New Jersey Family Lawyer

Volume 27 • Number 5
April 2007

CHAIR'S COLUMN

Is it Time to Revisit the Matrimonial Early Settlement Panel Procedures?

by Ivette R. Alvarez

In 1981, as a result of the success of the bar's voluntary initiative to assist the Judiciary in resolving matrimonial cases, the matrimonial early settlement panel (MESP) was incorporated into the rules and made mandatory. Each vicinage then developed its own standards and practices for MESP.

In 1999, standards for dissolution cases were adopted, including suggested standards for MESP. Those standards suggested submission of position statements to the panelists before the scheduled date; a calendar call of the lawyers and litigants prior to the panel so litigants could hear the judge's encouragement of arriving at an amicable resolution without going to trial; and a policy rewarding settling litigants by allowing attorneys to divorce those litigants on the same day. The standards, however, retained much flexibility for each vicinage with respect to the structure and procedures of the MESP.

The current Rule 5:5-5 retains much of the vicinage flexibility in the standards. The rule only requires that appropriate cases, including post-judgment applications, go to MESP, and that five days before the panel, case information statements and "such other required information" be submitted to the ESP coordinator and to assigned panelists, if known.

Great disparity exists in how MESPs are conducted from vicinage to vicinage. In some vicinages, position statements with case law and case information statements are required filings. Some other vicinages require no submissions, but panelists may accept position statements or documents proffered by the attorneys at the time of the panel, without any notice to adverse counsel. In vicinages that require position statements, there is great variance regarding the comprehensiveness of the submission. Some are as detailed as a trial brief while others may be a

single-page letter, merely stating the issues and the party's proposed distribution. Of course, a briefed case will be more persuasive to the panelist; however, the disparity in submissions and the relevant cost of each does not escape the litigants who often complain to the more thorough attorney: "How can they get away with this?"

A better-briefed case will be more persuasive only if the panelists actually have the opportunity to review the submissions ahead of time. It is not uncommon, however, for panelists who are volunteer attorneys to be unable to attend the panel for which they are signed up. Replacements are assigned, if the absence is known early enough. However, the transferring of submissions to replacement attorneys is almost never successful.

To accommodate uneven workloads among panels, cases may be transferred from one panel to another, the day of the panel. The new panelists will not have the opportunity to review the submissions, again resulting in a waste of the client's resources.

The time spent with each case by the panelists is a function of how many other cases have been called for paneling that day, and the number of panels available. It is not unusual to have five or more cases assigned to each panel. Assigning more than four cases per panel reduces the likelihood of successful results, considering that at best each panel has only two and a half hours to hear the two attorneys in each of their cases, ask questions, discuss the issues among themselves to arrive at their recommendations, present those to the litigants and answer their questions, if any.

The experience of the panelists is another variable that is handled differently from vicinage to vicinage. Some counties pair a very experienced attorney with a less experienced one. Some counties make no distinction in pairing or selecting panelists.

Not all cases benefit from an MESP. The rule provides an alternate track for those cases that are not appropriate for MESP. Yet, it is virtually impossible, even with the consent of both attorneys and a request for a case management conference instead, to opt out of an MESP.

It is not unusual that attorneys are scheduled on the same day for more than one case. This is not fair or cost effective for either side. The clients of the attorney with simultaneous cases must endure wasted time and money, only to receive their attorney's divided attention. The adversary, who has no idea the other attorney has more than one case being paneled until they arrive on the day of the panel, in turn has to wait around while his or her counterpart takes care of one or more other cases. It is no small wonder that litigants often feel abused by the system that requires them to be there to merely waste time.

While the rule governing MESPs is clear in that "the failure of a party to participate in the program or to provide a Case Information Statement or such other required information may result in the assessment of counsel fees and/or dismissal of the non-cooperating party's pleading," attorneys are sometimes blamed and sanctioned for not submitting their client's position statement. Yet, Rule of Professional Conduct 1.2 prohibits attorneys from making decisions regarding the client's settlement position. What happens if the client does not cooperate and the submission cannot be prepared? The attorney should never be sanctioned for the client's failure. Thus, if the attorney has filed a motion to be relieved, alleging the client's lack of cooperation or communication, the MESP must be adjourned until that motion can be heard. If no motion is filed, only the client should suffer the consequences.

These are but a handful of concerns regarding the MESP programs expressed by attorneys from various vicinages. As evidence from these concerns, while the judge presiding over the MESP typically advises the litigants how the MESP is intended to help them reach a settlement and save money, many of the actual practices are counterproductive to that result. While strict guidelines are not appropriate, some tweaking and standardization of the process seems appropriate. The general understanding is that 50 to 75 percent of the cases now going to MESP do settle on or shortly after the MESP. It is a highly successful program, dependant on the attorney volunteers. With minor adjustments, that statistic could be improved and become more client-oriented if uniform practices are instituted focusing on the clients' needs and concerns rather than over-calendaring attorneys, both as volunteers and as client representatives. ■

New Jersey Family Lawyer

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FROM THE EDITOR-IN-CHIEF

You are Never Too Old to Learn... or to Teach

by Mark H. Sobel

Perhaps it has something to do with the fact that I am now coming to the realization that my children might be more knowledgeable than I on a variety of subjects. Perhaps it might be because I recently watched the debut of a TV show pitting adults (unsuccessfully) against fifth graders regarding a variety of subjects covered at that grade level. Perhaps it is because I have been hearing a large number of anecdotes regarding a lack of familiarity with a variety of family law concepts. And perhaps it is just because I am getting older and tend to repeat myself occasionally. Nevertheless, a theme that has been previously voiced needs to be articulated again: It is imperative that not only family law attorneys but, perhaps more importantly, family law jurists, constantly maintain and upgrade their body of knowledge regarding both substantive law and procedural law impacting the myriad of issues present in family court.

...[I]t is essential that judges entering the family part have the tools necessary to effectively administer their difficult task. In order to do so, all of the various means to provide additional education should be fostered.

Recently, at the Frank Louis annual "If I Could Change the World" symposium (also known as the New Jersey Family Law Symposium), I noticed at least 30 judges in attendance. I also noticed, however, the geographic diversity lacking in those judges attending. Certain vicinages were well represented (in fact one I believed had all of their trial court judges in attendance), which seemingly was a byproduct of the presiding judges in those vicinages believing in the need for such continuing legal education. While such efforts are to be applauded, I believe they need to be indoctrinated into our formalized procedures for educating all family court judges. With the enormous pressures on family court judges to manage their calendar, have bench time, report to the Administrative Office of the Courts regarding clearance, and deal with a wide array of cases, it is extremely gratifying to see so many jurists take their free time to attend such symposiums.

I was equally surprised, while negotiating a resolution of a family court matter in one vicinage late into the night, to observe, while reentering the courtroom, an inns of court program dealing with family court matters, being attended by a number of that vicinage's jurists. I know they are not getting overtime for this, and it was extremely gratifying to see so many seeking additional knowledge after hours.

What we need to do is to continue to encourage such efforts, and provide sufficient time for judges to *learn the law*. Many years ago, I had the opportunity to conduct a seminar during the November *baby judge school*. I thought it was important that lawyers participate in such endeavors, and I believe there is a need to allow the judges both the time and an opportunity to meet with and discuss legal issues with attorneys. We have all seen the benefits of such joint bench-bar collaboration. In fact, in the not so distant past an entire day was devoted to bench-bar interaction regarding a variety of family law subjects. It was not only well attended and well received, but promulgated a variety of thought-provoking ideas, which found their way into our jurisprudence over the next five years. It is this kind of activity that needs to be reinserted into our normal, but frenetic, professional lives.

We are all aware our Judiciary believes that rotation of judges throughout the different branches is helpful for a well-rounded judicial pool. That topic is for another day. However, in light of this it is essential that judges entering the family part have the tools necessary to effectively administer their difficult task. In order to do so, all of the various means to provide additional education should be fostered. They not only include creating a culture where judges should regularly attend legal education symposiums (even if they have to leave some bench time in order to attend such sessions) but where they should be encouraged to par-

ticipate in a variety of programs to provide their insights both while they are on the bench and after leaving public service.

Importantly, all individuals experienced in family law matters can and should be conscripted to provide the benefits of their knowledge to the next generation. To do so, we should cast aside a myopic vision that these educators have some vested interest other than providing the benefits of their knowledge to the new judicial pool. Thus, the very individuals who can provide the most, *i.e*. retired judges, should not be eliminated from such efforts, but, rather, should be encouraged to provide such continuing legal education. It has come to my attention that certain initiatives and programs in this regard are either being curtailed or potentially eliminated as judges, who have guided such efforts, leave the bench for a second career as mediators and arbitrators. To lose the benefits of this knowledge, and to lose the opportunity to transfer that knowledge to a new pool of jurists, seems counterproductive to the essential goal that we all share: to provide the most knowledgeable judicial pool to serve our collective constituency.

If, in fact, the above is the paramount goal, then that goal should be reconfirmed by the Administrative Office of the Courts, by the assignment judges in the vicinages and by the presiding judges in the family parts. The directive should be clear and emphatic. It should not only allow, but actually encourage, judges to participate in a variety of legal education programs, not just those that happen to occur on a Saturday afternoon. It should enlist retired judges to continue to educate our judicial pool. It should require judges to attend, upon their transfer or initial ascendancy to the family court bench, a comprehensive educational program. It should seek to parallel the comprehensive and concentrated educational requirements necessary to become a certified matrimonial lawyer. Those requirements can be used as guideposts for those who are going to make determinations impacting people's lives in this area of law.

I believe that, over the past several years, we have strayed from that core concept. True, we have clearly shortened the time from date of complaint to date of divorce. We have clearly done better in clearing dockets. We have clearly expanded mediation and arbitration efforts. We have clearly adhered to the criticism that family court litigation takes too long and costs too much. In doing so, however, we have perhaps overcompensated, and thus lost the corresponding necessity that decisions made quickly still must be made competently. To do so requires the efforts of all concerned in continuing education and continuing exchange of ideas.

I know that the bar has been and would be a willing partner in this effort. We ask that the Judiciary, as they have in the past, reconfirm their adherence of that principle and assist in establishing a culture that education of judges is a required continuing obligation. It must be seen as an obligation that necessitates utilizing the full resources of the Judiciary, even if it impacts the bench time of judges.

I can think of no better time to re-emphasize this principle than at our Annual Meeting, hopefully attended by a large number of judges representing the entire geographic area of New Jersey. While this is only a first step, it must be taken with the path of continued adherence to allowing judges the freedom to pursue necessary educational endeavors.

While I am sure our judges would do far better than I did on those fifth grade scholastic topics, unfortunately the bar is much higher for family court judges. The decisions they make impact the fundamental issues of our citizens. This is an educational effort in which we all need to participate and is one from which we all benefit. ■

FROM THE EDITOR-IN-CHIEF *EMERITUS*

In Honor of Judge Eugene Serpentelli

by Lee M. Hymerling

(**Editor's Note:** The following address was delivered by Lee Hymerling during a March 14, 2007, dinner honoring Judge Eugene Serpentelli.)

It is a singular privilege to speak with you this evening about the Honorable Eugene D. Serpentelli, chairman for now 23 years of the Family Practice Committee. Upon its creation in the fall of 1983, our late great Chief Justice Robert Wilentz knew that he had huge shoes to fill in selecting a chair. The wisdom of that choice cannot be questioned because now so many years later and so many tasks fulfilled, Judge Serpentelli continues to serve in this capacity. The origins of the Family Practice Committee came from the Supreme Court Committee on Matrimonial Litigation, chaired by Associate Justice Morris Pashman, and the Family Court Committee that in the Court year from Sept. 1982 to 1983 was chaired by Associate Justice Daniel O'Hern.

When Judge Serpentelli accepted the chairmanship of our committee, he already had served as a member of the Family Part Planning Committee that consisted of Justice Pashman, Superior Court Judges Harvey Sorkow and Bob Page, and Juvenile and Domestic Relations Court Judge George Nicola.

In the more than two decades that have passed so very quickly, Judge Serpentelli and our committee have addressed huge issues and solved serious problems. In the early years, the committee had the task of bridging the merger of family court functions, which had before been performed by not only the superior court but also the domestic relations court. In doing so, the practice committee helped make our family part the model for divorce courts throughout the nation. I wrote an editorial in the Oct. 1983 issue of the *New Jersey Family Lawyer* titled "A Substantial Challenge for a Formidable Chairman." Judge Serpentelli and the committee have met every challenge. Over these many years, Judge Serpentelli, with good humor and a keen sense of mission and diplomacy, has led us to create workable procedural law that is the envy of judicial systems throughout our country.

Judge Serpentelli so often challenged all of us to go about our task as committee members, not as judges and not as lawyers, but as eminently qualified professionals, seeking to mold the procedural and sometimes even the substantive law in a direction that would best serve the citizens of our state.

The issues that our committee faced were legion. Were one to compare the 1984 Rule Book with the 2007 Rule Book, one could readily see how much our procedural law has evolved.

Although Judge Serpentelli would never claim that he is indispensable, I cannot imagine anyone else who could have led this committee better, or who was better suited to draw the very best from all of us.

In the early 1970s, after the advent of equitable distribution, our state courts became the legal beacon for other jurisdictions to follow and, with Judge Serpentelli's leadership, his committee shaped rules that placed New Jersey in the forefront of how to administer family court legal process.

Judge Serpentelli's task was not always easy. Sometimes difficult issues took more than one term of the committee to address. Some issues continue to demand our time.

Remember how, long ago, little discovery was permitted in family part matters as a matter of right? It took the multiyear work of our committee to reach where our rules today stand. Remember how, in more recent years, the efforts of this committee shaped how questions of alimony were to be best decided? Together, we crafted a workable way to address lifestyle concerns. And even now we continue to sort through how the child support guidelines should be addressed.

We who are practicing family lawyers know that the committee's reach goes far beyond what we now know to be FM cases. From termination matters to matters of juvenile delinquency; from custody matters to adoption; from termination of parental rights to domestic violence, our committee not only has framed the issues but has fashioned procedures that work.

After so many years, Judge Serpentelli has seen many serve on this committee. One has to marvel over how he has contained our egos and pointed us in the direction of progress. Long ago he followed the leads of Justice Pashman and Justice O'Hern as he gave substance to Chief Justice Wilentz' goal of a bench-bar partnership. Nowhere

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SENIOR EDITOR'S COLUMN

Collaborative Law, Today's Family Lawyer and the Rules of Professional Conduct: What is Our Role?

by John E. Finnerty Jr.

Collaborative law, as I understand it, is supposed to be a new way to process divorce cases amicably. Lawyers agree to represent clients and to meet with each other and them in an attempt to foster a resolution. If a reasonable accommodation of competing interests cannot be forged, and the case is not settled, the participating collaborative lawyers agree not to represent their clients in the ensuing litigation. The clients must retain new lawyers.

Our Rules of Professional Conduct and Court Rules generally impose many varied obligations upon us, and give us the opportunity, the authority, and the responsibility through our counsel to try to effectuate and implement reason and harmony rather than discord and partisanship.

Our case law is clear that the best case is a settled case. Our courts favor consensual resolution of disputes between litigants. On early settlement panel day, our judges give speeches that tell litigants and assembled lawyers that they, the litigants, working together, can do a better job of ordering their lives by consensual resolution than any judge can do in a decision after a trial. Each of these speeches is a judicial attempt to persuade litigants to avoid throwing their hats into the fray of a trial. The speeches admit and acknowledge that the judge will never understand the family as well as the family members, and that the family will create risks of future unhappiness and conflict by allowing the judge to decide the case.

Trying to understand collaborative divorce law and the unmistakable impetus and pressure we trial lawyers (and our clients) feel from trial judges to "resolve our cases above all else," causes one's mind to wonder about what the role of a family lawyer should be today. There obviously is a clear mandate from trial courts to resolve our cases. Although the policy has been longstanding, its more direct impetus in our daily lives seems to have grown, coincidentally or not, from the inception of best practices.

In view of our current Rules of Professional Conduct, we do not need to start a new kind of practice (collaborative law) in order for lawyers to counsel clients and let them know in no uncertain terms that the desire for revenge, punishment, or getting it all has no place in the family part system, and that they are not likely to be rewarded for such positions. Our Rules of Professional Conduct and Court Rules generally impose many varied obligations upon us, and give us the opportunity, the authority, and the responsibility through our counsel to try to effectuate and implement reason and harmony rather than discord and partisanship.

For example, RPC 1.16(4) provides lawyers, including matrimonial lawyers who are sought after by large numbers of people, the power to impact and moderate a divorce litigant's position and conduct of the divorce. Pursuant to RPC 1.16(4) the lawyer may withdraw from representation if the client insists upon a course of action the lawyer considers "repugnant," or "with which the lawyer has a fundamental disagreement." Since issues that may arise in a case and the client's position about them frequently are discussed in the initial interview, the sought-after matrimonial lawyer can send a clear message to a litigant about his or her view on issues and positions the client begins to discuss during the initial consultation. If the client really wants you enough and knows they may not get you if they take positions that are "repugnant to you" or "with which you have a fundamental disagreement," they may be less likely to do so once the case starts.

In addition, RPC 2.1. Advisor provides:

> In representing a client, a lawyer *shall* exercise *independent professional judgment and render candid advice.*

> In rendering advice, a lawyer may refer not only to law but to other considerations, such as *moral, economic, social and political factors,* that may be relevant to the client's situation. (emphasis supplied)

This canon, too, provides great license to a lawyer to bring into consideration for the client various factors beyond the immediate issue at hand, and to counsel the client to consider such issues in deciding a course of action or approach. In fact, this canon is not precatory. It says that a lawyer "*shall*...render candid advice" including reference to moral and social factors. It invites and mandates the lawyer to be a voice of reason, decency and moderation.

Of course, RPC 1.16(4) and 2.1 are subjective. What is "repugnant" to one may not be repugnant to another, and "fundamental disagreement" is really nothing more than seeing it a different way. Invariably, each lawyer's "candid advice" and opinion on morality and social issues will vary.

Other rules place greater emphasis on the lawyer's traditional role as a zealous and inherently adversarial advocate. RPC 1.2(a) is at clear odds with RPC 1.16(4) and 2.1. RPC 1.2(c), which provides in its first sentence:

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

The skillful lawyer will be able to serve the client by being wise enough to know when it is appropriate to counsel moderation, and the benefits of negotiated settlements crafted by litigants, and alert enough to be aware when an adverse party seeks to impose a serious injustice that is not likely to be continenced by a judge. Of course, each judge is different, and each judge's capacity and ability to understand and evaluate subtleties to reach the proper, fair result, are as varied as personalities on the bench.

The family lawyer must be knowledgeable, experienced and wise enough to work with the client to understand what is vital and cannot be sacrificed, and what is less material and therefore appropriate for compromise. He or she must have insight into how the judge will react to vital issues that cannot be compromised, since the decision to compromise is always related to the predicted outcome if the issue is litigated.

Although I have not been involved personally in collaborative divorce, there is no reason why lawyers need to disengage from representation of a litigant as a condition of working with each other toward resolution and providing candid advice to litigants that the Rules of Professional Conduct indicate both are required and permitted. If judges can decide cases after telling litigants in ESP speeches that working together will help them reach a resolution that works for the family better than the judge who will try the case, then lawyers, too can continue representation if their advice and counsel for moderation fails and the litigant wants to roll the dice before the court. New modes of practice usually require additional regulation, and create additional potential contractual conflicts and interpretive issues and obligations for lawyers. It does not seem necessary to add these to our plate, in view of existing Rules of Professional Conduct.

SUMMARY

Historically, prospective clients have gone to well-known, sought-after lawyers because they were perceived as vigorous advocates who could effectuate the desired result in a courtroom before a judge and persuade the finder of fact to adopt the client's perspective.

However, our roles have broadened. Lawyers who develop reputations as effective advocates have the authority and responsibility provided by our Rules of Professional Conduct to attempt to persuade against positions that harden and polarize. Although it always has been the policy of the law that settlements are to be fostered and encouraged, that policy appears to be even more prominent in the age of best practices.

Sought-after lawyers have a license, responsibility and obligation to facilitate and encourage objective fairness. We need not sacrifice our testosterone levels as trial lawyers to do so. After all, if we can effectively persuade and advocate positions before triers of fact, the very same triers of fact who attempt to persuade litigants that they should not try their case, we can do the same in our interactions with our clients in our attempts to foster consensual resolution. ■

Judge Eugene Serpentelli

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else has that partnership worked better.

And perhaps the greatest tribute to Judge Serpentelli is that he has led us all in such a way that the work has been fun.

Mrs. Serpentelli, on behalf of all of us, we thank you for sharing the judge with each of us. Judge Serpentelli, we cannot tell you how much it has meant to each of us to serve under your leadership. Over so many years, in so many ways, you have made a difference.

It will be for others to sing your praise about your service as so long serving an assignment judge; as the chair of innumerable committees and working groups; and of the wisdom of your jurisprudence. It will be for others to praise you for being one of the best, if not the best, trial court judge in this state. To us, thank you for your friendship and for your leadership. Your friendship and your leadership have assured the substance of the success of this, your committee. ■

Preserving *Innes*

by Brian D. Winters

Most matrimonial practitioners are familiar with the Supreme Court holding of *Innes v. Innes*.[1] *Innes* prohibits our trial courts from considering income derived from pension benefits distributed by way of equitable distribution when modifying alimony post-judgment. The infamous double dip is avoided in a motion to terminate or modify alimony, by excluding retirement benefits previously distributed between the parties.

The practical application of the principles set forth in *Innes* can be vexing to a practitioner. For example, Mr. and Mrs. Smith may divide their assets simply by placing certain assets in each other's column. They choose to offset assets against each other, rather than dividing each and every asset. The bottom line reflects a fair and equitable overall division of the assets. Mr. and Mrs. Smith are both satisfied with the final agreement. Mrs. Smith retained the marital home and Mr. Smith retained his pension.

Mr. Smith then retires and files a post-judgment application seeking a termination or modification of alimony based upon changed circumstances under *Lepis v. Lepis*.[2] The property settlement agreement provides that the wife has "waived" any interest she may have had in her husband's pension. Many trial court judges adjudicating such an application will refuse to apply the *Innes* holding. The trial court does not perceive a prohibited double dip under *Innes*, since Mrs. Smith waived her interest in the pension rather than the pension being equitably distributed.

It clearly was not the intention of the parties for the waiver language found in one provision of the property settlement agreement to constitute a judicial determination that the asset had not been equitably distributed. Remember, Mrs. Smith waived her interest in the pension in exchange for receiving Mr. Smith's interest in the marital home.

Before exploring suggestions regarding how this potential problem may be avoided, a review of the *Innes* holding, the statutory amendment upon which it was based, and the relevant case law is appropriate. N.J.S.A. 2A:34-23, as amended, and *Innes* did not represent new law, but rather a codification of existing law.

In *D'Oro v. D'Oro,*[3] the husband brought a post-judgment motion to terminate alimony based upon his retirement. He took the position that his share of a previously distributed pension should not be considered as income for alimony purposes, and argued that "it would be inequitable for [the wife] to be able to include [the husband's] pension income *twice* for her benefit, first for her share of equitable distribution, and second for an inclusion in his cash flow determination of an alimony base."[4]

The trial court phrased the issue as follows:

> This court is faced with the following question: Once a "present value" of a pension is equitably distributed, and the nonpensioner receives her share in immediate cash, and the pensioner's share is deferred, specifically "leaving all pension benefits to the employee himself," can his monthly pension benefits upon his retirement be included in an income base for purposes of re-establishment of alimony? This court answers in the negative.[5]

The trial court declined to double-dip and consider the husband's pension as income in determining his alimony obligation. The Appellate Division affirmed, and in *dicta* stated:

> Judge Krafte in his opinion indicated that he was not deciding whether after defendant received, in pension payments, the value of his pension calculated as of the termination of marriage, the pension could be considered income. He made this disposition since defendant had not as yet received such value. *See* 187 N.J. Super. at 380, 454 A.2d 915. While we approve of this result we want to make it clear that we are not inferring that after defendant receives payments equalling [sic] the value as of the termination of the marriage, the payments may be considered income for alimony purposes. Obviously a pensioner who receives pension payments following the distribution of a pension to him has been delayed in the receipt of actual cash. When a pensioner receives payments equal to the value of the pension as of the date of the termination of the marriage, he does not obtain equal value to a cash or other property distribution made at the time of the divorce. This is obvious since a current distribution of money or other property will allow immediate use of the property or permit generation of income. Further the pensioner receiving distribution of a pension runs the risk of dying and receiving no payments on the pension. Since the payments he does receive are actual cash distributions contem-

> plated by the court at the time of the divorce ultimately to flow from the equitable distribution of the pension, a substantial argument may be made that no matter how much is paid to the pensioner, the payments should not be regarded as income for alimony purposes.[6]

It should be noted that the trial court held that the wife was not entitled to have the husband's pension benefits considered as income for the purposes of a modification of alimony, based primarily on the fact that the husband had not yet received pension payments in an amount equal to the value of his share of the marital portion of the asset as of the date of divorce. *D'Oro* left open the issue of post-marital pension income.

The issue of post-marital pension income was addressed several years later by the court in *Staver v. Staver*.[7] In *Staver*, the trial court ruled that pension payments flowing from benefits earned after divorce may be considered in determining changed circumstances, but those attributable to benefits earned during the marriage that were subject to equitable distribution may not.

In *Innes*, the Supreme Court analyzed the issue of "whether the trial court in determining whether [a litigant's] alimony payment should be modified may consider [that litigant's] pension payments."[8] Stated otherwise, the issue before the Supreme Court in *Innes* was whether the trial court may consider, on a post-judgment application, either party's receipt of pension benefits that were already distributed by way of equitable distribution in admeasuring alimony or whether the same represents a double dip. The Supreme Court ruled that the trial court may not consider income derived from a pension in a post-judgment modification of alimony motion, to the extent that the asset was distributed at the final hearing of the matter.[9] The Court relied in part on an amendment to N.J.S.A. 2A:34-23, which provides in pertinent part:

> When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony.

Interpreting the amended statute, the Supreme Court stated:

> The plain language of the pertinent amendment provides that income from pension benefits that has been treated as an asset for equitable distribution purposes (those benefits reflecting work during the marriage partnership) is not to be considered in determining alimony. Conversely, under the amendment income from pension benefits earned after the marital relationship has ended may be considered. This interpretation is substantiated by Senate Judiciary Committee, *Statement to Senate No. 90. 976*, which provides "that when a share of retirement benefit is treated as an asset for purposes of equitable distribution, income generated by that share *only* is not to be considered in determining alimony."[10]

The Supreme Court emphasized that the statute, as amended, codified and embodied the holding and policies of previously decided cases. The *Innes* court stressed that the prior case law applied to both initial alimony awards and modification of earlier alimony awards.[11] Lastly, the Supreme Court in *Innes* made it clear that "the double dipping amendment" applies to both consensual property settlement agreements and to judicial determinations.[12]

Innes holds that "the trial court can no longer...determine alimony by considering income generated by retirement share that has been equitably distributed, either at the time of divorce or when it considers a modification application."[13] Indeed, "payments generated by pension benefits that had been previously equitably distributed are not income for purposes of alimony modification."[14]

So how do we, as matrimonial practitioners, heed our clients' desires to trade, yet still preserve *Innes*? The author believes that first we should acknowledge that the answer is not to give up on offsetting assets or to enter into a qualified domestic relations order for every pension in every case. The Supreme Court in *Moore v. Moore* implicitly encouraged the use of an off-set or buy-out approach with respect to equitable distribution of a litigant's pension as opposed to dividing a pension by way of a QDRO, while recognizing that there are often difficult and thorny issues associated with dividing pension assets by way of QDRO including, but not limited to, how to divide future post-retirement cost of living benefits.[15] In order to avoid such complications and serve the goal of divorce proceedings, which is "to eliminate possible contact and strife between the parties," the *Moore* Court encouraged the use of an "immediate off-set or payment" method or the "present payout" method whereby the non-participant spouse receives her share of the current evaluation of the participant spouse's pension benefits either by way of immediate pay-out or by way of an off-set against other assets.

Similarly, in *Kikkert v. Kikkert*[16] the Appellate Division encouraged the present-day evaluation of a pension followed by a payout to a non-participant spouse or an off-set against other assets versus any sort of pension distribution. The court instructed:

> Although fixing present value under such circumstances may be difficult and inexact, nevertheless, immediate final resolution of the method of distribution is to be encouraged, preferably by voluntary agreement whenever possible. Long-term and deferred sharing of financial interest

> are obviously too accessible to continued strive and hostility, circumstances which our Courts traditionally strive to avoid to the greatest extent possible. This may be best accomplished, if present value of a pension benefit is ascertainable, by fixing the other spouses share thereof, as adjusted for all appropriate consideration, including the length of time the pension must survive to enjoy its benefits, to be satisfied out of the other assets, leaving all pension benefits to the employee himself.[17]

Clearly, the best method to heed the guidance and principles set forth in *Innes, Staver, D'Oro, Moore* and *Kikkert* is in the careful drafting of the property settlement agreement. Therefore, any property settlement agreement that provides for the offset of a pension against other assets, where there also is the payment of alimony, must specifically provide that the pension was equitably distributed, as well as an acknowledgment that the parties have considered the post-judgment implication of the division. For example, if such is the case, the property settlement agreement should contain language as follows:

> The parties have determined that the value of husband's pension is roughly equivalent to the value of his putative interest in the former marital residence, and the parties agree therefore to have wife retain the former home and have husband waive his interest therein and husband shall retain his pension and wife shall waive her interest therein. For purposes of any potential post-judgment application filed by either party and in keeping with the *Innes* decision, any income received by husband attributable to pension benefits accrued during the coverture period, shall not be considered as income for purposes admeasuring alimony.

If the parties intend that even income derived from pension benefits that accrued pre- or post-divorce not be considered as income for alimony purposes in a post-judgment setting, the following language may be appropriate:

> Given the overall scheme of equitable distribution and support in this matter, it is expressly understood and agreed that wife shall waive any interest she may have in husband's pension benefits and, moreover, that husband's receipt of income relating to pension benefits which accrued prior to, during, or following the marriage shall not be considered income for purposes of admeasuring alimony upon post-judgment application initiated by either party.

In addition, if applicable, the following language may be added:

> Nor shall the increase in value of assets acquired by wife by way of equitable distribution be considered in any such post-judgment application.

It may be that the parties specifically negotiate and agree that the entirety of the income derived from the husband's pension be considered as income upon a post-judgment application, notwithstanding *Innes*. In this event the following language may be considered:

> Notwithstanding the *Innes* decision, the parties specifically agree that any and all income derived from husband's receipt of pension benefits upon his retirement shall be considered income for purposes of measuring alimony on a post-judgment application initiated by either party. This is fair and appropriate given the overall scheme of equitable distribution and support in this matter.

The simplest way to avoid any confusion regarding the application of *Innes* on a post-judgment basis is to be as specific as possible with respect to how income derived from pension benefits is to be treated in a post-judgment setting. This approach also is beneficial to the post-judgment court that will be determining a modification application, as it provides a clear and unambiguous statement of the parties' intentions. While this approach might create an additional issue to debate pre-judgment, the parties will benefit from the time and money spent. This approach is designed to avoid confusing and unnecessary litigation in the future. It is the attorney's obligation to his or her clients to advise them of the complications that may arise in the post-judgment setting, if their intention is not clearly set forth in their agreements. ■

ENDNOTES

1. *Innes v. Innes*, 117 N.J. 496 (1989).
2. *Lepis v. Lepis*, 83 N.J. 139 (1990).
3. *D'Oro v. D'Oro,* 187 N.J. Super. 377 (Ch. Div. 1982), *aff'd*, 193 N.J. Super. 385 (App. Div. 1984).
4. *Id.* at 379.
5. *Id.* at 378.
6. *Id.* at 387-88.
7. *Staver v. Staver*, 217 N.J. Super. 541 (Ch. Div. 1987).
8. *Innes*, at 504.
9. *Id.* at 505.
10. *Id.*
11. *Id.*
12. *Id.* at 511.
13. *Id.* at 514.
14. *Id.*
15. *Moore v. Moore*, 114 N.J. 147, 158-9 (1989).
16. *Kikkert v. Kikkert,* 177 N.J. Super. 471 (App. Div. 1981), *aff'd o.b.*, 88 N.J. 4 (1981).
17. *Id.* at 478.

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Post-Adoption Sibling Contact: Some Issues to Consider

by Mary E. Coogan

Do siblings placed in different adoptive homes have an independent right to a continuing relationship once the adoptions are finalized? What if the siblings never lived together? What if the adoptive parent objects to the contact? Should the integrity of the new family be paramount? Should it matter whether the objection appears to be reasonable? Should a court be able to overrule that objection?

How do we balance the importance of existing or *anticipated sibling bonds* with the sanctity of the adoptive family? Do siblings have a fundamental right of visitation? Will creation of a right between siblings to post-adoption contact adversely affect the state's ability to recruit families to adopt children living in foster care?

SUPREME COURT RECOMMENDS LEGISLATIVE REVIEW

Recently, the New Jersey Supreme Court had an opportunity to consider these questions. In *New Jersey Division of Youth & Family Services v. S.S.*, a child named A.M.S., who is almost four years old, "lives happily with the only family she has ever known, a foster family that wishes to adopt her."[1] Her four older siblings have already been adopted by another family. The families have voluntarily maintained the sibling relationship. Since the sibling relationship was not in jeopardy, the Court chose not to address the constitutional questions. Rather, the Court indicated that the public policy concerns would benefit from some legislative review. Writing for a unanimous Court, Justice Barry Albin articulated issues for legislative consideration.

> In light of the goals of the Child Placement Bill of Rights Act, the [grandparent and sibling] Visitation Statute, and the Adoption Act, the Legislature may wish to weigh the importance of maintaining sibling relationships in the post-adoption context against the need for protecting parental autonomy and the harmony of the new family unit, and ensuring the success of our adoption system.[2]

In its opinion, the Court identified other state statutes that address post-adoption sibling visitation.[3] While a few states have statutes authorizing post-adoption visitation, it is more common for statutes to permit the adoptive parents and birth family to enter into an agreement for post-adoption contact and/or to authorize courts to enforce such a consent agreement. Some states prohibit a sibling from seeking contact after an adoption is finalized.

No one questions that sibling ties are important. In the best of all worlds, all adopted children would know their siblings, half siblings, birth parents and relatives. All adoptions would be cooperative or open, permitting interaction and ongoing dialogue between the families. In fact, in the ideal world we would not have adoptive homes because all children would live with their birth parents, not needing placements with other families to protect them from abuse and neglect. But we do not live in an ideal world. Many children removed because of abuse and neglect cannot return home and need adoptive families to raise them. These questions raise complicated issues, not easily resolved when applied to real family situations.

Concern has been expressed about any law that *mandates* post-adoption sibling contact for several reasons. Critics indicate that such a law would:

- Interfere with the autonomy of the adoptive family,
- Further limit an already dwindling pool of prospective adoptive parents,[4] and
- Require supports that do not exist.

While continued contact between siblings should be encouraged, additional legal obligations should not be imposed on adoptive families, especially when the supports needed to implement such mandates do not exist. A thoughtful approach is needed. A suggested first step is to obtain input from experts, as well as foster and adoptive families, perhaps through a task force similar to the New Jersey Assembly Task Force on Grandparenting, which held public hearings in 1999 to determine what supports were needed by grandparents and other relative caregivers.[5] The Supreme Court noted an absence in the record of "expert testimony comparing the importance of existing or anticipated sibling bonds to the sanctity of the adoptive family."[6]

SIBLING RELATIONSHIPS ARE IMPORTANT

Some argue that there is nothing more precious than a sibling relationship, one established through shared experiences of life. A sibling relationship may be the longest lasting relationship most people have; longer than relationships with parents, spouses or children.[7] A bond exists in children raised in well-adjusted families, and arguably the bond is stronger between brothers and sisters from dysfunctional families. "They learn very early to depend on and cooperate with each other to cope with their common problems."[8]

The author believes siblings entering foster care should be placed together and remain together. Most child welfare experts agree that siblings can offer each other a distinctive and beneficial kind of emotional support, especially if they had previously lived together in households with parents who are abusive or neglectful. New Jersey's *Child Placement Bill of Rights*[9] requires that every effort be made to place siblings together. The policy of the Division of Youth & Family Services (DYFS) is to make every effort to place siblings together, although this does not always happen.

According to DYFS statistics, groups of two or three siblings are placed in the same home 63.5 percent of the time. However sibling groups of four or more live in the same home less than 30 percent of the time.[10] It can be difficult to find homes for large sibling groups. Many children entering foster care have special needs, perhaps due to substance abuse by the mother or the trauma of movement through several foster homes, which require more attention. Siblings may have different fathers. It may be challenging for a DYFS case manager to find and maintain a placement for a sibling group with difficult or defiant behaviors. Sometimes siblings are not together simply because the case manager did not check to see if a child had older brothers and sisters.

Not all sibling relationships are through blood. Consider the example of three siblings entering placement who are placed together. Another child (call him John), born three years later to the same mother but a different father, is placed into another foster home. John never experiences those shared events that create and solidify the sibling bond with his three older siblings. Instead John develops a relationship with the children in his foster home. Although not related by blood, these children become John's brothers and sisters. Through their shared experiences of life, they develop the sibling bond that the literature identifies as being special and in need of protection. John is eventually adopted into that home in part because of that psychological bond, and they become his legal family. Is it appropriate to disrupt that sibling bond at a later date to protect a blood sibling relationship that never existed?

> It is not the children's job to sacrifice their new families to fix bad social work practice. If the family is loving and safe, leave the child where he is planted and blooming. Child-to-mother attachment occurs before sibling-to-sibling attachment. Do not ask a child to give up her primary bond to her parent to establish, [rather than] preserve a relationship with a stranger who happens to have shared the same womb at a different time.[11]

SIBLING VISITATION CAN BE COMPLICATED

If it is not feasible to place siblings together, DYFS is expected to facilitate ongoing contact between siblings while they are in the agency's care. But imagine the DYFS case manager was not aware of John's older siblings when he was placed, and does not arrange sibling visits. No other participants in the litigation ask the judge to order visits. Not knowing of their existence, John cannot miss his siblings. Further imagine that the three older siblings were placed with a paternal relative, not related to John. Should the three older blood-related siblings have the right to demand visits with John even over the objection of John's parents? What if the siblings seeking visitation have returned to the birth family and the adoptive family does not think it is in their child's best interest to have contact with the birth family? If the child entered foster care or the parental rights were terminated because of parental drug addiction and/or physical abuse or neglect, the adoptive parents' objection may be justified.

Logistics is another area to consider. Families may live at different ends of the state, or even in another state. Continued contact becomes difficult to implement. DYFS is no longer involved to facilitate the visits.

Parents set rules and standards for their children. Parenting styles differ from home to home. If the adoptive family objects to the lifestyle of the birth family, this would be a reasonable consideration when deciding the issue of sibling contact.

Establishing an ongoing visitation plan creates an expectation for the child that more visits will occur. This can be a very positive thing. But what if a sibling initiates contact, obtains a court order for ongoing contact, but then does not continue to visit? The failure to follow through may have a devastating impact upon the adopted child, leaving the adoptive family to deal with the consequences. Is the state willing to fund support services to help families facilitate these visits and identify and then address the aforementioned ongoing problems?

NEW JERSEY ADOPTION LAW

Once the adoption is finalized in New Jersey, the adoptive parents have exclusive responsibility for and authority over their child.

> The entry of a judgment of adoption

> shall establish the same relationships, rights and responsibilities between the child and the adopting parent *as if the child were born to the adopting parent* in lawful wedlock.[12] [*emphasis added*]

In New Jersey, there is no difference between a biological parent and an adoptive parent.

> The intent of the Legislature is to promote the creation of a new family unit without fear of interference from the natural parents.[13]

Both natural and adoptive parents retain the same rights, both incur the same obligations. As parents then, should not the adoptive parents be able to determine the extent of the child's contact with individuals outside the immediate family?

The United States Supreme Court has long recognized the fundamental right of parents to make decisions regarding the upbringing of their children.[14] The right of parents to enjoy a relationship with their children is of constitutional dimension.[15] Both federal and state constitutions protect the integrity of the family unit.[16]

Moreover, an adoptive family needs the opportunity to grow and develop as an autonomous family. Experts say that adoptive parents need to feel that they have become the child's rightful parents, legally and emotionally. "A fear that the biological family may come back to claim the child, or the biological family's actual, ongoing involvement in the child's life may hinder this bonding process." Yet limiting contact with biological siblings may worsen a child's feeling of abandonment and alienation.[17] So the right of siblings for post-adoption contact needs to be balanced against the need for parental autonomy. The author believes we need to recognize that the adoptive parents have a compelling reason to decide what is in the best interest of their child.

NEW JERSEY GRANDPARENT AND SIBLING VISITATION STATUTE

New Jersey's first grandparent visitation statute was enacted in 1972.[18] The statute was amended in 1987 to allow siblings to apply for visitation. Prior to 1993, only families disrupted by death, divorce or separation were subject to an application of a grandparent or sibling seeking visitation.[19] The statutory amendments in 1993 expanded the scope of grandparents' and siblings' visitation rights and removed the requirement that the birth parents be deceased or divorced.

That same year, major revisions were made to New Jersey's adoption laws. The New Jersey Supreme Court had an opportunity to review the legislative history of both sections of law when deciding *In the Matter of the Adoption of a Child by W.P. and M.P.* in 2000. The Court determined that the Legislature did not intend the Grandparent Visitation Statute to apply to situations where the child is adopted by non-relative adoptive parents.[20]

A judicial review of the legislative history revealed that the overarching purpose of revising the adoption statutes was to facilitate and encourage adoptions.[21] Moreover, the Legislature had specifically rejected a provision permitting post-adoption contact between a child and biological family with the consent of the adopting parent. "The Grandparent Visitation Statute must not be interpreted to qualify or condition an adoption."[22] The Court also stressed the needs of the adoptive family.

> An adoptive family must be given the right to grow and develop as an autonomous family, and must not be tied to the very relationship that put the child in the position of being adopted. Any other ruling would relegate the adoptive parents to 'second class' status.[23]

ARE ADOPTIVE PARENTS SECOND-CLASS CITIZENS?

Through the selection, training, and licensing of the resource parent, DYFS is saying that this individual is able to parent. Through the adoption process it is being stated that the adoptive parent loves the child and will act in the child's best interest as if the person gave birth to the child. Since the state is not and should not be a parent, the author feels the adoptive parent should be allowed to exercise parental authority. Compelling visitation over the objection of the adoptive parent could result in the undermining of their authority and ability to make parental decisions in other areas of the child's life. Additionally, it may cause potential adoptive parents to think twice about getting involved with the child welfare system.

Anecdotal evidence suggests that many adoptive parents are willing to maintain sibling contacts. However, they want to be able to choose to schedule visits with their child's birth family and to end or limit the contact if it becomes detrimental to their child without having to go to court. In mandating sibling visitation post-adoption over the objection of the adoptive parent, would not the Legislature be telling adoptive parents that they are less than real parents, giving them second-class citizen status? Wouldn't the implication be that they are not trusted to do what is best for their child, that they have more responsibility than birth parents, but less rights?

Why should the state continue to tell an adoptive family how to raise their child? To some the constant intrusion is insulting. The author believes that if the issue is that we do not trust the adoptive parent to act in the child's best interest, then we need to reassess the selection training and licensing processes. The solution is not to impose more obligations on already stressed adoptive homes and create anxiety in the adoptive parent and child by the threat of further litigation.

A statute providing the right to seek visitation permits any applica-

tion to be filed. What if a request for visitation is denied, thus finding the adoptive parent's denial of contact justified? Will the state pay that parent's legal fees? Will the state step in to fix the disruption?

THE NEEDS OF SEPARATED SIBLINGS

Children taken out of their biological parents' homes and placed into foster care or adoptive homes have likely endured a considerable amount of hardship. Separation from their biological siblings may compound feelings of loss and abandonment. Continued contact may ease those feelings. Depriving the child of the relationship may have lasting effects on the child's development.

Experts arrive at different conclusions regarding whether continued contact with the birth family—including parents, siblings and other relatives—is beneficial or detrimental. Some psychologists maintain that the legal status of an adoption does not erase these relationships from the child's memories; nor does it resolve any conflicts they generate or perpetuate. Therefore, the best way for the child to come to terms with his or her past is if the natural parent remains a live presence, not a fantasy.[24] Other experts favor a clean break with the past, letting the adoptive relationship take hold psychologically. They argue that severing the ties with abusive or neglectful parents is a better way to ensure that the child's adjustment to the adoptive family is not jeopardized by the conflicting loyalties produced by continued contact.[25]

More importantly, "there is not much empirical research on the short- or long-term consequences of open adoption for children whose biological parents agreed to resolve a contested adoption in exchange for a promise of continued contact, or whose biological parents had their parental rights terminated for child abuse or neglect."[26]

In the case of a very young child, some argue that children placed with adoptive parents shortly after birth are not likely to have formed stable bonds with biological parents or other family members with whom they have never lived. "[I]nfants are much more likely to adjust to their new surroundings and to perceive themselves as 'belonging' to their adoptive parents."[27] If the adopted child is an infant separated from his or her sibling before any bond was formed, it is more difficult to justify infringement on adoptive parents' autonomy. That is not to say, however, that establishing and maintaining a relationship would be a negative experience.

COOPERATIVE OR OPEN ADOPTIONS

Any contact between a birth family and an adoptive family before and/or after an adoption has been finalized falls within the definition of an open or cooperative adoption. The range of arrangements regarding contact can be informal through an occasional exchange of letters, phone calls or photos, or a formal written contract involving scheduled visitation.

Supporters of post-adoption contact see the deprivation of the sibling relationship having a negative impact on the child's development.[28] Those opposed to post-adoption contact argue that some families may not come forward to adopt children who need homes, fearing the potential ongoing involvement of an abusive birth parent or one with a history of drug and/or alcohol problems, or that ongoing contact will interfere with the autonomy of the adoptive family. Further, once an adoption is finalized DYFS is no longer involved to facilitate visits, which presents some logistical concerns.

One of the greatest barriers to open adoption is the potential for continued court involvement. Even those supporting open adoptions recognize the fact that disputes arising subsequent to the agreement, as the circumstances of both families and the needs of the child change, may create more post-adoption litigation. There also is concern that enforceable open adoption agreements may discourage adoptive families who would have considered open adoption on an informal basis from considering such an arrangement or from becoming adoptive parents altogether.

OTHER STATES' STATUTES ADDRESSING POST-ADOPTION CONTACT

In the mid-1990s, states began to enact statutes that recognize the possibility that an open adoption arrangement may be compatible with a full and final legal adoption.[29] While most statutes address contact for birth parents, some address contact for other birth relatives including grandparents and siblings.[30] Some states' statutes are permissive, meaning that post-adoption contact agreements are permitted, but do not mandate enforcement. Others simply protect the visitation that was established by court order prior to the adoption. As of 2003, five states required the parties to attend mediation before an application is filed with the court.[31]

WHAT TO DO IN NEW JERSEY?

Post-adoption sibling contact is a type of open or cooperative adoption. There are different levels of openness that can be successfully achieved in some DYFS cases. It may be sufficient for the families to meet and exchange information, pictures, and/or add to the child's life book. Some families may be comfortable with continuing the contact through letters, telephone conversation and emails. Others may wish to arrange ongoing visits. The author feels that while we should remain focused on the child when considering such arrangements, we also must be realistic about logistical issues and recognize that people's living arrangements change over time.

Anecdotal evidence suggests that foster parents who adopt oppose mandatory contact. They recognize the child's need to maintain existing

relationships, but it should be on a voluntary basis. Once an adoption is finalized these parents do not want to have to seek the court's permission to limit the contact if it becomes detrimental to their child.

Some articles and other advocates argue that children have a fundamental interest in sibling contact, thus creating a constitutional right to such contact.[32] Some opine that it is unlikely that the U.S. Supreme Court will declare that siblings have a fundamental right of association anytime soon.[33]

Surely the interests of children must be balanced in the equation, but it is important to remember that adopted children do not exist in a vacuum. Visitation affects adoptive parents and newly formed adoptive families whose interests also are significant. The author believes we want a system that encourages prospective adoptive parents to adopt, or at least one that does not discourage families from adopting because of fear or additional obligations.

Recognizing the movement toward creating cooperative/open adoption arrangements, the author urges and recommends that the Legislature first create a task force to solicit input from young adults who have aged out of the foster care system, adoptive families, foster families, those who recruit adoptive homes, and psychological experts regarding the pros and cons of post-adoption contact between siblings coming out of foster care and other members of the child's birth family. The author further recommends that the needed time be taken to consider Justice Albin's suggestion to "weigh the importance of maintaining sibling relationships in the post-adoption context against the need for protecting parental autonomy and the harmony of the new family unit, and ensuring the success of our adoption system." In this way, the author concludes, we can all learn something from the process, and hopefully create a system that is supportive of maintaining sibling contacts without trampling on the rights and needs of adoptive families. ■

ENDNOTES

1. *New Jersey Division of Youth & Family Services v. S.S., In the Matter of the Guardianship of A.M.S.,* Minor Child (A-48-September Term 2005) 187 N.J. 556 (2006).
2. *Id.* at p.564.
3. *Id.* at fn1; fn2, fn3 and fn4.
4. Some argue that the reason more and more people are adopting children born outside the U.S. is because of a perception that this will ensure that they do not have to deal with the birth family. www.adoptioninstitute.org reports that international adoptions more than doubled between 1991 and 2001. Eighty-nine percent of the children adopted during those 11 years were under the age of five. N.J. Foster and Adoptive Family Services supports the education and training of families regarding post-adoption sibling visitation to encourage them to consider it, but opposes mandating post-adoption contact, see www.fafsonline.org for position statement.
5. The New Jersey Assembly Task Force on Grandparenting held public hearings to hear from grandparents and other relatives parenting children about what their needs were, issuing a report in Jan. 2000. Those hearings and report helped support the introduction of the kinship legal guardianship statute, New Jersey's Kinship Navigator Program and financial subsidies for both DYFS and non-DYFS kinship placements: first state recognition of grandparents and other relative caregivers needing financial support.
6. *New Jersey Division of Youth & Family Services v. S.S., In the Matter of the Guardianship of A.M.S.*, Minor Child (A-48-September Term 2005) 187 N.J. 556, 564 (2006).
7. Seifert, Meghann M., Note: Sibling Visitation After Adoption: The Implications of the Massachusetts Sibling Visitation Statute, 84 *B.U.L. Review* 1467, 1987-1490. (December 2004); Patton, William Wesley; The Status of Siblings' Rights: A View into the New Millennium, 51 *De Paul L. Rev.* 1 (Fall 2001); Marrus, Ellen; "Where Have You Been Fran?" The Rights of Siblings to Seek Court Access to Override Parental Denial of Visitation; 66 *Tenn. L. Rev.* 977 (Summer 1999); The Sibling Bond: Its Importance in Foster Care and Adoptive Placement at pgs 1-2, Gloria Hochman, Ellen Feathers-Acuna, and Anna Huston, National Adoption Information Clearinghouse; Administration for Children and Families, U.S. Department of Human Services (1992); http://naic.acf.hhs.gov/pubs/f_siblin.cfm.
8. *The Sibling Bond* , *supra* at pgs 1-2.
9. N.J.S.A. 9:6B-1 *et seq.*
10. *See ACNJ Child Protection Data Report*, Appendix B reporting 2005 DYFS statistics.
11. Kupecky, Regina, *Womb Mates: When Sibling Rights & Child-Parent Attachment Clash* Adoptalk (North American Council on Adoptable Children (2002).
12. N.J.S.A. 9:3-50(b).
13. *In the Matter of the Adoption of a Child by W.P. and M.P.*, 163 N.J. 158, 169-170 (1998).
14. *See e.g., Wisconsin v. Yoder*, 406 U.S. 205, 231-34 (1972) (recognizing parents' rights to make decisions regarding the religious upbringing of their children); *Prince v. Massachusetts,* 321 U S. 158, 166 (1944) (*citing Pierce v. Soc'y of Sisters*, 268 U.S. 510 534 (1925) ("It is cardinal with us that the custody, care and nurture of the child reside fist in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing parents' rights under the 14th Amendment to determine what subjects their children will study.).
15. *In re Guardianship of K.H.O.,* 161 N.J. 337, 346 (1999) (*citing Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed.2d 551 (1972)); *In re Adoption of Children by G.P.B. Jr.,* 161 N.J. 396, 404 (1999); *Adoption of Children by L.A.S.,* 134 N.J. 127 (1993); *A.W., supra*, 103 N.J. 591. Parents have a fundamental liberty interest in raising their biological children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982).
16. *Stanley, supra*, 405 U.S. at 651, 92 S. Ct. at 1212-13, 31 L. Ed. 2d at 558-59; A.W., supra, 103 N.J. at 599.
17. 84 *B.U.L. Rev.* 1467, 1486-87.

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COMMENTARY

Professionalism: Where has it Gone?

by Marilyn J. Canda

> "What is hateful to you, do not do to your fellow; that is the whole Law: the rest is interpretation."
>
> Hillel (30 B.C.-10 A.D.)

When we, as attorneys, violate the Rules of Professional Conduct (RPCs) we are subject to disciplinary action. Professionalism, however, is a much broader, undefined concept that requires us to carry out our responsibilities as attorneys with civility, diligence, courtesy and honesty. To be a true professional is to take seriously our role as attorneys, to strengthen the morality of our profession and to earn the respect of the public.

It was not until my third year of law school that I was given the most valuable advice of my career thus far, from a very wise professor (a former judge). In fact, there is rarely a day that goes by when I do not reflect upon his words: "As a lawyer, there is nothing more valuable to you than your reputation."

When in doubt, when consumed by anger or frustration, when tempted to act out of revenge or rage, remember these words, and do not react in haste. Carefully consider the value of our reputations and act with professionalism by extending courtesies without regard to the way in which you have been treated. No adversary is worth losing our most valuable asset as an attorney—our reputation.

> "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."
>
> Elihu Root

As family lawyers, we are required to act in a variety of conflicting roles. For example, since the very nature of our profession is to deal with clients who call upon us to examine extremely personal and sensitive issues, we must be a counselor, listening carefully and treating with consideration the client's emotions. We also are expected to be fierce advocates, battling our adversaries in pursuit of the best result possible for our clients. Finally, we are professionals, officers of the court, expected to be diligent, courteous and truthful. Inherent in these dueling roles are serious ethical issues and moral conflicts.

Family law in particular involves embittered litigants who face the loss of all things they hold dear—a spouse, children, a home, and money. There are expressions of anger and betrayal that lead to an overwhelming desire to do harm or seek revenge. We have an obligation to explain to the client, no matter how much he or she is willing to pay, that litigation cannot be conducted for the purpose of causing emotional and financial harm to the other party. As appealing as this strategy may appear to the client in the heat of the moment, it may lead to the financial devastation of *both* parties. Most importantly, if children are involved it will destroy any possibility for the parties to effectively co-parent.

Although some may say that it is our job to represent our client, and not the child, we cannot pursue a course of action we know will bring harm to a child.

It is inevitable that during the course of the litigation, our clients will ask us to behave in a manner that offends the notion of professionalism. This occurs when an adversary requests an adjournment and your client insists you oppose this very reasonable request. Or when you notice a mistake made by your adversary that inures to the benefit of your client and your client insists you remain silent. Most often issues with clients arise when you properly follow the Rules of Court, only to have your adversary break the rules time and time again without consequence. Naturally, our clients insist that we break rules in response. Finally, one of the most difficult situations is when one spouse refuses to allow the other parent to exercise parenting time with the children in order to harass the parent. Although your client insists that the reason he or she has created is legitimate, you know it is being done out of retaliation and anger.

In the face of these demands, we must constantly remind ourselves that true professionals do not cheat to win; we do not embarrass our colleagues or refuse professional courtesies. We do not do everything our clients tell us to do without exercising our responsibilities as counselors to *counsel* them. We do not defend our client's actions, when clearly the actions committed are indefensible. Most importantly, we do not assist our clients in bringing harm to a child for his or her own selfish reasons. These are the cornerstones of being an exceptional lawyer.

ADVISING CLIENTS OF ALTERNATIVES TO LITIGATION

While in some cases prolonged litigation and the need to conduct complicated discovery is unavoidable, clearly the trend in family law is to encourage settlement through alternative dispute resolution (ADR). In fact, the Court Rules now require that we specifically advise our clients about these alternatives. ADR allows the clients to resolve their disputes quickly and amicably, significantly reducing litigation fees and expert fees, enabling litigants to move on with their lives, and most importantly, preserving the parties' relationship for the sake of the children.

Another approach, which is often a successful one and clearly underutilized, is to exchange case information statements at the commencement of your representation and schedule an immediate four-way conference to discuss the parties' issues and expectations. Often, holding these meetings early on will give the attorney some perspective on the case by meeting opposing counsel (if you have never worked together before) and even more importantly, meeting and assessing the credibility of your client's spouse. Based upon such a meeting you can determine whether ADR and/or settlement negations are appropriate. Often, this will ultimately reduce the fees in a case, undoubtedly leading to more satisfied clients and more client referrals. More importantly, you will preserve the parties' self-respect, encourage civility and save family relationships in the process.

NOT SO INNOCENT SPOUSE— NOT SO INNOCENT LAWYER

> "Our profession is good, if practiced in the spirit of it; it is damnable fraud and iniquity when its true spirit is supplied by a spirit of mischief-making and money catching."
>
> Daniel Webster
>
> Letter to James Hervey Bingham, 19 Jan. 1806, in Papers of Daniel Webster: Legal Papers 1.69 (Alfred S. Konefsky & Andrew J. King eds. 1982).

Refusing to assist clients in an abuse of the process to achieve a favorable result in family law matters is not only our duty as professionals, it is required by the Rules of Professional Conduct:

> RPC 2.1 Advisor
>
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral, economic,* social and political factors, that may be relevant to the client's situation.
>
> RPC 3.4 Fairness to Opposing Party and Counsel
>
> A lawyer shall not:
>
> (g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.
>
> RPC 8.4 Misconduct
>
> It is professional misconduct for a lawyer to:
>
> (d) engage in conduct that is prejudicial to the administration of justice

While we have an obligation to zealously represent our clients, we must do so within the bounds of the law and ethical standards. Often we get caught up in the pursuit of victory, and in our quest to satisfy our clients often lose sight of the fact that we cannot engage in behavior that not only violates the letter of the RPCs, but also violates the spirit of professionalism. We must advise the client that the strategy is not ethical, fair and/or reasonable, and for the sake of our reputation, we must refuse to assist in its implementation. Unfortunately, sometimes in representing our clients we come across those who may not have lived a life as honest as our own. Often we learn of these infractions not at the inception of the case, which would have given us the opportunity to refuse to represent the client, but during the course of our representation, after we are invested in that case. If we do not choose at that point to withdraw from the case and we continue representation of the client, we are often called upon to make very difficult decisions.

An example of such questionable strategy has been termed by one of my colleagues as a scorching the earth approach, which means that if one spouse is going down in flames, that spouse will take along with them whomever they can, including their spouse and children.

An example of this scorched earth approach can be seen in a case where there are issues of unreported cash income. Upon the dependant spouse learning of the potential magnitude of the situation, he or she requests the disputes be resolved by way of settlement or arbitration. However, the wage-earning spouse refuses this request, and instead insists on a trial, specifically in an attempt to extort from the dependant spouse a less-than-equitable result. Ultimately the fear of the unknown forces the dependant spouse to agree to accept a settlement that is less than fair. Unfortunately the children are often harmed in the process.

An incident such as this gives rise to a number of ethical issues for the attorney representing the not-so-innocent spouse. If an attorney devises, with his or her client, a litigation strategy that forces a dependant spouse to settle a case out of fear of criminal prosecution (of either spouse), this conduct may violate Rule 3.4, which prohibits an attorney from threatening to present criminal charges in order to obtain an improper advantage in a civil matter. Moreover, in implementing such a strategy the attorney is clearly engaging in conduct that is prejudicial to the administration of justice (Rule 8.4) by effectively preventing the dependent spouse from getting his or her day in court.

Another example of a strategy that gives rise to serious ethical issues is when the supporting spouse threatens to file for bankruptcy, which will put the assets at risk, solely for the purpose of forcing the dependant spouse to accept an inequitable settlement. By employing such a strategy, the supporting spouse's attorney is again clearly engaging in conduct that is prejudicial to the administration of justice. Since the dependent spouse is being harmed in the process, as well as the children, the strategy is indefensible.

Finally, there is the case of a domestic violence complaint that has been filed by a spouse the day after that client has asked us: "How do I get my spouse out of the house?" The victim spouse insists that domestic violence occurred and we must assist in the prosecution of this action. Although when we *voir dire* the client the story sounds credible, and you have no proof that the client is being untruthful, your gut tells you that the story is not true, and that the client is using the domestic violence law to remove the spouse from the home. Under these circumstances, what is our obligation to the client, to the court and to ourselves? Do we proceed as directed by the client, or do we refuse to prosecute the complaint on the basis that something in our gut tells us that domestic violence has not occurred?

Again, since it is our obligation to zealously represent our client's interests, it is not always clear where and when a line should be drawn. There always will be ethical issues and considerations that will (or should) cause an attorney serious pause. However, just because we are not clearly violating a Rule of Professional Conduct, or the letter of the law, we cannot conclude that our conduct is acceptable.

Family court is a court of equity. Equity is defined by *Black's Law Dictionary* as:

> Justice administered according to fairness as contrasted with strictly formulated rules of common law…The term "equity" denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse with men and men.

Although we must represent our clients to the best of our ability, when we as family law attorneys behave in a way that offends the definition of equity, we offend our profession, we lose the respect of the public and most importantly, we do families harm. This practice must be discouraged by attorneys and judges, and attorneys engaging in this behavior must be sanctioned. There is no place for this behavior in our practice.

The practice of family law is often frustrating and emotionally demanding. However, before we act and retaliate out of anger or frustration, before we stand up on behalf of our client to defend a clearly indefensible position, we must remember that we are professionals and must act as such. Moreover, since we deal with family relationships and issues that clearly affect the welfare of children, we should do no harm to these children. No one case is ever worth compromising our values and damaging our reputation. As an attorney, without our reputation and self-respect, we have nothing. ■

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Post-Adoption Sibling Contact

Continued from Page 124

18. N.J.S.A. 9:2-7.1 (L. 1971, c.420, §1, effective Feb. 1, 1972).
19. *W.P, supra.*, 163 N.J. at 165.
20. *Id.* at 168 and 171.
21. *Id.* at 173.
22. *Id.* at 174.
23. *Id.* at 175-76 *citing Mimkon v. Ford*, 66 N.J. 426, 441 (Clifford, J., dissenting).
24. Post-Adoption Contact With Biological Parents, 2-13 *Adoption Law and Practice* §13.02 at page 7 (Matthew Bender & Company, Inc. 2004).
25. *Id.* at pgs 1 and 10; 84 *B.L.U. Rev.* 1467, 1489
26. Adoption with Continuing Contact: 'Open Adoption"—An Overview of Contemporary Law and Policy, 2-13B *Adoption Law and Practice* §13-B.01 at page 4 (Matthew Bender & Company, Inc. 2004).
27. Post-Adoption Contact With Biological Parents, 2-13 *Adoption Law and Practice* §13.02 at page 3 (Matthew Bender & Company, Inc. 2004).
28. 84 *B. L.U. Rev.* 1467, 1489.
29. Adoption with Continuing Contact: "Open Adoption" – An Overview of Contemporary Law and Policy, 2-13B *Adoption Law and Practice* §13-B.01 (Matthew Bender & Company, Inc. 2004).
30. *Cooperative Adoptions: Contact Between Adoptive and Birth Families After Finalization,* State Statutes Services 2003; National Adoption Information Clearinghouse, Administration for Children and Families, U.S. Department of Human Services; http:/naic.acf.hhs.gov/general/legal/statutes/cooperative
31. *Id.* The five states identified are Arizona, Connecticut, Louisiana, Minnesota and Oregon.
32. Ferraris, Angela; Comment: Sibling Visitation as a Fundamental Right in *Herbst v. Swan*; 39 *New Eng. L. Rev.* 715 (Spring 2005); Markel, Christine D., Notes and Comments: A Quest for Sibling Visitation: Daniel Weber's Story, 18 *Whittier L. Rev.* 863 (1997); Post-Adoption Contact With Biological Parents, 2-13 *Adoption Law and Practice* §13.02 at pg. 11 (Matthew Bender & Company, Inc. 2004).
33. *The Status of Siblings' Rights*, *supra* at pgs. 24-25, fn 123.

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Electronic Discovery: Rules and Tools in the Age of Connectivity

by Frank J. LaRocca

The rapid advance of the digital revolution has had an impact upon every aspect of our personal and professional lives. From systems widely used, such as digital faxes, voicemail, instant messages and email, to more automated data management systems and the use of portable devices, the ability to communicate simplifies our work in many ways. However, this state of constant connectivity makes electronic data discovery much more complex. In the highly interpersonal area of family law, this information can be crucial in proving many issues in your case. Within the last three months, both the Federal, and New Jersey Rules of Court have been amended to address this emerging issue. This article will provide an overview of the New Jersey Court Rule amendments and some insight into issues we are likely to face in using these rules in litigation and in practice.

THE NEW RULES

With so much attention paid to the recent amendments to the federal rules, attorneys may have overlooked the Sept. 2006 amendments to the New Jersey Court Rules dealing with electronic discovery. The most significant change is reflected in just three simple words added to Rule 4:10-2, which expand the scope of discovery to include "electronically stored information." As will be discussed, the implications of this amendment are anything but simple.

- Scope of Discovery—Rule 4:10-2 requires the production of electronically stored information unless it is "not reasonably accessible" due to an undue burden or cost. This provision is subject to good cause being shown by the requesting party for the need of this information, despite such burden. Rule 4:10-2(f).
- Case Management—Rule 4:5B-2 requires the court to "address issues relating to discovery of electronically stored information" at the initial conference. Although this language was not specifically added to Rule 5:5-7, a common sense reading of the rules now requires that these issues be addressed by the court at the initial case management conference.
- Subpoenas—Rule 1:9-2 provides that a subpoena authorized by Rule 1:9-1 may now require the production of electronically stored information.
- Interrogatories—Rule 4:17-4 allows a responding party to provide answers in the form of electronically stored information.
- Notice to Produce—Rule 4:18-1 allows a party to request electronically stored information and to specify the format in which such information should be produced.
- Sanctions—Rule 4:23-6 requires exceptional circumstances to be demonstrated before the imposition of sanctions against a party who fails to produce electronically stored information lost as a result of routine, good faith operation.

WHAT IS ELECTRONICALLY STORED INFORMATION?

Now that it is specifically included within the scope of discovery, what is electronically stored information? The most common forms of this information are the various types of email communications, and the sometimes large and complex attachments found therein. Attorneys also should inquire into other "non-traditional" communication tools, as well as specific internal and external data management systems used by the parties, or the business, that may shed light on many financial issues in the case.

- Email. This mode of electronic communication is considered by many attorneys as a digital smoking gun during litigation. Standard email is what is offered through an office network system using a local program for information management and the Internet to deliver the messages to out-of-network recipients. Generally, this information is maintained on the local computer or network, and can be produced by the user or IT manager of the business.
- Web-based Email. This mode of electronic communication is conducted remotely by service providers such as hotmail, AOL, gmail and the like. This information is more difficult to obtain due to the location of the electronically stored information and certain privacy rights discussed below. However, email messages through web-based accounts are recoverable by a forensic review of the computer's temporary files. In fact, parts of a message (fragments) may be identified long after the message has been deleted.
- Instant Messaging. This mode of electronic communication is an internal or external direct message by a separate program that allows access to the network for communication and file sharing. These records also are required to be maintained in certain industries as

part of federal compliance. With instant messaging (IM), users are generally under the misimpression that their *conversations* are not recorded. However, enterprise IM servers can be set up to log all communications and, even if the logs are deleted they may still reside on the computer and be discovered by a forensic examination of the hard drive.

- Voicemail. Now stored on digital systems, voicemail becomes an electronic form of data easily stored and retrieved by an individual or business. In fact, many service providers now allow voicemail messages to be attached to emails and delivered to the recipient as a sound file.
- Internal Systems and Productivity Tools. An important aspect of any investigation is to identify the programs and databases a company uses, and design a plan to effectively analyze the relevant information stored in the company's data systems. In family law, data on personal and business finances, vendor contacts, and accounting programs will contain valuable information on marital lifestyle and valuation of assets.
- Portable Devices and Other Storage Media. This mode of storage, communication and maintenance of electronically stored information is perhaps the fastest growing. PDAs such as the Palm Pilot, Treo, Blackberry and even the standard cell phone, is relied upon to maintain connectivity with business and personal contacts. Even the standard cell phone has the ability to calendar events, take notes, and most importantly, text message. Similar to IM conversations, many users believe that a text message is not recorded. However, if not available through a forensic review of the cell phone, this data may be available through the cell phone service provider.

Although the technology is rapidly changing, it is incumbent upon the attorney to inquire about and investigate this potential treasure trove of information. In order to effectively develop discovery and litigation strategies using these new tools of discovery, it is important to understand the historical perspective and the emerging nature of the law in this area.

USE FEDERAL LAW TO SUPPORT YOUR DEMANDS

While it may seem like a daunting task for the not-so-computer-savvy attorney, a working knowledge of federal law provides valuable insight into how, when and why this information may, or must, be available. In the wake of the Enron scandal, on July 30, 2002, President George W. Bush signed the Sarbanes-Oxley Act of 2002,[1] which he characterized as "the most far reaching reform of American business practices since the time of Franklin Delano Roosevelt." The intention was to make publicly held corporations more accountable, and to set guidelines for proper recordkeeping. In its simplest of forms, the legislation requires that all electronic business records, including emails, be stored for at least five years.

In furtherance of the act, the Securities and Exchange Commission (SEC) promulgated amendments to regulation 7 C.F.R. 240.17a *et. seq.* that specify the requirements for the maintenance and production of electronic records, more specifically defined to include any and all email or other electronic communications to and from clients used to make investment decisions. The regulations also call for criminal penalties for the destruction of electronic records (deleting of emails) that fall within such category.

While these regulations focus on broker dealer, client, and audit communications, they provide a common sense format for the preservation of records and verification of authenticity. In order to be compliant, a company must:

- Preserve the records exclusively in a non-rewriteable, non-erasable format;
- Verify automatically the quality and accuracy of the storage media recording process;
- Serialize the original, and, if applicable, duplicate units of the storage media, and time-date for the required period of retention the information placed on such storage media; and
- Store separately from the original, a duplicate copy of the record for the time required.

It follows that any email sent or received by any party working for a publicly held corporation will be available through federally mandated archives. Further, the production of electronic records directly from a bank or broker will include any electronic data sent or received by the institution in connection with the acquisition or sale of the asset. This evidence, at the time of the actual transaction, may lead attorneys to particularly relevant information that can have a tremendous impact upon issues of support and equitable distribution. Certainly, any demand for production may be met with a proper request for a protective order, or to limit disclosure of irrelevant information. As discussed below, any email with personal content will likely be produced.

PRIVACY ISSUES

A common roadblock in the discovery of electronically stored information may appear to be a claim that the information contained in emails may be private or privileged. However, emails and other electronic communications on company time have been knowingly held to be discoverable.

It may be surprising to learn that the use of email to communicate with a private attorney may not be privileged if company email or a company computer is used. In *Kaufman v. SunGard Invest. Sys.*[2] and *Curto v. Medical World Communications*,[3] federal district court judges in the District of New Jersey and the Eastern District of New York addressed this issue. In both matters, the focus was whether or not the employee had a reasonable expectation of privacy in emails exchanged with his or her attorney. In each case, the court's decision turned on whether the employer had implemented, and enforced, an electronic communications policy confirming that email is the property of the company, subject to review and monitoring. In *Kaufman,* the court held that "all information and e-mails stored on

the company computer systems were company property" and therefore, the plaintiff had no reasonable expectation of privacy in her communications with her own attorney.

In *Curto*, the court reached the opposite conclusion on this issue, holding that the party did not waive her right to assert the attorney/client privilege because she worked primarily from home, using an employer-owned laptop that was *not* connected to the employer's server. Also, she did not use the company email system, but rather a web-based account in her own name. Finally, because the employer in *Curto*, rarely, if ever, enforced the company computer usage policy, the court found that the employee had a reasonable expectation of privacy, with no resulting basis to vitiate the privilege.

Accordingly, despite the appearance of limiting language in Rule 4:10-2, attorneys have seemingly broad powers to uncover what a party, at the time of transmittal, believed was a private or privileged communication. A necessary byproduct of this legislation requires attorneys to take the necessary steps to insure that emails to clients, while at work, remain privileged and confidential. In this regard, an exception to the company policy for permitted and easily identifiable attorney/client communications can be established. This can be accomplished, with permission of the company, by identifying the communication as attorney/client-privileged information in the subject or header of the email, and confirming such a policy with the company in writing.

WHAT IS THE LAWYER'S PROFESSIONAL OBLIGATION?

The New Jersey Court Rules were only recently amended. However, federal practice has specifically addressed similar rules over the course of the last four years. The evolution of a lawyer's responsibility becomes clear when reviewing the District of New Jersey Local Civil Rule 26, which requires New Jersey attorneys to review their clients' computers and information management systems "to understand how information is stored and how it can be retrieved" for purposes of discovery. Even if an attorney is not practicing in the federal District of New Jersey, this rule offers all litigators best practice guidelines for effective electronic discovery case management. Attorneys have three broad duties: the duty to investigate and disclose, the duty to notify, and the duty to meet and confer.

- Duty to Investigate and Disclose—Requires attorneys to work with the client to review and create an inventory of the client's relevant information and storage systems. This allows counsel to prepare for the electronic document disclosure and to anticipate collection, review and production issues. If an attorney is on the side of production, understanding this data and its relevance early on will help him or her best represent the client.
- Duty to Notify—If on the requesting side, a letter at the beginning of the case seeking this information (and how it is stored and maintained) will set the stage for early production. This request for computer-based or other digital information is made prior to the initial case management conference, specifically identifying relevant categories of information being sought.
- Duty to Meet and Confer—Although it may seem like a novel concept to the family part litigator, attorneys have a duty to "meet and confer" to discuss specific issues relating to preservation, inadvertent waiver of privilege, deleted and legacy data, production, format, and cost allocation.
- Sanctions—While these duties and obligations may seem trivial, in the years since the implementation of the rule, courts have awarded sanctions of upwards of $500,000 when parties fail to preserve and disclose discoverable email evidence.

ETHICAL ISSUES: FOOD FOR THOUGHT

Although not yet mandated in state court, having a good working knowledge of the relevant federal rules and case law is imperative to ensuring proper preservation and production of electronically stored information. The recent local and federal rule amendments increasingly reflect the risk of sanctions, and malpractice actions, for failing to form an electronic information discovery strategy.

Attorneys also must be mindful of their own modes and methods of communication. Emails and text messaging, while convenient, can pose serious concerns if their review and receipt by a client has no privilege attached. An even bigger concern may be the electronic or digital message that is easy to overlook. Many attorneys have websites and email addresses prominently placed on our letterhead. It must be remembered that this is not only for marketing, but can be relied upon by judges, courts, and clients as a means to communicate, invited by the attorney. Several Rules of Professional Conduct can be implicated.

- RPC 1.4 Communication—A lawyer must inform a *prospective* client of how, when and where the client may communicate with the lawyer. With websites, and email addresses published therein, it is reasonable for the prospective client to believe that email is an acceptable form of communication. This rule also implicates the diligence provisions of RPC 1.3. Having published an email address, an attorney is bound by this ethical rule to be prompt and diligent in his or her communication. Moreover, as it relates to a prospective client made via an email contact, attorneys *must* make sure that they are aware, and advise the client, of any applicable statute of limitations.
- RPC 1.6 Confidentiality—A lawyer "shall not" reveal information relating to the representation of a client. Based upon the federal legislation, and case law, a simple email may violate this rule if measures to protect its confidentiality are not taken.
- RPC 1.7 and RPC 1.9 Conflict of Interest and Duties to Former Clients—Does an attorney's three-day series of emails with Jdoe@yahoo.com create a relationship that will give rise to a conflict if Mrs. Smith, the unknown spouse of Jdoe@yahoo.com, retains the

attorney in the future? As set forth in RPC 1.18, the answer is yes. A lawyer should have methods in place that clearly identify email contacts, and they should be included in any conflict-checking system.

- RPC 5.3 Non-Lawyer Assistants—An attorney's electronic communication policies, by rule, must extend to non-lawyers via *any* mode of email, text, or IM communication.

Based on the above rules, it seems that a lawyer must monitor all data and information that enters, and *leaves*, the law firm, even the garbage. Most of us are familiar with HIPAA (the Health Insurance Portability and Accountability Act), which sets forth more stringent procedures in order to obtain patient information. It also provides higher standards to protect digital and other communication in a doctor patient setting. Interestingly, this area of law has had dramatic implications on how pharmacies handle their trash. To be compliant, pharmacies now need to maintain specific and separate HIPAA trash disposals to be certified as destroyed in order to maintain patient confidentiality. Attorneys should pay attention to this principal and be careful to shred any and all client-related information before disposal.

The New Jersey family law attorney faces many challenges in practice and representation of clients. The recent rule amendments will certainly help in this regard. However, with this help, like it or not, comes an ever-evolving and expanding obligation to ensure that electronically stored (and other) data is properly disposed of and maintained for each client and for the attorney's overall practice. ■

ENDNOTES

1. 15 USCS §§ 7201.
2. 2006 WL 1307882 (D.N.J. May 10, 2006).
3. 2006 WL 1318387 (E.D.N.Y. May 15, 2006).

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