Commentary:
Celebrate: The MESP is 35

by Christopher R. Musulin

Congratulations are in order: The Matrimonial Early Settlement Panel (MESP) Program recently celebrated its 35th year in the state of New Jersey. When the first MESP took place, Jimmy Carter was in the White House, gasoline was 55 cents a gallon and Hotel California by the Eagles was the number-one record in America. What started during those less-complicated times as an informal process among colleagues "rapidly grew into the most significant tool our Court system now uses to assist matrimonial litigants in resolving their disputes."[1]

Although it has been the subject of examination by various judicial and bar committees over the ensuing years, the MESP Program has remained largely the same as it was in 1977, despite enormous changes in the world and in the practice of law. It is enlightening to review the discussions and conclusions of the numerous committees and working groups over the decades to better understand the historic purpose of the program and further determine whether any changes or modifications are appropriate.

All Things Good about Lawyering

Many practitioners do not remember a world without the MESP Program. It has become a central fixture of the matrimonial practice landscape. Its virtues are both totally unique and abundant.

- The MESP Program represents the ultimate expression of cooperation between the Judiciary and the bar association.
- The MESP Program incorporates alternative dispute resolution into the traditional litigation process.
- The MESP Program forces litigants to come to the courthouse, often for the first time, to experience the stress, expense and formality of court proceedings—the ultimate reality check.
- The MESP Program challenges the legal writing and oral presentation skills of each attorney, forcing counsel to refine often complex information for purposes of effectively advocating positions on behalf of clients.
- The MESP Program is formal, yet more relaxed than a trial or motion practice. It commands a unique mixture of advocacy and camaraderie since the panels are often conducted behind closed doors with long-familiar attorneys from the local bar association.
- The MESP Program is incredibly effective, assisting in the settlement of approximately 75 percent of the cases submitted for consideration.[2]

Genesis of the Program

The MESP Program traces its origins to the year 1977 in Morris County, when a group of attorneys began meeting informally in an attempt to assist each other in settling the financial aspects of divorce matters. The meetings took place at both the offices of the private attorneys and at the courthouse. The concept was then introduced to the neighboring counties, and by 1981 over half of the county bar associations in New Jersey began implementing the MESP Program with greater formality, including the adoption of specific program criteria.[3]

It is fair to conclude that the MESP Program was created as an indirect reaction to the 1971 adoption of a version of the Uniform Divorce and Marriage Act by the New Jersey State Legislature, which, among other things, formalized the introduction of no-fault divorce. With a significant explosion of divorce filings, the family court system developed massive backlogs, to the point where some counties required up to four or five years to resolve even simple pre-judgment matters. If necessity is the mother of invention, matrimonial backlog invented the MESP Program, creating an avenue of alternative dispute resolution in a world of judicial gridlock.

The Supreme Court Committee on Matrimonial Litigation

While well intended, problems developed almost immediately with the program. There were extreme

differences from county to county regarding the composition of the panels, the varying credentials of the serving attorneys, the degree of formality/informality, the requirement and extent of written submissions, the relevance of the recommendations, and other ongoing issues.[4]

Sensing the importance and potential of the program, and in an attempt to address perceived problems, the Supreme Court Committee on Matrimonial Litigation, Phase II, investigated the program, issuing its final report on June 10, 1981, with the following observations and recommendations:

> "Early settlement programs" have been established by 11 county bar associations for the purpose of facilitating the resolution of family law disputes. Typically, the programs have involved panels of either two or three attorneys who meet after the termination of the discovery period. To date, these programs have been primarily the responsibility of the Bar, and participation by litigants has generally been on a voluntary basis. The Committee agrees that the existing programs have been successful. They have saved considerable time for matrimonial judges to devote to other matters. The Committee recognizes that these programs, and the many matrimonial attorneys who serve as panelists, have made valuable contributions as to the administration of matrimonial justice. In particular, the Committee applauds the sacrifice of those attorneys who have borne the cost of administering these programs.
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> Ideally, the Committee believes that every contested matrimonial case should be sent to a settlement panel. However, it is neither fair nor feasible to expect the private Bar to finance a comprehensive State-wide settlement program.
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> Recognizing that early settlement programs have greater potential to further the cause of matrimonial justice, the Committee presents the following recommendations...
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> The Supreme Court should adopt a rule, substantially as set forth in Appendix B to this Report, authorizing matrimonial judges to require participation in early settlement programs.
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> Referral to an early settlement program should occur approximately four months after the issues are joined. Initially, most cases referred would be of moderate difficulty. These would typically involve moderate spousal assets and income and would lack extensive factual disputes. Once it is determined that the programs can consider and effectively dispose of additional cases, more complex cases should be submitted where feasible.
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> The Supreme Court should establish the function of early settlement programs as three-fold:
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> a. Wherever possible, the panel should effectuate a full settlement of the controversy. If a panel fully resolves all issues, the case should proceed expeditiously to final uncontested hearing and judgment, even before judges not normally assigned to matrimonial matters.
> b. Where a full resolution is not practicable, the panel should narrow the issues in dispute as much as possible. Stipulations of record should be employed liberally to prevent waste of judicial resources.
> c. The panel should mediate discussions to obtain reasonable stipulations as to discovery and other material matters, not only for purposes of trial but as a prelude to further settlement discussions. Where agreement is not possible, the panel may also recommend an appropriate discovery order to the court. The matrimonial judge could then consider the recommendation and the parties' responses and enter an appropriate order, thereby avoiding the necessity of a formal motion.
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> The Court should acknowledge that fiscal restraints on county and State Governments may prevent allocation of additional funds necessary to expand early settlement programs. The adoption of this recommendation will create a greater demand for attorney volunteers. In turn, routine expenses usually borne by panelists—photocopying, mailing—will increase. However, the time will soon come when that burden will be excessive and unreasonable; then public support will be necessary to ensure the program's success. In the interim, the success of these programs must continue to depend on the generosity of individual attorneys.

Panels throughout the State should be composed of two attorneys. The Committee has concluded that panels of two attorneys are sufficient to accomplish the purposes of an early settlement program. The addition of a third attorney would unduly increase administrative costs and tend to limit the number of available volunteers.

The Supreme Court should urge the family law sections of the various county bar associations to cooperate in expanding this important program. Likewise, the New Jersey State Bar Association should be encouraged to support participation. The Committee feels it is essential that experienced matrimonial practitioners serve as panelists. Not only are their abilities crucial to the program's effectiveness, but their presence will enhance the credibility of the program in the eyes of litigants and their attorneys.

Matrimonial judges in each of the counties should contact the local bar association, especially in those counties where early settlement programs do not exist, to encourage and facilitate their establishment.

Matrimonial judges should refer cases in their informed discretion to early settlement programs. Both Assignment Judges and matrimonial judges should cooperate with the programs by making it possible to place a settlement on the record as soon as practicable. This will give litigants and their attorney's additional incentive to save time and resources through participation.

In particular, matrimonial judges should forward cases involving *pro se* litigants to these panels. The Committee believes that litigants without lawyers should begin to handle their own cases at the earliest possible time. *Pro se* litigants will benefit from referral to these informal panels by receiving assistance from attorney-panelists in settling or narrowing issues for trial.

The report by the Supreme Court Committee on Matrimonial Litigation represented the first significant step toward mandating attendance at the MESP on a statewide basis and creating uniform procedures. By this time, each vicinage adopted more formalized procedures for their MESP Program and the practice became common and, to a certain extent, uniform throughout the state.

ADR Practice Committee

As part of the continued evolution of the MESP Program, Chief Justice Robert Wilentz created a Supreme Court committee on ADR practice in both 1983 and 1987 that directly addressed the MESP Program through two sub-committees: the Supreme Court Committee on Complementary Dispute Resolution and the Supreme Court Task Force on Dispute Resolution.

In 1990, a subsequent version of this committee was instrumental in creating current Court Rule 1:40, the genesis of the Post-MESP Economic Mediation Program.

The Commission to Study the Law of Divorce

As part of its comprehensive review of matrimonial practice, the Commission to Study the Law of Divorce, established April 5, 1993, encouraged the Judiciary to utilize the early settlement program as a protocol for disposing of both pre- and post-judgment motion applications. This was the first committee to recognize the utility of the program to resolve complicated issues raised in a post-judgment setting. Genuine issues of fact frequently resulted in the scheduling of plenary hearings in a system already burdened and lacking significant judicial resources. Post-judgment MESP offered parties a more expeditious and less expensive alternative to testimonial hearings.

The MESP Program also began receiving consistent attention from the Supreme Court Committee on Complementary Dispute Resolution, which eventually issued a report addressing the MESP Program. The committee focused on both the process and dynamics of the MESP Program, concluding it represented a combined mediation and arbitration model.

The MESP Workgroup

In July 1995, the Matrimonial Early Settlement Panel Workgroup issued its final report, offering highly detailed recommendations and guidelines for the program:

1. An Early Settlement Panel Coordinator will be designated to ensure that the program runs efficiently;
2. All Early Settlement Panel programs should occur in the Courthouse, so that the coordi-

nator, the court rules, calculators, and private meeting facilities are available;

3. The Early Settlement Panel program should be utilized as an integral part of a comprehensive case management process;
4. Early Settlement Panels should be scheduled after discovery is completed. After the Early Settlement Panel, non-settled matters should be scheduled for trial;
5. The Selection of Early Settlement Panel panelists should be a joint undertaking of the County Bar Association and the Court. Panelists should have three to five years of experience in Family Law;
6. Written submissions should be required five days in advance consisting of a proposal/position letter as to every financial issue in dispute. These should be accompanied by current financial data and Case Information Statements;
7. All who participate in the process should treat the panel hearing as they would a trial appearance in terms of promptness and courtesy. The number of cases presented to the panel should be limited so that all receive meaningful consideration;
8. The Administrative Office of the Courts should maintain certain statistics, such as: (i) number of cases assigned to the panel; (ii) number of cases settled; (iii) number of cases settled post hearing and prior to beginning trial; (iv) which matters are pre or post judgment; and (v) the time lapsed from filing of Complaint to Early Settlement Panels;
9. Uniform and standard forms should be encouraged, such as notices of the scheduling and submission requirements. A central registry should also be established as to such forms.

A further effort should be made to standardize MESP programs from county to county. Complicated post-judgment matters should more frequently be referred to the MESP Program.

The Committee notes that in its September 15, 1994 Report to Chief Justice Wilentz, the Supreme Court Workgroup on Matrimonial Early Settlement Panels concluded that many MESP procedures then in effect appeared to vary greatly from vicinage to vicinage. Differences then existed concerning the manner of scheduling; the timing of MESP scheduling; and even the designation of actual cases assigned to MESP Panels.

The Workgroup concluded that the MESP process should not be used for initial case management and that most, if not all, contested matrimonial matters should be referred to the MESP program. Recognizing that the MESP program provides litigants with an opportunity to resolve issues themselves rather than requiring resolution of most of those issues by the court, that Committee properly noted that panel hearings "serve as a focal point for parties and counsel in ensuring that the cases are reviewed, analyzed and prepared for trial." Indeed, because of the success MESP had achieved on a statewide basis, the Committee concluded that virtually all contested matters, and not only those dealing with dissolution, would benefit from the MESP process. In addition to basic dissolution cases, the Committee specifically noted with approval submission to MESP panels of post-judgment disputes as well.

The committee endorsed the recommendation and requested that the Supreme Court Family Practice Committee be responsible for monitoring the MESP Program. The committee further suggested that a process of standardization occur to minimize differences in the program from county to county across the state.

Best Practices and the MESP

Further suggested changes to the MESP Program came by way of the New Jersey Supreme Court Best Practices Report. Among other things, the committee recommended that early settlement panels in all of New Jersey's counties need to receive submissions five days prior to each scheduled session.

Most Recent Revision of the Rule

The rule was last amended on July 28, 2009 with the addition of the final sentence requiring the submission of an MESP memorandum five days prior to the scheduled panel session.

Rule 5:5-5

In its current form, Rule 5:5-5 provides as follows:

> All vicinages shall establish an Early Settlement Program (ESP), in conjunction with the County Bar Associations, and the Presiding Judges, or designee, shall refer appropriate cases including post-judgment applications to the program based upon review of the pleadings and case information statements submitted by the parties. Parties to cases that have been so referred shall participate in the program as scheduled. 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 pleadings. Not later than five days prior to the scheduled panel session, each party shall be required to provide a submission to the ESP coordinator in the county of venue, with a copy to the designated panelists, if known.

Commentary

While the 1999 best practices report may have marked one of the last tangible changes to the MESP Program, the program has continued to be the subject of occasional published commentary. In Oct. 2003, Lee Hymerling published an article in the *New Jersey Family Lawyer* with the following observations:

- Keep the program truly *early*, (i.e., four to six months after joinder of the action).
- Submit a memo to the panelists at least five days prior to the scheduled panel and prepare a high-quality memorandum for consideration by the panelists.
- Have a superior court judge appear on the record with all of the litigants and deliver an "MESP speech" detailing the program and the importance of the day, etc.
- Require each county to maintain statistics on the performance of the program.
- Publically recognize the attorneys who volunteer their important time.
- Recognize the MESP Program can peacefully co-exist with the use of mediation.[5]

Yvette Alvarez also commented on the MESP Program in the April 2007, issue of the *New Jersey Family Lawyer*, noting:

- The written submissions must be submitted at least five days before the scheduled panel, as many counties continue to experience difficulties with written submissions.
- The inclination toward uniformity should be carefully checked, as each vicinage is unique. Flexibility with regard to creating and administering the programs should be retained as much as possible in each of the counties.[6]

Reflections on the 35th Anniversary

Many observations and concerns with regard to the MESP Program have been raised by both the bench and bar over the years. These include the following, described in no particular order:

Written Submissions and Procedures

Difficulties continue to plague the program with regard to the written submissions to the panel. There is a chronic problem with late submissions. Part of the difficulty relates to different time requirements for the submissions. Eight counties require the submissions five days before the panel; three counties require them an entire week before the panel; two counties require them 10 days before the panel; one county sets the requirement at a single day before the panel; two counties require submissions either the Monday or Friday before the panel; and the remaining counties permit submissions to panels on the day of the hearing.[7] Perhaps all vicinages should adhere to the five-day rule as articulated by the various committees throughout the years.

There is also great variation between the counties regarding the nature and quality of the submissions. While all counties require some form of memorandum, approximately half mandate a case information statement, while at least two counties require significant submissions, including copies of the case management order and completed child support worksheets.[8]

Questions have been raised as to the appropriate response in the event of non-compliance with MESP procedures. This can include blatant non-cooperation or a mistake by the attorney who simply fails to submit a memorandum through mere inadvertence. Another variation on this concern relates to ripeness when a case is simply not ready for the MESP process within the tradi-

tional four- to six-month period from joinder. To address these situations, judges and attorneys have suggested various solutions, including the filing of an affidavit of discovery compliance as a prerequisite to attending the MESP or the scheduling of a phone conference between the MESP coordinator and counsel approximately 14 days before the MESP to ensure the case is prepared for the panel.

Self-represented Litigants

Enormous problems continue with regard to self-represented litigants and their involvement in the MESP Program. Unfortunately, these litigants are often unaware of legal procedures and, despite the best efforts of case managers to provide instruction, they fail to provide adequate written submissions. Some counties have attempted to address this problem proactively. For example, in Burlington County the Bench/Bar Committee, in cooperation with the presiding judge, drafted a statement titled "Uniform MESP Procedures," which contains highly detailed instructions for participation in the program. Burlington County also drafted an outline, which it made available to self-represented litigants, to assist in the preparation of their memoranda.

In some vicinages there are security concerns with self-represented litigants attending the MESP since the panels are conducted near chambers or in areas not staffed by the sheriff's department.

Panel Assignments

Difficulties continue to exist on the day of the panel when, due to conflicts, absenteeism or other circumstances, cases are transferred on the spot to a different panel sitting on the same day. Since the purpose of the five-day submission rule is to permit the panelists to study often-complex information several days ahead of time, shifting cases among the panels last minute creates a disservice to all involved. Perhaps conflict checks should occur at the case management stage when the panelists are specifically identified and included in the body of the case management order. Also, the author believes all participants must extend the appropriate courtesies in the event of uncontrollable absence due to illness or other situations.

The number of cases assigned to each panel varies dramatically throughout the state. In some counties a panel can be assigned four, five or more cases on a single morning or afternoon. But in Ocean County, for example, a panel is rarely given more than one or two cases, so they can spend a substantial amount of time on each matter, rendering the program highly effective.

The number of panelists also varies between counties. While most vicinages have a panel consisting of two attorneys, in three counties the panels consist of three members and in at least two counties the number of panelists varies from one to three.

The process of composing the panels appears to be highly informal and completely different from county to county as well. For example, in some counties the list of panelists has not been reviewed in years. In other counties, the list is reviewed on an annual or bi-annual cycle. Of great concern is the process of a substitute panelist, whereby a highly qualified member will send a younger associate to serve on his or her behalf. To address this problem, some counties have a strict rule that in the event of a conflict or absence, the panelist is responsible to confirm the appearance of a duly qualified substitute. However, in other counties, the panelists leave this to the court or MESP coordinator.

Scheduling

The scheduling of an MESP in multiple cases for one attorney on the same day can create havoc in the courthouse. In general, the author believes an attorney should never attempt to handle multiple MESPs on the same date and time, since this is discourteous to the court, the panel, adversaries and the litigants. In general, the author believes there should be a one attorney/one panel protocol in effect.

Public Opinion

Although the research is limited, there appears to be some level of dissatisfaction with the MESP Program among litigants. While the MESP speech by the assigned trial judge has greatly helped, many litigants feel they are not participating in a significant judicial event, as they most often sit in the hallway for several hours and in some counties are not brought before the panel to announce the decision or they do not receive a written recommendation. In approximately 16 counties the litigants enter the MESP room to hear the decision. In two counties this practice is optional and in three counties it is not done at all. Written recommendations are discretionary, with approximately half of the programs providing detailed written recommendations.

Some litigants have suggested a staggered schedule, similar to motion practice, so that one MESP will be

heard at 9, a second at 9:30, etc. The author believes each vicinage should solicit immediate feedback from the litigants on the day of the panel, if feasible.

The MESP Speech

While virtually all counties adhere to the MESP speech concept, Hudson County has taken the process a step further by having litigants review a helpful video presentation put together by the bench and bar. The author believes this concept should be considered in all counties.

The Use of Settlement Panels Post-judgment

The court rules do not restrict the MESP Program to pre-judgment circumstances. Many judges will use the program in a post-judgment setting. For example, a post-judgment MESP referral represents a viable alternative to a plenary hearing on complicated issues such as applications to modify alimony or for payment of college expenses.

Post-MESP Disposition

Some counties immediately list the matter for trial if the MESP fails. Other counties take seriously Rule 1:40, and aggressively utilize the Post-MESP Economic Mediation Program.

Use of Recommendations with Regard to Award of Attorney Fees

Rule 5:3-5(c) states that in determining an award of attorney fees the court can consider "the reasonableness and good faith of the positions advanced by the parties both during and prior to trial." Based upon this consideration, should a court be made aware of an MESP recommendation after the completion of a trial when assessing good faith and reasonableness of positions? Litigants and attorneys frequently change positions during the course of the litigation. While some trial judges may believe they can discern reasonableness of positions from the presentation of evidence at trial, they have no way of knowing the positions of the parties prior to trial that may have necessitated ongoing and potentially unnecessary litigation. A procedure could be created whereby the MESP recommendation is disclosed to the court after the completion of the trial. If the court determines the trial decision is substantially similar to the recommendation of the panel, this could be considered in determining the reasonableness of positions, good faith and the ultimate assessment of an award of attorney fees. Perhaps this concept could be initially utilized with blue ribbon panels as a method of incentivizing settlement for otherwise recalcitrant litigants.

There appears to be a single reported decision related to this issue, *Kelly v. Kelly*, 262 N.J. Super. 303 (Ch. Div. 1992). In *Kelly*, plaintiff sought an award of counsel fees from a self-represented defendant premised upon the similarity between the ultimate result of a default proceeding and the MESP recommendation. The opinion does not contain specific details regarding whether the trial court reviewed the recommendations, but it can be inferred that Judge Seltzer was aware of the suggestions of the panel.

Process for Appointment of Blue Ribbon Panels

The use of blue ribbon panels continues to be widely divergent throughout the state. In some counties the panels consist of not only attorneys but also financial or custody experts, depending upon the specific issues in the case. In some counties the court chooses the panel, in others the attorneys choose the panel. In some counties a blue ribbon panel meets only once, in others it meets on multiple occasions. The author believes all issues pertaining to the use of a blue ribbon panel should be driven by the unique requirements of each individual matter.

Adequate Facilities for the Panel

Despite the fact that the MESP is a critical event, there is enormous disparity throughout the state regarding the accommodations for the process. In some counties the MESP occurs in a large conference room, in other counties it is impossible to find a private area. In some counties laptops or other computer access exists to run child support calculations or garner access to case law or information relevant to the process. In some counties there is access to private rooms or areas for attorneys to confer with their clients for purposes of reviewing the recommendations. In other counties, however, attorneys are often forced to sit in a public stairwell or open waiting area to discuss confidential legal matters with clients. The author believes this is a breach of attorney/client confidentiality and should be addressed promptly.

Quid Pro Quo for Panelists

The author believes attorneys who volunteer their time should be given preference on lists for their MESPs and on motion days as a matter of simple courtesy.

Conclusion

It is impossible to overestimate the importance of the MESP Program; it is the consummate expression of all things good about the legal profession. Still, there remains room for improvement. To maximize the effectiveness of the program, practitioners need to present quality memoranda and address the issue of chronic late submissions. Practitioners also need to embrace the value of the Court's MESP speech to the litigants and the application of the MESP Program to post-judgment disputes. The author believes effort should also be made to give credit where credit is due to the panelists, providing them with priority on all lists.

Perhaps most importantly, the author believes practitioners need to be on guard against the use of MESP scheduling as a method of case management. What began as a program of the bar has, to a certain extent, become a vehicle of scheduling and managing the disposition of the case, which can present problems to well-intentioned practitioners. Attorneys are in the best position to judge when a case is ripe for the MESP, despite the rigid scheduling protocols typically memorialized within a case management order. While there is great merit to best practices and the rapid disposition of family law matters, a program that the bar created should not be used against us. The MESP has always been a joint venture of cooperation between the bench and the bar, and it should remain that way. It should continue to be the most significant tool that our court system uses to resolve matrimonial disputes. ■

Christopher Rade Musulin is the principal of Musulin Law Firm, LLC, located in Mount Holly.

Endnotes

1. Lee M. Hymerling, MESP Revisited. *New Jersey Family Lawyer* 24.2 (Oct. 2003):6-7.
2. Ivette R. Alvarez, Is it Time to Revisit the Matrimonial Early Settlement Panel Procedures? *New Jersey Family Lawyer* 27.5 (April 2007):109.
3. Skoloff & Cutler, I *New Jersey Family Law Practice*, (14th ed. 2010), §1.8L(1) at p.358.
4. Professor Paul Tractenberg, Rutgers School of Law, Newark, quoting Supreme Court Committee on Complementary Dispute Resolution, Subcommittee on Vicinage Comprehensive Justice Programs, *Master Plan for Vicinage Comprehensive Justice Programs* (May 22, 1991).
5. Lee M. Hymerling, MESP Revisited, *New Jersey Family Lawyer* 24.2 (Oct. 2003):6-7.
6. Ivette R. Alvarez, Is it Time to Revisit the Matrimonial Early Settlement Panel Procedures?, *New Jersey Family Lawyer* 27.5 (April 2007):109-10.
7. Megan M. Murray and Kimber L. Gallo, MESPs Uncovered, *New Jersey Family Lawyer* 33.2 (Oct. 2012):30-37.
8. Megan M. Murray and Kimber L. Gallo, MESPs Uncovered, *New Jersey Family Lawyer* 33.2 (Oct. 2012):30-37.
9. *See Kelly v. Kelly*, 262 N.J. Super. 303 (Ch. Div. 1992).