better than the probability of judicial turnover at trial. It is the parties' choice whether to proceed with mediation, knowing that what they reveal in mediation may not be concealed in future criminal litigation.
  C. The mediator has no disclosure duty in these circumstances, except if: a) called as a witness in a criminal trial, and b) the trial judge makes the requisite factual and legal finding, balancing the specific needs of the defense against the general risk of harm to the public's expectation of privacy in mediation.

Some observers nationally and in New Jersey are concerned that the privilege and confidentiality exceptions will swallow the expectation of privacy in mediation. It will take years before we know who has the better argument. Lawyers and mediators must encourage the trial and appellate courts to interpret the UMA-NJ and the rules of court and standards in ways that protect the mediation process, while also doing justice to parties in family part, general civil, and criminal litigation.

It is a matter of urgency that mediators get parties to decide what rules of confidentiality will govern use of expert's reports and possible future testimony. This is a major issue, and could become a serious liability problem for mediators if not handled correctly. For example, are the parties going to retain separate experts or start out with a joint expert? Regardless of that answer, are the experts' reports being prepared for use in the mediation only, or for after-litigation as well, should mediation fail or only partly succeed? Mediators do not want one party saying, "The expert was a joint expert, whose report and testimony relating thereto are expressly useable by either party in court," whereas the other party says,

"The expert was mine [or joint], and in any event his or her report was prepared for use solely in mediation. Either party must use a new expert for trial." The issue should be decided up front and put into a signed writing. If litigation ensues, the document then becomes an admissible agreement to mediate under N.J.S.A. 2A:23C-6(a)(1). Mediators must always have their eyes on multiple process monitors: Which communications are off the record? Which are on? Do the parties' documents so indicate?

Given the complexity generated by UMA-NJ, the author has started incorporating a mandatory mediation clause in mediation retainer agreements if a former mediation client challenges the handling of the mediation matter and claims resulting damages. It may end up in court, but this way all parties are sure to try to work things out, with the help of a professional mediator if needed. Such a provision is both ethical and enforceable, but it is wise to carefully review its intention and use with clients and their legal counsel at the time of retention. Most people will agree to mandatory mediation, as: a) they are already open to mediation, b) it is not binding, and c) either party may terminate after one meeting. It is also a way of reinforcing the value of mediation work, of walking the talk.

The following is a sample mediation clause:

> If any dispute(s) arise(s) regarding the interpretation or enforcement of any provision contained in this Agreement, then the Law Firm and you agree to attempt to resolve any such dispute(s) including fee and cost disputes, first by direct negotiations and then by mediation with a qualified professional mediator who is mutually selected by the Law Firm and you. The mediator's fees and costs will be divided equally between the Law Firm and you unless otherwise agreed in writing at the time of mediation. After the mediation process is completed, and if any issue(s) remain(s) unresolved, than each party is free to pursue any such remedies in any processes as may be permitted or required by law.

MEDIATOR REGULATION: ISSUES OF DISCLOSURE, UNAUTHORIZED PRACTICE, COMPETENCY, QUALIFICATION, TRAINING, MENTORING, CONTINUING EDUCATION, AND COMPENSATION

Individuals from various professional disciplines are welcome to serve as New Jersey mediators, both privately and in court-connected programs. NJAPM's code says that mediation is a distinct discipline, separate from other professions, although mediation may be offered as a service by those professionally trained in other disciplines. Similarly, UMA-NJ expressly holds that "a mediator [does not have to] have a special qualification by background or profession."[8]

The New Jersey Supreme Court, acting through two of its committees (Attorney Advertising and Advisory Committee on Professional Ethics) issued a Joint Opinion, 676/18, in or about 1994, expressly stating that mediation practice was deemed part and parcel of a lawyer's practice when conducted inside a traditional law firm. However, the joint opinion also said that mediation was *not* exclusively the province of legal professionals, and thus properly practiced by other-trained professionals (nor was it the unauthorized practice of law by those professionals, unless they otherwise gave legal advice or held themselves out as lawyers).

In other words, New Jersey, unlike certain other jurisdictions, has taken a let 1,000 flowers bloom approach to mediation practice. Mediation is not a licensed profession in New Jersey, and in fact, virtually anyone may set up shop and declare him or herself a mediator. It is strictly a case of *caveat emptor.*

Interestingly, UMA-NJ requires anyone selected as a mediator to disclose, upon request, "the mediator's qualifications to mediate a dispute."[9] NJAPM's code requires that mediators have "appropriate and sufficient formal training in the practice of mediation," but does not require disclosure, even upon a party's request. The author believes this should be changed to conform to UMA-NJ's requirements.

The Supreme Court's Standard on Competence, Principle IV, is somewhere between NJAPM's code and UMA-NJ on disclosure; it requires "familiarity with the general principles of the subject matter...being mediated," that the mediator have "the necessary and required qualifications to satisfy the reasonable expectations of the parties," and that he or she "shall have [mediator competence] information available for the parties." The principle never states when the mediator shall actually provide the information, if ever. The Supreme Court's standards and NJAPM's code should be revised to satisfy the UMA-NJ requirements on this point, as consumer self-determination and informed consent should extend to selection of the mediator.

Beyond ethics, the author feels it is fundamental and good marketing to give parties and their counsel confidence, built on legitimacy, that the mediator is precisely the right one for their matter, based on experience as a mediator and with matters similar to the one before the parties. The mediator may not represent these facts to be true if they are not, of course, but it is often the case that mediators have relevant experience to the matters in controversy. If a mediator lacks confidence or is unable to get work in a field of interest, he or she should consider volunteering in that subject matter area, until they can state with confidence that they are prepared to serve.

Neither UMA-NJ nor the Supreme Court standards refer to mentoring, an essential component of any professional education and accreditation process. However, NJAPM's accreditation rules and the rules of court on approved list eligibility both reference mentoring require-

ments. Both NJAPM and the rules of court require mentoring as a condition of, respectively, accreditation and approval for the court list. In an ideal world, newly minted mediators, as a condition of accreditation or court approval, would be required to observe master mediators for a reasonable period of time, to ensure the incoming mediators' professional development, as well as to be observed and critiqued by master mediators.

In the real world, creating, fostering, and reinforcing the mentoring model has proven to be very difficult indeed. The court system recently watered down its already basic mediator mentoring requirements. To encourage excellence in professional mediation practice and ethics, mediators should develop a system in which people are observed, and observe others, in a clinical setting, over reasonably long periods of time, and where these interactions are videotaped and reviewed by and between mentors and mentees. NJAPM is actively considering such a mentoring plan. Until that system is in place and operating, new mediators will continue to scramble to get the review time necessary to obtain accreditation. Mediators need to get a high-quality and cost-effective mentoring program up and running.

Regarding continuing mediator education, also an issue of critical importance as it relates to experienced mediators and their need for maintenance and enhancement of skillsets, NJAPM's code is silent, but its rules for APM qualification are not. Accredited mediators must demonstrate 10 hours per year of continuing education credits, including units on ethics, or their accreditation will not be renewed. UMA-NJ is completely silent on continuing mediation education (CME), apart from requiring disclosure of qualification information upon a party's request. The Supreme Court's standards require a mediator's continuous improvement upon professional skills, abilities, and knowledge of the mediation process. Principle IV(C) and Court Rule 1:40-12(b)(3) require proof of four hours of CME per year. The Supreme Court roster of mediators will not stay open to those failing to meet the basic and ongoing requirements.

In the private sector, there is no state of New Jersey licensure or other required credential limiting one's service as a mediator, and consumers must ascertain for themselves the qualifications, training, and experience of any proposed neutral. NJAPM is the only group in the state offering accreditation to qualified mediators in the areas of family/divorce mediation and commercial/business mediation. Its published accreditation and continuing education requirements are available online at www.njapm.org. These standards and credentials are important, both as a consumer tool and a marketing brand, to allow highly qualified practitioners to distinguish themselves in the marketplace and highly selective clients to identify them.

Court-connected mediators are included on an approved list, but the standards for getting and staying on that list are inadequate in the author's opinion. From the public's perspective, and that of their mediation-conscious lawyers, the Supreme Court's list is not a relevant tool for distinguishing highly qualified mediators from unqualified mediators. The author feels the Court would do well to stiffen the standards for inclusion on the list. NJAPM generated the idea, not accepted to date, that NJAPM, with its 15 years of training, accreditation and continuing education experience, would become the Court's mediator accrediting body.

Mediators also need to pay attention to the ethics of mediator fees, costs, and billings. The UMA-NJ is totally silent on that issue. The NJAPM code is as well, although it should not be. The rules of court and standards are effusive on the topic, mostly due to the issue of "three free hours." However, the standards also express in Principle VII that mediators' fees must be reasonable, taking into account the subject matter, its complexity, the mediator's expertise, the time required, and rates customary in the community. Mediator compensation shall not be contingency fee-based. The author feels these standards are reasonable, and should be utilized by mediators in all assignments, whether or not court-referred. Retainer agreements must spell out the basis for compensation, so that parties know up front the basis and hourly rate for all time charges, and that specified costs will be added to the bills.

Court-referred mediators are heavily regulated regarding what work they may and may not charge for, what travel time is and is not compensated, billing procedures, and a host of other details. On October 24, 2003, the Conference of Civil Presiding Judges published a set of mediator compensation guidelines on these technical issues, which are statewide and mandatory in application.

Rule 1:40-4(b) and mediator compensation guideline 15 direct that unpaid mediator bills shall be handled first by a request to the complementary dispute resolution point person in the county of venue, after which the trial court will, on its own motion, issue an order to show cause, directing the parties to appear and explain nonpayment, failing which a final judgment and sanctions may be entered against the uncooperative party. This is the court system's way of taking care of its mediators, by short-circuiting a collection process that otherwise would spawn additional litigation out of the failed mediation of an existing dispute.

Again, mediators may wish to include a dispute resolution clause in all retainer agreements, whether court-referred or private. Mediators are better off attempting to resolve such disputes peacefully and efficiently, rather than through adversarial process.

TERMINATION OF MEDIATION FOR CAUSE: WHEN IS IT AN OPTION AND WHEN REQUIRED?

Termination of process is an important tool for the mediator to understand and properly exercise. It plays a key role in shaping the parties' understanding of mediation, and serves as an appropriate check on a party's abuse of the process, another party, or (as sometimes happens) the mediator. UMA-NJ is silent on this important issue. NJAPM's code is very weak on this subject, stating only that the mediator

> may suspend or terminate the mediation if the mediator determines a lack of good faith by a party or the parties, if a party's disclosure of relevant information is wanting, if either party appears not to understand the negotiations, or "for any other reason deemed appropriate by the mediator.

Rule 1:40-4(f) states the following seven grounds for process termination, all of which are valid for court-connected or private settings. The first three permit suspension or termination at the mediator's discretion, and the last four require termination:

1) An imbalance of power between the parties "that the mediator cannot overcome" (Permissive termination)
2) A party's perception that the mediator is partial to the other side. (Permissive termination)
3) A party's abusive behavior toward the other party or the mediator "that cannot be controlled." (Permissive termination)
4) A party's continuous resistance to the process or the mediator. (Mandatory termination)
5) The parties' poor communication "seriously impedes effective discussion." (Mandatory termination)
6) The mediator believes that a party is under the influence of drugs or alcohol. (Mandatory termination)
7) The mediator believes that continuing the process "is inappropriate or dangerous." (Mandatory termination)

In addition, Principle VI, Quality of the Process, requires the mediator to conduct the mediation diligently, not to permit the process to become "unnecessarily prolonged," and to monitor the continuing suitability of the case for mediation. NJAPM's code clearly permits these mediator decisions and actions, but does not lay them out expressly.

Judges' orders of referral and mediators' retainer agreements should incorporate the above-cited rules and standards by language or reference. Mediators' early disclosure maximizes the chances of the parties' and their counsels' buy-in, moves the process in a positive direction, and discourages misconduct by mediation participants. If the parties or one of them persist(s) in misconduct, then the mediator should terminate the process and refer the parties to another mediator, or, more likely, back to court. If legal counsel are involved, it sometimes helps to have a private meeting with them, to give them a reality check for possible future use with the clients.

DISCLOSURES TO THE COURT

Unless the parties consent, neither the mediator, nor the parties, nor their legal counsel, should advise the court as to why a mediation has terminated. Trial judges or their CDR point people uniformly want brief progress reports, *i.e.,* whether the matter is moving forward; whether parties and counsel are showing up as required; and has the case resolved in whole or in part. It is sometimes necessary to integrate mediation management with the court's own case management. With party consent (both the standards of conduct and UMA-NJ are clear on this point), communications between the mediator and the trial court are perfectly appropriate—and sometimes key to parties' ability to resolve the case efficiently.

MEDIATION PRACTICE CONSIDERATIONS

Importantly, mediators who also possess licenses to practice in the legal, mental health, accounting, or other regulated fields will be held to their licensed professional standards when practicing as a neutral. A mediator does not cease to represent his or her profession when acting as a neutral. Presumably, the neutral was selected for his or her reputation, skill, and experience in a primary profession. If the mediator's behavior would have been actionable if performed by him or her in the course of the traditional licensed practice, then such misconduct may result in discipline by the licensing authority.

For example, Joint Opinion 676/18, previously referenced in this article, expressly states that a lawyer who serves as a mediator does so "as part and parcel of the practice of law...." The joint opinion therefore imposes upon lawyers who mediate the duty "not [to] serve as mediator...in any case in which they have a conflict of interest[,]" and cross-references the attorneys' Rules of Professional Conduct on confidentiality issues. Other professional boards will likely take the same approach vis-a-vis their licensees who also mediate.

In January of 2004, the New Jersey Supreme Court, with limited exceptions, put strict limits on the ability of an out-of-state lawyer to represent a party at a New Jersey mediation or arbitration.[10] A companion rule makes it ethically improper for a New Jersey lawyer to "assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law."[11] In other words, by permitting an out-of-state lawyer to appear as a party's legal representative in a mediation, an attorney-trained mediator would engage in unethical conduct.

N.J.S.A. 2A:23C-10 creates an interesting wrinkle to the unauthorized practice issue for attorney-

trained mediators, since it expressly permits a party to designate a person to appear and participate in the mediation. In the case of an out-of-state lawyer, or an in-state person with an out-of-state law license, the author believes an excellent argument can be made that such persons are permissible designees and nonparty participants at mediation, provided they do not act as legal representatives.

Mediators must become aware of limitations on their own practice. Mediators must know their limits in terms of complexity of matters to be mediated, but also must stay clear of informing parties substantively in fields and areas in which they lack familiarity or licensure when required.

For example, a mediator who offers legal or tax advice without a legal or certified public accounting license risks engaging in unauthorized practice, which is a fourth-degree crime in New Jersey, and also may invite a negligence claim—without benefit of otherwise available malpractice insurance (unauthorized practice is considered knowing and willful, not negligent, and therefore will not likely be an insurance-covered event). If an unrepresented party follows such advice to his or her financial or other detriment, then the mediator should expect to be called to task for his or her conduct. Similarly, a certified public accountant who serves as a mediator should not dispense mental health advice, or he or she could risk client complaints to the Board of Psychological Examiners, a lawsuit, or both. There is less of a risk for a lawyer-trained mediator in that regard, since legal practitioners are exempted from the psychological practices statute, to permit attorney-client counseling in moments of emotional difficulty.

Professional boundaries are getting less clear all the time. Mediators have to be increasingly aware of and careful about the recombinant professional beings they create with cross-disciplinary assignments.

CONCLUSION

With mediation as the preferred method of dispute resolution, New Jersey residents have begun to appreciate significant savings of time and money and, with any luck, the ability to stay out of court more or less permanently. However, sometimes mediation fails or ancillary civil or criminal litigation starts. When former mediation participants are hailed into court as parties or witnesses, citizens should now have confidence that, except in specific circumstances and for particular public policy reasons, their mediation communications should be treated as sacrosanct.

As stated by the Supreme Court's Advisory Committee on Professional Ethics and its Committee on Attorney Advertising, in Joint Opinion 676/18:

> Alternative Dispute Resolution and Complementary Dispute Resolution have...swept the country. Given the…expense of the more traditional adversarial process, state and federal courts have embraced ADR and CDR as providing faster and less expensive resolution of disputes.

Without question, New Jersey is in the midst of a major mediation revolution. Mediation practitioners and advocates have the opportunity to make these changes vital and long lasting. If mediation is to achieve co-equal status with adversarial processes, then mediators must adhere to the highest ethical standards.

This article shows that specific ethical precepts are available, as never before, to guide New Jersey's professional mediators. All branches of government, the private sector, NJAPM, other professional organizations, and mediators from every discipline will continue to fill in the blanks. Mediators will adjust their initial approaches based on the collective wisdom and experience. And for the long term—to maximize public and professional gain—mediators must hold fast to these worthy ideals. ■

ENDNOTES

1. N.J.S.A. 2A:23C-9(g).
2. 359 N.J. Super. 201 (App. Div.), *certif. den.* 177 N.J. 223 (2003).
3. Uniform Mediation Act §9 (rev. 2003).
4. *See, Isaacson v. Isaacson*, 348 N.J. Super. 560, 578 (App. Div.), *certif. den.* 174 N.J. 364 (2002), in which the Appellate Division made it clear that a person serving as a guardian *ad litem* for children in family litigation may not also serve as the mediator for the parents' financial disputes.
5. N.J.S.A. 2A:23C-6(b)(2).
6. On July 26, 2005, in an opinion written by Justice Zazzali, the New Jersey Supreme Court issued a 5-2 decision in *State v. Carl Williams*, referenced in this article. The majority held that Mr. Williams' need for the mediator's testimony did not outweigh the public's interest in mediation confidentiality. The Court grounded its analysis on the Uniform Mediation Act's balancing test for evidentiary use of mediation communications, and explicitly followed *amicus curiae* New Jersey State Bar Association's and mediation community's requests for statutory interpretation. The dissent, written by Justice Long, did not disagree with the majority on statutory analysis, but felt that Mr. Williams had made a sufficient showing of need to overcome the general prohibition on mediator testimony.
7. *See, Sheridan v. Sheridan*, 247 N.J. Super. 552 (Ch. Div. 1990), a case that involved ill-gotten assets and the trial court's express duty to report the parties to the tax authorities).
8. N.J.S.A. 2A:23C-9(f).
9. N.J.S.A. 2A:23C-9(c).
10. RPC 5.5(b)(3)(ii).
11. RPC 5.5(a)(2).

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