

OCEAN COUNTY BAR ASSOCIATION

MARIANNA C. PONTOREIRO
President

MATT SAGE
President-Elect

ADAM J. STEUERMAN
Treasurer

CHRISTINE L. MATUS
Secretary



OCEAN COUNTY COURTHOUSE
POST OFFICE BOX 381
TOMS RIVER, NJ 08754

(732)-240-3666
MICHELE GEOGHEGAN-DIRECTOR
Michele.oceancountyba@gmail.com

JAMIE L. SCHRON-TRUSTEE
KARIN SAGE-TRUSTEE
KATHLEEN M. DOTOLI-TRUSTEE
JONATHAN Z. PETRO-TRUSTEE
CLIFFORD P. YANNONE-TRUSTEE
KELLY TONER-TRUSTEE
KIMBERLEY S. CASTEN-TRUSTEE
TAYLOR E. TOSCANO-TRUSTEE
MICHAEL A. ABATEMARCO-TRUSTEE
DANIEL STRAFFI-TRUSTEE
JULIE E. PETERSON-TRUSTEE
KELSEY MCGUCKIN-YOUNG LAWYER LIAISON
EUGENIA M. LYNCH-STATE BAR TRUSTEE
STACIE BRUSTMAN-IMMEDIATE PAST
PRESIDENT

November 4, 2022

Via First Class Mail and e-mail (Comments.Mailbox@njcourts.gov)

Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Comments on Report of the Judiciary
Special Committee on the Non-Dissolution Docket
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Notice to the Bar and Public (Report and Recommendations of the Judiciary
Special Committee on the Non-Dissolution Docket) – dated September 30, 2022

Dear Judge Grant,

On behalf of the Ocean County Bar Association’s Family Law Committee (hereinafter “OCBA FLC”) attorney members, I thank the Administrative Office of the Courts (AOC) for the promulgation of the above-referenced Notice and the thorough and well-reasoned Report and Recommendations of the Special Committee on the Non-Dissolution Docket. I further thank the AOC for requesting and considering the input of the public and, specifically, interested parties such as County Bar Associations. As the Special Committee recognized, there are numerous significant issues pertaining to the Non-Dissolution (“FD”) Docket which must be addressed. The OCBA FLC reviewed the recommendations and agrees with the stated issues and recommendations related thereto.

However, the OCBA FLC respectfully requests the Special Committee review and address the use of “consent conferences” for FD Matters. The OCBA FLC is of the opinion that these consent conferences are detrimental to settlement, unfair to FD litigants, and counterproductive to the resolution of cases because they are not confidential. The OCBA FLC proposes that the consent conferences in FD Court be made confidential mediations (similar to the Court’s existing Custody and Parenting Time mediation program). This would foster free and open settlement discussions, avoid any potential taint to the Court based on the court officer’s perception of the

litigants, counsel, and/or their positions in the matter, and, as a result, increase the likelihood that the matter will settle between the parties.

Judicial Directive #02-20 (regarding the FD Education Program) confirms litigants in FD matters are ordinarily required to participate in a “consent conference.” (Slides 21 and 22 of Judicial Directive #02-20). This Directive indicates consent conferences are an “informal” process while still being subject to the Rules of Court. Further, the facilitator of the consent conference is obligated to communicate with the Court “concerning the reasons for the lack of a resolution, as well as [the facilitator’s] recommendations.” Slide 22 of Judicial Directive #02-20 espouses the benefits of these consent conferences. Specifically, that the parties will obtain a court order “suited to [their] needs,” “no delay or additional proceedings,” “more time to spend creating [their] order with court staff,” and “less costly.” It is unclear if Slide 22 is comparing consent conferences to standard mediations (as indicated in the preceding slide) or simply advocating the benefit of settlement from a general sense. However, the OCBA FLC submits that the stated benefits of consent conferences are identical to those of traditional (confidential) mediation.

New Jersey courts have long recognized and championed a strong public policy in favor of settling disputes. Willingboro Mall, LTD. V. 240/242 Franklin Avenue, L.L.C., 215 N.J. 242 (2013). Settling cases outside of trial affords the parties “monetary and emotional” relief as well as preserving “overstretched judicial resources.” *Id.* Indeed, the success of mediation depends on the confidentiality of those discussions. State v. Williams, 184 N.J. 432 (2005); see also R. 1:40-4(d). Statements made in Economic Mediation and Early Settlement Panels are confidential and shall not be disclosed to “anyone who was not a participant in the mediation.” R. 1:40-4(d); R. 1:40-5 (Mediation in Family Part Matters); R. 5:5-5 (MESP); R. 5:5-6 (Post ESP Mediation).

The confidentiality of these settlement discussions is integral to the potential resolution of the issues because otherwise “disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.” State v. Williams, *supra*, 184 N.J. at 447. Furthermore, the New Jersey Supreme Court has recognized that “[c]onfidentiality promotes candid and unrestrained discussion, a necessary component of any mediation intended to lead to settlement.” Willingboro Mall, *supra*, citing Williams, *supra* 184 N.J. at 446-477. Therefore, “our court and evidence rules and the Mediation Act [N.J.S.A. 2A:23C-1 to -13] confer a privilege on mediation communications, ensuring that participants’ words will not be used against them in a later proceeding.” Willingboro Mall, *supra*. See also, Lehr v. Afflito, 382 N.J. Super. 376 (App. Div. 2006).

Rule 1:40-4(c) makes clear that communications made during the course of mediation are privileged and “not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the New Jersey Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13.” The Mediation Act broadly defines “mediation communication” as any “statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” N.J.S.A. 2A:2C-2. Additionally, New Jersey Rule of Evidence 519(a)(a) clearly states communications made at mediation are “privileged ... and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by ... [N.J.S.A. 2A:23C-5].”

Furthermore, offers of compromise are to be “excluded from consideration as proof of the merit, or lack of merit, of a litigated claim.” Brown v. Pica, 360 N.J. Super. 565 (Ch. Div. 2001). Offers of compromise are not to be substantively introduced in to evidence to prove the validity or amount of a disputed issue. N.J.R.E. 408. The rationale for this Rule is twofold: (1) “offers of compromise are not factually relevant;” and (2) “there is a vital public policy in encouraging voluntary dispute resolution that would be thwarted if a settlement proposal could only be made at the peril of knowing that it could be used in court against the maker of the proposal if no settlement was achieved.” Brown, supra. (citations omitted). Indeed, disclosure of such settlement offers would serve to “chill settlement negotiations severely, and result in even more cases going to trial.” Id. New Jersey Rule of Evidence 408 makes clear that the mediator need not be present for statements to be covered by this Rule. N.J.R.E. 408.

As such, New Jersey Courts recognize the benefits of entering into confidential settlement negotiations are integral to the successful resolution of contested matters. As the FD Special Committee notes numerous times in the Report and Recommendations, the dichotomy between how FM litigants and FD litigants are treated results in injustices and unfairness to both the litigants and their respective children. The failure to offer FD litigants confidential mediation as part of the litigation process interferes with the successful negotiated resolution of those cases. This is in stark contrast to FM matters wherein the parties are routinely referred to the Court’s confidential custody and parenting time mediation. R. 1:40-5 and R. 5:8-1.

As a result of the lack of confidentiality in FD consent conferences, attorneys are prevented from negotiating effectively, as any and all comments, settlement offers, and even body language of the parties and counsel can be communicated to the Court prior to the disposition of the matter. Therefore, FD consent conferences run the risk of becoming merely performative and/or perfunctory rather than legitimate attempts to resolve a matter.

The OCBA FLC is aware of the high volume of FD cases filed each year, and the additional fact that many FD litigants are self-represented. However, that is all the more reason to offer FD litigants an opportunity to confidentially mediate their matters. Self-represented FD litigants may not have the wherewithal to seek professional trained family mediators to resolve their matters, or otherwise avail themselves of other alternative dispute resolution options, as litigants represented by counsel.

The OCBA FLC respectfully requests the Special Committee to investigate and issue recommendations regarding abolishing FD consent conferences and replacing same with confidential mediations. There may be additional training in the event that an FD consent conference facilitator has not yet completed the mandatory family mediation training set forth in R. 1:40-12(b)(4). However, this requirement (whereby untrained “facilitators” become fully trained family action mediators) will provide a greater pool of trained personnel who will not only be more effective mediators (and therefore settle more cases), but also allow for coverage in the FM custody and parenting time mediation program, and vice versa.

Please note, this correspondence represents the opinion and position of the OCBA Family Law Committee attorney members only. The content of this correspondence does not reflect any opinion or position of any member of the Judiciary.

If you have any questions, please feel free to e-mail me at: Greg@MRALawFirm.com.
Thank you and I wish you the best.

Respectfully Submitted,

/s/ Gregory B. Thomlison

Gregory B. Thomlison, Esq.
Law Firm of Matthew R. Abatemarco, Esq., LLC
Chair, OCBA Family Law Committee

CC: Hon. Marlene Lynch Ford, Assignment Judge, *via* e-mail
Hon. Madelin F. Einbinder, P.J.F.P. *via* e-mail
Ocean County Bar Association Family Law Committee members, *via* e-mail
Michele Geoghegan, Director, OCBA, *via* e-mail
Marianna Pontoreiro, Esq., President, OCBA, *via* e-mail