

CHAPTER 1 EARLY SETTLEMENT PROGRAMS

§ 1.1 GENERALLY

Experience shows that a great percentage of cases settle as a result of participation in MESP¹⁹. The reasons are as varied as the cases, but generically, one might say that litigant's hear their attorney's opinions echoed by the panel; they are emotionally and financially tired; the panel's recommendations are credible (because of the lack of financial interest of the panel members); and the recommendations represent a dose of reality overcoming the cost of continuing to litigate.

§ 1.2 COURT RULES

R. 5:5-5 is the main rule in the Family Part rules which governs MESP. Details of the rule are discussed in appropriate sections that follow.

§ 1.3 PARTICIPATION OF THE COUNTY BAR ASSOCIATIONS

As indicated in § B1, the beginnings of MESP programs emanate from the Morris County Bar Association, Musulin, *op. cit. footnote 8*. Since then and continuing to this day, and notwithstanding these programs may be governed by court rule, *i.e.*, R. 5:5-5. MESP programs are entirely a function of the largess of county bar associations. The court system may devote personnel to scheduling, but the administration, funding, manning, and all other administrative aspects are determined by the county bars.

§ 1.4 STRUCTURE OF THE COUNTY MESP

Every county has established and maintains an MESP. This was so, to a large extent, even before the Supreme Court mid-1980's mandatory mandate, R. 5:5-5. The Court, by rule, establishes some of the basic concepts, *i.e.*, R. 5:5-6, but implementation thereafter is left to the individual county bar associations. This lack of symmetry from county to county leads to a certain amount of discomfort among lawyers as to the differences in each county's program, with the concomitant result that attorneys practicing in multiple counties need to know the details of each program. However, notwithstanding this lack of standardization, as is evidenced by the assumed success rate of settlements (*see footnote 18, supra*), the various programs have worked exceedingly well. In such posture, the public is amply served by the vast attorney participation without remuneration to the panelists.

¹⁹ While statewide statistics are inconclusive, many would agree that the settlement rate as a result of MESP (either on the date of the session or within a reasonable time thereafter based on the panel's recommendation) is between 50 and 75%. Some even argue that the settlement rate is actually on the higher end of that spectrum, 75%, Musulin, *op cit. footnote #8*.

§ 1.5 TYPES OF MATTERS SUBMITTED TO MESP

Originally, in its initial stages, MESP was intended for the *pendente lite* stage of a divorce matter, and for many years, it was so practiced. However, one only need look at the number of “published” unpublished cases rendered involving post-judgment matrimonial matters to realize that this is a fruitful area in which MESP panels can be helpful, particularly as a vehicle for a dose of reality to the parties. Now, R. 5:5-5 provides that a judge “. . . shall refer appropriate cases including post-judgment application to the program . . .” R. 5:5-6 goes on to buttress R. 5:5-5 in providing that cases appropriate for MESP referral include the “. . . economic aspects of a divorce, [as well as] dissolution of a civil union or termination of a domestic partnership . . .”

Note, however, that R. 1:40-5(b)(1) expressly excludes from MESP referral cases involving a “. . . temporary or final restraining order . . . in effect in the matter under pursuant to the *Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.)*.” Also, while technically applying to mediation, R. 1:40-5(a)(1) also excludes any matter “. . . involving domestic violence in which no order has been entered or in cases involving child abuse or sexual abuse, the custody or parenting time.” Thus, cases such as those which are the subject of R. 5:5.7a (domestic violence), 5.8 (custody of children), 5.9 (termination of parental rights), 5.9a (actions of kinship guardianship), 5.10, 10a or 11 (adoption), 5.12 (actions by the Division of Child Protection and Permanency (DCPP)), 5.13 (proceedings under the Child Placement Review Act, or 5.14 (proceedings to determine parent-child relationship are not intended to be referred to an ESP panel due to their sensitivity, confidentiality, or just plain lack of subject matter.²⁰

Thus, virtually any type of family dissolution matter involving financial differences is fodder for the MESP mill. This is probably a good thing inasmuch as the essence of the economic circumstances among the various types of family matters is not markedly different.

§ 1.6 COORDINATION WITH OTHER ADR PROGRAMS

The one program in which a trial court has significant contact is mandatory mediation, *Chapter 2*. Many times when participation in an MESP session does not produce an immediate settlement, the parties and their attorneys must report to the judge in charge that day so that they can obtain an order for referral to mandatory economic mediation, *i.e.*, R. 5:5-6(a). One advantage, of course, of mediation over ESP, is that a mediator can spend more time on the case and can also facilitate negotiation.

²⁰ But note the inroads to submission of cases to mediation involving domestic violence noted in § 2 and footnote 8.

§ 1.7 PANELS

All matters submitted to an MESP program go before a panel of (usually) two attorneys.²¹ The composition of the panels is up to the individual programs, but always is limited to attorneys of significant matrimonial experience.

Some of the complex cases involving significant issues are assigned to so-called “blue ribbon” panels whose compositions are intended to include senior members of the matrimonial bar with (not just significant but) substantial matrimonial experience. Blue ribbon panels maybe less structured than regular panels. Differences range from submissions and session not unlike regular MESP appearances except that the panelists generally of more senior experience than the average regular panelists, or in really unique and complex matters, submission may be greater in detail and sessions might even take place at an office outside of the courthouse and take several hours over more than one session.

At the present, panelists serve without remuneration or other forms of compensation. However, there is a movement afoot to “reward” panel service with exemption from pro bono criminal assignment or with continuing educational credits, or some hybrid of both.

§ 1.8 SCHEDULING OF SESSIONS

Dates for MESP participation are scheduled by court personnel. Many have emphasized that Early Settlement Program means “*early*,” that is, a case should be scheduled early in the process to encourage “early” settlement before the cost in terms of human toll and dollars have worn the parties down. Others take the position that many, too many cases are scheduled much too early, that is before discovery and other processes are completed. They point to the inordinate number of times when courts will not adjourn MESP dates past one adjournment, and that the attorneys plead to the panel that the case is just not ready for paneling.

Many who criticize the first alternative — that is, pushing a case to MESP, many times before it is naturally ready or could be ready — is a disserve to the parties in that engaging in the process at that juncture is a total waste of time and litigating dollars, and cite the attendant cost of attorney preparation and appearance. They hold that the motivation of the court system in pushing “early” MESP appearance is (on the knowledge that a certain number of cases will settle right there and then) compliance with the “numbers game” of the AOC, that is, the push to make the number of case dispositions look more favorable than it might otherwise be.

The argument surrounding “early” MESP participation has been going on since almost the start of the programs, and will undoubtedly continue until the AOC faces the issue head on.

²¹ The original Morris County program started with 3 panelists, but (realizing that the program could handle more cases if it reduced the number of panelists) that program fairly quickly followed other start-up programs which engaged only two panelists.