

MATRIMONIAL EARLY SETTLEMENT PANELS:
A HISTORICAL ANALYSIS IN NEW JERSEY AND COMPARATIVE
REACTIONS TO CURRENT PRACTICES IN SELECTED STATES

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This paper will review the history of the Early Settlement Panels in New Jersey by providing a comparison between two northern vicinages, one central vicinage, and one southern vicinage to the matrimonial settlement negotiations of California, Florida, and Michigan.¹ Additionally, five couples that have been divorced share their experiences regarding matrimonial settlement negotiations.

During the late 1970's and early 1980's, the New Jersey state courts were backlogged and lawsuits often took longer than would be typically necessary to move through the justice system. For instance, one divorce began in 1979 and was not finalized until 1984.² Then, New Jersey started to offer citizens various programs prior to reaching trial or in place of litigation. These programs, known as Alternative Dispute Resolution or Complementary Dispute Resolution, included settlement negotiations of matrimonial cases by panels of attorneys identified through local bar associations.³ Matrimonial settlement negotiations are known as Mandatory Early Settlement Panels, Matrimonial Early Settlement Panels, or most typically Early Settlement Panels.

Generally, Early Settlement Panels are a form of settlement conference that involves the parties, their attorneys, and a third-party neutral. In New Jersey, disputes that are not designated to other Complementary Dispute Resolution programs are assigned to Early Settlement Panels. Ideally, the

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¹ There are twenty-one counties in New Jersey, however the state is divided up into geographical divisions, called vicinages. There are fifteen vicinages for New Jersey's twenty-one counties.

² Interview with Harriet, Divorce Litigant, Bergen County, NJ (October 2003).

³ PROFESSOR PAUL L. TRACTENBERG, NEW JERSEY DISPUTE RESOLUTION 36 (1994).

Early Settlement Panel program assists in the early settlement of disputed financial issues in matrimonial cases and helps produce a more effective disposition of contested matrimonial cases.⁴

The first Early Settlement Panel began in Morris County in 1977, for the purpose of acting as a catalyst for settlement of financial issues.⁵ As of 1981, eleven county bar associations had established Early Settlement Panels in New Jersey.⁶ In 1987, it became a requirement that each vicinage establish such a program.⁷ Both the Pathfinders Committee and the Pathfinders II Committee of the Supreme Court of New Jersey have the duty to review and evaluate the Early Settlement Panels. The program was recognized as an “integral component of efficient and effective case management.”⁸ However, the panels were criticized because they were created without any statewide plan, explained Professor Paul Tractenberg of Rutgers Law School-Newark.⁹ The programs that were in place at the time were set up in various communities to fit their own specific purposes.

These criticisms were addressed in 1983 when Chief Justice Robert Wilentz appointed the Supreme Court Committee on Complementary Dispute Resolution to examine the existing needs of the Early Settlement Panels in order to better prepare a more comprehensive dispute resolution program. First, the Committee reviewed and assessed the need for various dispute resolution techniques. Second, the Committee established four dispute resolution projects that promoted the development of new dispute resolution processes; one project encompassed Family Court Programs.

⁴ *See id.* at 35.

⁵ Gary N. Skolof, Esq. & Laurence J. Cutler, Esq., *New Jersey Family Law Practice*, Vol. 1, 1:268 (10th ed. 2001).

⁶ Robert D. Lispcher, *Report of the Matrimonial Early Settlement Panel Workgroup*, 141 N.J.L.J. 1453 (1995).

⁷ N.J. CT. R. 5:5-5.

⁸ *Supra* note 3, at 5.

⁹ *See id.*

Third, the Committee undertook the creation of a statewide uniform, systematic and comprehensive plan to complement traditional trial and pretrial procedures.¹⁰

The first chairperson of the Committee from the bar association side was John Fiorello, of Feldman and Fiorello in Wayne. He coordinated the Early Settlement Panels in Passaic County from 1985 until 2000.¹¹ The committee adopted the phrase complementary rather than alternative to impart the message that dispute resolution processes are complements to traditional trial processes, not alternatives. However, Fiorello explained that there was no uniformity in New Jersey.¹² The different vicinages all utilized varying Complementary Dispute Resolution programs

Five years later, in 1987, Chief Justice Wilentz again re-visited Complementary Dispute Resolution. He created the Supreme Court Task Force on Dispute Resolution. The task force's final objective is stated as follows:

[to] provide citizens with a full set of options for resolution of disputes, including traditional litigation as well as various complementary forums, so as to continue to fulfill the commitment to provide the highest quality of justice possible.¹³

The task force created subcommittees to evaluate and expand the Complementary Dispute Resolution programs throughout the state. They also conducted public hearings to ensure that they had obtained a complete overview of all the programs. Fiorello was “appointed to the task force to homogenize what was being done [in New Jersey].”¹⁴ In his minority report, Fiorello states that Early Settlement Panels

¹⁰ See *supra* note 3, at 5.

¹¹ Telephone Interview with John Fiorello, Attorney for Feldman and Fiorello (July 2002).

¹² See *id.*

¹³ TRACTENBERG, 6 quoting Supreme Court Task Force, *Final Report 1* (1990).

¹⁴ See *supra* note 11.

should be used to settle cases rather than as case management tools.¹⁵ The task force recommended that a Complementary Dispute Resolution program:

- be as accessible as possible . . .
- protect the legal rights of all participating disputants
- provide a fair and competent mechanism for resolving disputes
- encourage the confidence and respect of disputants and the general public
- and be an effective forum for the enforcement of law . . . be conducive to subsequent enforcement
- and be as efficient as possible in terms of cost and time required¹⁶

In 1990, following the task force report, the Supreme Court created a standing Committee on Complementary Dispute Resolution. This Committee had the following duties: (1) to create rules of court to govern Complementary Dispute Resolution practices; (2) to review the rules; (3) to develop standards to govern mediators and arbitrator; (4) to develop uniform data gathering forms; and (5) to provide oversight in the assessment and evaluation of the Complementary Dispute Resolution programs in operation, as well as those in the planning stages.¹⁷ The first recommended rule, Rule 1:40 on Complementary Dispute Resolution Programs and the accompanying Guidelines Governing the Qualifications and Training of Court Mediators, was adopted by the Supreme Court in 1992. The purpose of Rule 1:40 is twofold. First, that Complementary Dispute Resolution is an integral part of the New Jersey court system. Second, that lawyers should become familiar with

¹⁵ *See id.*

¹⁶ TRACTENBERG, 6 quoting Supreme Court Task Force, *Final Report* 4 (1990).

¹⁷ *See id.*

available Complementary Dispute Resolution programs and inform their clients of them.¹⁸ The committee's master plan also called for assignment judges to designate Complementary Dispute Resolution coordinators for their vicinages and appoint advisory committees. The vicinages submitted their local comprehensive justice program plans to the Supreme Court that same year. The statewide master plan required that each vicinage provide mediation to resolve custody and visitation issues and matrimonial early settlement panels to facilitate settlement of contested economic issues.¹⁹

This new system began to draw some attention. In 1992 two articles were written in the *New Jersey Lawyer*. The first article was about the cooperation from attorneys in the Matrimonial Early Settlement Panel process.²⁰ The second article focused on how fines for non-compliance would start to be utilized.²¹ Two years later, the Supreme Court Committee issued a report based on the years 1992 - 1994.²² The Committee made various recommendations, noted continuing activities, and made plans to review some programs, including the Early Settlement Panels.²³

The Committee compiled the data and it was determined that the most common approach in New Jersey during 1994 to the Early Settlement Panel was the Combined Mediation-Arbitration Model.²⁴ Although the Complementary Dispute Resolution process is characterized as mediation, it is actually a combination of mediation and non-binding arbitration. Mediation is facilitated negotiation — the mediator is a neutral²⁵ — whereas non-binding arbitration is a form of non-binding adjudication. In arbitration, parties who do not prevail may pursue litigation and the court will review

¹⁸ N.J. CT. R. 1:40-1.

¹⁹ TRACTENBERG, 8 quoting Supreme Court Committee on Complementary Dispute Resolution, Subcommittee on Vicinage Comprehensive Justice Programs, *Master Plan for Vicinage Comprehensive Justice Programs* 8-9 (May 22, 1991).

²⁰ Cary B. Cheifetz, *Lack of Cooperation Could Kill a Settlement Program*, *New Jersey Lawyer*, March 16, 1992.

²¹ Thomas P. Zampino, *A Judge is Getting Tough*, *New Jersey Lawyer*, March 16, 1992.

²² The committee membership is appointed every two years. Complementary Dispute Resolution Committee Report, 136 N.J.L.J. 598 (Feb. 14, 1994).

²³ *Id.*

²⁴ TRACTENBERG *supra* note 3, at 28.

²⁵ STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* 201 (2001).

the matter *de novo*.²⁶ Up to this point matrimonial lawyers preparing for an Early Settlement Panel had no way of knowing what the process entailed because, as mentioned previously, it differed throughout the state. To compound the situation, although Early Settlement Panels had been in existence since the early 1980's, lawyers were typically untrained in the field of Complementary Dispute Resolution and they were being asked to utilize the methods as per Rule 1:40. To remedy the situation, Professor Tractenberg and his Dispute Resolution Seminar students researched the Complementary Dispute Resolution processes that were being utilized throughout the State of New Jersey.²⁷

Professor Tractenberg and his class discovered that generally, the Early Settlement Panels handled the contested issues of alimony, child support and property settlement. The panelists were Family Law attorneys and members of the county bar association. They worked on a volunteer, pro bono basis. Panelists were selected from a court-approved list and were scheduled on a rotating basis. Panels of two or three attorneys were chosen to meet either a certain number of times per month at the county courthouse or to be available at each calendar call for assignment or to serve upon request. How and when cases were assigned to the panels varied by vicinage. Cases were referred to the Early Settlement Panel by Family Division staff upon review of the initial divorce pleading after the answer or by case management staff at a case management conference. In some vicinages, either a specified amount of time had to have elapsed after filing the answer or both parties and their attorneys must have agreed to the referral. In some vicinages, the oldest cases were referred first. In other vicinages, a case may not have been referred unless attempts had been made to resolve the financial issues.²⁸

²⁶ *See id.*

²⁷ TRACTENBERG, *supra* note 3, at xix.

²⁸ TRACTENBERG, *supra* note 3, at 35.

Once parties were referred to the Early Settlement Panel, they were required to provide Case Information Statements that they either brought with them to the Early Settlement Panel or submitted in advance. Once at the Early Settlement Panel, the attorneys needed to be prepared to discuss all aspects of the case. Like arbitration, the attorneys presented their positions to the Panel, beginning with the plaintiff's attorney. After this step, the procedure varied according to the Early Settlement Panel members. Whether the parties themselves took part in the Early Settlement Panel, depended on the Panel and the attorneys.²⁹ In some vicinages, the matters were brought before the Panel in the presence of the parties and the attorneys; recommendations were made, accepted, or rejected. In other vicinages, the attorneys met with Early Settlement Panels without their clients. They presented the financial information and then were excused by the Panel. The Panel made their decision in private and made a recommendation to the attorneys and their clients. In most vicinages, the Early Settlement Panel procedure was not specifically mandated and attorneys were able to make special arrangements with the Panel.

The Early Settlement Panel recommendations were non-binding. If the decision was accepted, the divorce was then granted and the agreement incorporated into the divorce decree. If it was not accepted and settlement was not imminent, the attorneys may be asked to follow up with the Panel or the matter may be referred to the judge for a case management conference. At the conference, the judge would try again to negotiate a settlement regarding the contested issues and should the matter not settle, schedule a trial. In some cases, parties and attorneys were required to begin trial immediately. The Early Settlement Panel was free of charge to participants of the program and settlement rates varied with each vicinage.³⁰ Professor Tractenberg writes that there is some evidence

²⁹ *See id.*

³⁰ *See id.*

that cases that did not settle were either incompletely prepared or of such complexity that they required more in depth discovery.³¹

In July 1995, the Matrimonial Early Settlement Panel Workgroup issued its final report and made numerous recommendations. The guidelines for the statewide county programs were stated as follows:

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 coordinator, 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 Offices 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.³²

³¹ See *id.* Professor Tractenberg does not document any examples of this evidence.

³² See Lipscher, *supra* note 6.

The last significant change in the Early Settlement Panel process occurred in 1999 when the New Jersey Supreme Court issued Best Practice guidelines for Early Settlement Panel submissions. For instance, Early Settlement Panels in all of New Jersey's counties need to receive submissions five days prior to each scheduled session.³³

Today, the Early Settlement Panel is mandatory unless the divorce is uncontested or a settlement is reached. Statewide participation in the Early Settlement Panel is required by New Jersey Court Rule 5:5-5, which established Panels in the Family Division of every vicinage. Divorce cases with contested custody or visitation issues are sent to mediation prior to the Early Settlement Panel. Early Settlement Panel sessions are scheduled for at least two months after the referral so that attorneys may sufficiently prepare. There are form letters available for attorneys to send to their clients about the Early Settlement Panel.³⁴ The average Early Settlement Panel session varies, from five minutes to one hour. Typically, only one session is conducted, unless the parties are close to a settlement; then another may be scheduled.³⁵

The New Jersey State Resource Directory's Family Law Advisor has an information sheet that explains how the process is designed to help with financial issues such as alimony, child support, property division, and counsel fees.³⁶ The sheet also highlights the Early Settlement Panel procedure. Yet, in speaking with various representatives from the northern counties Passaic (Vicinage 11) and Bergen (Vicinage 2), central Monmouth County (Vicinage 9), and southern Atlantic/Cape May (Vicinage 1), there are some differences both procedural and otherwise.

³³ Telephone Interview with Geraldine Washington, Assistant Chief Family Practice Administrative Office of the Court, (July 2002).

³⁴ Susan Reach Winters, *Form Letter to Client Advising of and Explaining Mandatory Early Settlement Program*, 10 N.J. Prac., Family Law and Practice §1.14 (2002).

³⁵ See *supra* note 33.

³⁶ New Jersey State Resource Directory, *What is the Early Settlement Panel?* Family Law Advisor Articles (visited July 20, 2002), at <http://www.divorcenet.com/nj/njart14.html>.

In Vicinage 2, where there is the highest rate of dissolution in the state, Early Settlement Panels are held twice a week.³⁷ There are five judges who handle dissolution cases and they rotate, so that there are two judges who are assigned to the Early Settlement Panels each time they are held. There are three panelists, who sit for three hours. They do not hear more than six cases per sitting. If there are cases with very complex issues, the judge will schedule three cases per panel, rather than the customary six. The Early Settlement Panel is scheduled during the case management conference. The judge determines the time frame for discovery and the Early Settlement Panel takes place when discovery is completed. The attorneys must submit a written settlement proposal five days prior to the Early Settlement Panel. If this is not submitted, the attorneys are sanctioned.³⁸ The Panel calls the attorneys in first for the Early Settlement Panel. The litigants have a chance to speak after their counsel has met with the Panel. If the recommendation is accepted, the divorce is granted that day. If not, the majority of the cases are sent to post-mediation “which is very successful.”³⁹ Vicinage 2 is part of a pilot program that utilizes post-Matrimonial Early Settlement Panel mediation for disputed economic issues.⁴⁰ Regardless of the referral for post-mediation, the case is issued a trial date that same day. When asked if Vicinage 2 has a blue-ribbon panel (made up of the more successful conflict management attorneys), one of the Team Leaders responded, the economic mediators are the blue-ribbon panelists; economic mediation has made a total difference.⁴¹ Thus, the blue-ribbon panel has not been utilized since the vicinage became part of the post-Matrimonial Early Settlement Panel pilot program. The settlement data is not available since the vicinage changed from a centralized matrimonial system to a judge calendar system.

³⁷ Telephone Interview with Kurt Schoening, Team Leader for Judge Torack, Family Division Bergen County, NJ (June 2002).

³⁸ *See id.*

³⁹ Telephone Interview with Debra Capozzi, Team Leader for Judge Koblitz, Family Division Bergen County, NJ (July 2002).

⁴⁰ Marilyn Slivka, Address at Rutgers University School of Law – Newark, Alternative Dispute Resolution Class (June 20, 2002).

⁴¹ *See supra* note 39.

In Vicinage 11, Early Settlement Panels are held four times each month. There are three Panels, each comprised of two attorneys. There is a blue-ribbon panel of attorneys that could be available for complex cases.⁴² The Team Leader explained that there is not a need for the blue-ribbon panel, as “we have an extremely experienced Panel.”⁴³ One week before the Early Settlement Panel, each attorney must complete a memorandum and file it with the panel. This must include the financial information of the case. Prior to the start of the panel, the parties and their attorneys must go before the judge, who gives them all a speech about the panel.⁴⁴ Superior Court of New Jersey Family Division Judge Michael Diamond, the only judge in Passaic County that governs Early Settlement Panels, explains to the parties that the Panel is there to help them arrive at a settlement which will “save money, aggravation, and time.”⁴⁵ Judge Diamond said that ten years ago, the Panels were a “joke...Attorneys went behind closed doors. Now, the litigants go in front of the Panel and attorneys are forced to be prepared.”⁴⁶ He further explained that years ago attorneys would keep asking for adjournments saying they were still doing discovery. Now, the rules specifically state that discovery must be completed within 120 days of filing and the Early Settlement Panel will happen afterward. Attorneys are only allowed one adjournment. If the attorneys do not file the memorandum, the judge may sanction them. Judge Diamond gives attorneys one warning and then issues sanctions. Passaic County has a 55% settlement rate with the Early Settlement Panel program.⁴⁷

In Vicinage 9, the Panel is made up of two attorneys. There are four family court judges who

⁴² Telephone Interview with Peter Kennedy, ESP Coordinator, Passaic County, NJ (June 2002).

⁴³ Telephone Interview with Lorraine VanAssen, Early Settlement Panel Team Leader, Passaic County, NJ (July 2002).

⁴⁴ Telephone Interview with Judge Michael Diamond, Family Division Superior Court, Passaic County, NJ (July 2002).

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

preside over the Panels. This allows the vicinage to have twelve sessions.⁴⁸ A profile form is sent to the Early Settlement Panel prior to the conference date. Then, the Panel meets with the litigants and their attorneys. Kathy Fread, the Coordinator, explained that there is no set Early Settlement Panel procedure.⁴⁹ There is a blue-ribbon panel available for very complex cases. The attorneys must agree on a Panel in those instances. Also, the Panel would meet somewhere other than at the courthouse. Regarding the scheduling of Early Settlement Panels, there are no set times appointed, explained Fread, “whoever is ready goes first.”⁵⁰ The cases are called and even if an older case is present and a newer case is prepared, the newer case proceeds. There is no information as to settlement rates from Vicinage 9. If a case does not settle, the judge does some case management and a pretrial memo, as well as sets a trial date.⁵¹

In Vicinage 1, there is one lead judge who presides over the Early Settlement Panels. The Early Settlement Panels meet twice a month in Atlantic County and once a month in Cape May County. There are two attorneys who sit on the Panels.⁵² The most obvious difference in this vicinage from Vicinages 11, 9, and 2 is that the litigants do not attend the Early Settlement Panels.⁵³ The attorneys present their cases and the Panel makes its recommendations. The panelists sit for a minimum of two hours; but typically they are there for four hours. Occasionally the Panel will sit longer depending on the number of cases that are scheduled. They do have a blue-ribbon panel that handles cases where there are a lot of property and assets. These cases go somewhere other than the courthouse for their Early Settlement Panel. Although statistics on settlement rates were not available from Vicinage 1,

⁴⁸ Telephone Interview with Judy Stoveken, Team Leader, Monmouth County, (July 2002).

⁴⁹ Telephone Interview with Kathy Fread, Coordinator, Monmouth County, (July 2002).

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² Telephone Interview with Dottie Auer, Team Leader, Atlantic/Cape May, (July 2002).

⁵³ Telephone Interview with Edna Cordery, Secretary for Judge Charles Middlesworth, Family Division, Atlantic/Cape May, (July 2002).

Judge Charles Middlesworth's secretary, Edna Cordery, stated, "We are proud of the fact that we have a good turnaround and not a lot of backlog;"⁵⁴ if a case does not settle, it is immediately given a trial date.

Just as there is no uniformity amongst the vicinages in New Jersey, there is also no uniformity among the three states: California, Florida, and Michigan. In California, as in New Jersey, dissolution cases involving custody and visitation issues are handled in a different manner. Yet, unlike New Jersey, California cases with financial issues may choose to go to mediation or non-binding arbitration; the judges prefer mediation.⁵⁵ Both of these forms of Alternative Dispute Resolution utilize one person, rather than a Panel and the litigants always have a chance to speak.⁵⁶ In Florida, unlike New Jersey, the issues in matrimonial cases are not bifurcated. The Director of Dispute Resolution Center, Sharon Press, explained that in Florida "we have a strong preference for mediation."⁵⁷ The attorneys have to agree on a mediator; if they cannot, then the court appoints one from a rotating list. The mediation usually takes place at the mediator's office and not the courthouse. If no agreement is reached, then the court will move the case.⁵⁸ In Michigan, the Alternative Dispute Resolution process that is used for dissolution cases is called facilitative mediation.⁵⁹ It is most similar to New Jersey's Early Settlement Panels. A settlement conference is scheduled thirty to sixty days after filing for dissolution and after a meeting with the judge. It is made up of a Panel of three attorneys.⁶⁰ Yet, Michigan is beginning to move away from this process toward a purer form of mediation. The Michigan Supreme Court

⁵⁴ *See id.*

⁵⁵ Telephone Interview with Fabiola Franco, Alternative Dispute Resolution Staff Assistant, CA (July 2002).

⁵⁶ Judicial Council of California, *Introduction to Alternative Dispute Resolution* (last modified July 5, 2002), at <http://www.courtinfo.ca.gov/selfhelp/alternative/adrothertypes.htm>.

⁵⁷ Telephone Interview with Sharon Press, Director of Dispute Resolution Center, FL (July 2002).

⁵⁸ *See id.*

⁵⁹ Telephone Interview with Mike Boltz, Court Administrator, Family Division, Calhoun County Circuit Court, MI (July 2002).

⁶⁰ Telephone Interview with Theresa Lefkowitz, Law Clerk for Judge Reed, Calhoun County Family Court, MI (July 2002).

recently adopted an order for mediation.⁶¹ Parties will now have the option of going to Case Evaluation (what used to be termed facilitative mediation) or Mediation. “Attorneys were saying three years ago, that won’t work, but now they are requesting mediation,” explained Mike Boltz, the Court Administrator.⁶²

Following this review of the history of Early Settlement Panels, some litigant case studies will illustrate the dynamics of the process. The following information was taken from interviews conducted with two couples that recently divorced in the two northern vicinages in New Jersey; one from Vicinage 2 and the other from Vicinage 11. All of the litigants’ names have been changed to protect their anonymity. The first couple, Michele and Herman, was married for fourteen years and live in Passaic County (Vicinage 11). They have four children, all of whom are minors. The couple had a predominantly traditional marriage in the sense that Herman worked outside of the home and provided the majority of financial support for the family. Herman was in charge of the finances, while Michele took care of the home and the children. Michele finished college during their first year of marriage, had the children, and had started watching other people’s children from their home during the last few years of the marriage. Their divorce was complicated by disputes over debt. Herman had inherited \$465,000 when his father died one month after they were married. Then, he lost \$260,000 in the stock market. Herman wanted Michele to assume half of the debt, while Michele did not feel that would be fair as she was uninvolved in Herman’s stock market dealings and had made it known to him that she was against such dealings. In the beginning Herman thought he would fight for custody, but his attorney advised against it.

Prior to the Early Settlement Panel, Michele and Herman, their attorneys, and approximately

⁶¹ Local Rule 2.403, *Mediation*, (visited on July 23, 2002), at <http://courts.co.calhoun.mi.us/crule002.htm>.

⁶² See *supra* note 59.

ten other couples attended a meeting with the judge who spoke to them about the process. The judge explained that the Early Settlement Panel was confidential and that he would not be privy to whatever transpired. He urged the couples to be honest and work toward a settlement. Michele spoke very highly of the Early Settlement Panel.⁶³ Yet, they did not settle and in fact went to trial, which lasted eight days. Both attorneys submitted a memorandum to the Early Settlement Panel prior to their session containing information about the financial aspects of the case. There were three panelists, two women and one man.

Michele, Herman, and their attorneys went to the courthouse early in the morning on their scheduled date for the Early Settlement Panel. They were asked to stay in a waiting room until they were called. Michele and Herman waited for one hour before it was their turn. Both attorneys went into the Early Settlement Panel first, without their clients. They were in there for approximately ten minutes. Michele explained that her attorney had told her that usually the litigants do not go before the Panel and that the Panel does not speak directly with the litigants. When Michele's attorney came out, she discussed a settlement with her. Herman would not accept the Panel's recommendation, therefore, the couple was asked to go before the Panel.

Next, Michele, Herman, and their attorneys went before the Early Settlement Panel. Michele explained that one of the female panelists spoke first. She summarized the attorneys' memoranda and their discussion without the litigants. Then, the panelists asked Michele and Herman questions. They asked Herman if Michele had any idea that he was obtaining cash advances on the credit cards to invest in the stock market. He agreed that she did not. The panelists said that he could have stopped, but he kept on going. He lost \$100,000 the night the Gulf War broke out. Afterward, Herman tried to recover his losses. The panelists recommended that the couple split the money that was in escrow from the sale

⁶³ See Telephone interview with Michele, Divorce Litigant, Passaic County, NJ (June 2003).

of the condominium and the marital home. The panelists suggested the couple split the assets, which would give each of them \$80,000 and out of Herman's money, it was recommended that he assume the debt of the three credit cards that were in Michele's name totaling \$40,000. Herman would then have \$40,000 in cash and \$90,000 of debt in his credit cards and the joint credit cards. The panelist then told Herman that he had three options: he could take \$40,000 and pay down more of his debt; he could take some money and put it in the bank and pay down some of his debt; or he could go to Atlantic City and gamble it away. Herman declined to accept the Panel's recommendation. Then, the male panelist warned the couple that their court fees would be astronomical and would undoubtedly exhaust the rest of their assets. Michele believes it was this last comment that convinced Herman not to settle. Herman knew then that he would be able to leave Michele with little or no money and that was his goal.

Michele thought the panelists had very reasonable suggestions and that the process would have worked had her ex-husband been a reasonable individual.

Herman found the Early Settlement Panel was "a complete waste of time."⁶⁴ He found the Panel's suggestions to be unreasonable. Herman was annoyed that he had to pay his attorney to listen to other attorneys who knew nothing about his life. He missed work and was upset about the resulting loss in pay. Herman never intended to give Michele any money. He bought the house with his father's money, as well as the condominium. Herman explained that he was the breadwinner and that Michele was the one who broke up the marriage.

Michele and Herman went to trial. The judge recommended that the couple claim bankruptcy so that he could preserve all of the assets. The judge said that he could put all of the money in a trust fund for the children. Herman would not agree to this suggestion. The judge awarded Herman 75% of the debt and Michele 25% which came out to Michele assuming the debt of the three credit cards that

⁶⁴ Telephone interview with Herman, Divorce Litigant, Passaic County, NJ (June 2003).

were in her name and Herman paying the two joint credit cards, one of Michele's and all of Herman's credit cards. Regarding the assets: \$50,000 went into a trust fund for their four children; the remainder, \$67,000 was split equally between the litigants, before the deduction of legal fees.

The second couple, William and Jean divorced in Vicinage 2. They had been married for twelve years. They were a dual career family and had two small children. Jean worked at night so that either she or William were always home to care for the children. The divorce was uncomplicated. At first, William had planned to fight for custody of the children, but his attorney advised him that women typically are awarded custody.

William said, "The Early Settlement Panel was a complete waste of time and money."⁶⁵ He spent six hours in the hallway at the courthouse with his attorney. Prior to the Early Settlement Panel, he and Jean along with their attorneys had to see the judge with other divorcing couples. The judge explained the Early Settlement Panel to them. Also, the attorneys had to prepare written settlement proposals that were then submitted to the Early Settlement Panel for review, prior to the date of the Panel. William and his attorney were called in and spent approximately fifteen minutes with the Panel. There were three panelists. When William first went in there was one man and one woman. A second woman arrived ten minutes into the Panel. William said, "she only got part of the story, but she was the worst of the three of them."⁶⁶ The Panel spoke to William about the marital home. They suggested that he accept Jean's offer of \$100,000 so that she and the children could remain in the home. Jean asked that he maintain a small mortgage that she would pay off within five years, including interest. William refused. The second female panelist asked him why he was being difficult. William explained that he did not want to get divorced in the first place and he was not about to let another man live in his house with his wife. William mentioned that his

⁶⁵ Interview with William, Divorce Litigant, Bergen County, NJ (June 2003).

⁶⁶ *See id.*

attorney did not say anything during the session. William did not feel that he needed his attorney, who was being paid hourly. William explained that they had spent six hours waiting for their session, which only lasted 15 minutes during which his attorney was silent. The divorce cost William \$7,000, of which the Early Settlement Panel cost \$1,000. At the end Jean was persuaded to sell the house. They settled and never went to trial.

Jean went into the Panel after William and was in for approximately the same amount of time as William. She left the room crying. Jean thought that the process was fine, just that William was impossible.⁶⁷ She could not understand why he put himself first, before their children. It was important for them to stay in their home and continue in the same school. Jean believed that some degree of continuity would be best for two young children. She stated that the panelists agreed, but that William would not be swayed.

The following information was taken from interviews conducted with a couple that recently divorced in Florida. Hilda and Lee were married for seven years. They have two small children. Lee and Hilda's marriage was a dual career marriage. Hilda worked as a preschool teacher, which allowed her to bring the children to work with her. Hilda and Lee first had to file a separation agreement that would end after six months. They were able to remain in the same household and be civil with each other.⁶⁸ Hilda initiated the divorce due to Lee's problems with alcohol and his abusive treatment toward their older son. After the six-month period had passed, the couple went through mediation. They agreed on a mediator and the mediation took place at the mediator's office. Both custody and economic issues were discussed during the mediation. Hilda and Lee were able to reach an agreement during the session. Her attorney accompanied Hilda, but Lee went alone. Hilda handled the mediation almost entirely by herself and did not feel that her attorney's presence had been

⁶⁷ Telephone interview with Jean, Divorce Litigant, Bergen County, NJ (June 2003).

⁶⁸ Telephone interview with Hilda, Divorce Litigant, FL (July 2003).

necessary. Many of the questions were personal and the attorney would not have been able to answer them. The main issues were custody and the funds in a small bank account. The money was split equally and the couple entered into a joint custody agreement. Shortly thereafter, Hilda and Lee met with their attorneys and signed the divorce paperwork. Then they went in front of the judge and their divorce was granted.

Hilda felt that “the mediation was productive.”⁶⁹ She described that the mediator was efficient and that the whole process was very straightforward. Lee agreed that the entire divorce process was much better than the painful divorce he had received from his prior marriage.⁷⁰ (He had been married and divorced in Washington some years earlier). Lee did not bring his attorney to the mediation because he wanted to save money since his attorney billed by the hour. Lee and Hilda were in complete agreement about all of the issues and Lee did not feel the need for representation.⁷¹

In Michigan, Lucille and James divorced in 2001. Prior to this they had a more traditional marriage. Lucille raised the children, while James worked as an attorney. They went to a Settlement Conference with a judge who then ordered them to Facilitative Mediation. Lucille explained that only the two attorneys attended the mediation session.⁷² She and James waited in the hallway of the courthouse. Lucille described the mediation session “as a joke.”⁷³ They were not fighting for custody, as James agreed that Lucille should have custody. Also, there were no financial issues, as they had both already decided on the division of assets.

⁶⁹ *See id.*

⁷⁰ Telephone interview with Lee, Divorce Litigant, FL (July 2003).

⁷¹ One interesting note, Lee ended up kidnapping their children and Hilda had to fight for six months before she was able to see the children again. This occurred after the divorce was final, when Lee found out that she had started seeing someone else.

⁷² Telephone interview with Lucille, Divorce Litigant, Michigan (July 2003).

⁷³ *See id.*

James said that the “whole process was a waste of money.”⁷⁴ He did not appreciate having to wait in the hallway while his attorney attended the mediation session. James thinks that the new Supreme Court ruling will be beneficial. He stated that when people are given a choice, they would feel that they have some sort of control. Then, James explained, they may take the process more seriously. Perhaps, divorce litigants will be able to hold panelists and mediators more accountable, which, in turn, will aid the system. James added that this might end mediation sessions that last only five minutes and that do not include the litigants.⁷⁵

Finally, Lynda and Arthur divorced in California in 2002. Lynda explained that their case was bifurcated as to issues of finance and custody.⁷⁶ The couple had a seven-year-old daughter at the start of the divorce; their marriage had been traditional. Lynda raised their daughter, while Arthur worked as an attorney. It took seven years for their divorce to be finalized. Lynda recounted how the couple went through twenty-nine hearings and two trials, in addition to mediation. She explained that they chose mediation over non-binding arbitration for their financial issues.⁷⁷ Lynda felt that living in a community property state was beneficial for her. She explained that Arthur was able to take a large number of deductions and these kept increasing. Lynda mentioned that Arthur was not held accountable for the deductions and that many seemed frivolous, such as dry-cleaning. Also, Lynda had owned her own home prior to the marriage. She had put all of the money from that home into the marital home. Since California is a community property state, Lynda was unable to get back any of her original funds. Lynda felt that the mediation session was a success. The mediator was able to explain to Arthur that his daughter would be the person who suffered whenever he increased his deductions in order to reduce his monthly child support payment.

⁷⁴ Telephone interview with James, Divorce Litigant, Michigan (July 2003).

⁷⁵ *See id.*

⁷⁶ Telephone interview with Lynda, Divorce Litigant, CA (July 2003).

⁷⁷ *See id.*

Lynda explained that during the custody portion of the case, Arthur had become volatile. At a custody hearing, the judge split custody awarding Lynda 60% custody and Arthur 40% custody. Several hearings later, after Arthur had been convicted of drunk driving while their daughter was with him, the judge finally granted the custody split 99% Lynda and 1% Arthur.⁷⁸ This did not happen immediately, each time the couple went for another hearing Arthur's custody was reduced. The entire custody case took seven years. In the end, Arthur refused to sign the judgment and after about six motion cycles, the judge signed for him. The financial case was settled much more quickly. There were several motions filed regarding this issue, as well as a trial, but this process did not take nearly as long as the custody case. Lynda felt that the divorce process in California is most favorable to males because they are the ones who typically have most of the money. Yet, she did not mind the length of the process. Lynda believes that it may take seven years for the court to discover the truth about which parent should have custody.

Arthur, on the other hand, "found the process unfair."⁷⁹ He is very disappointed that he no longer has custody of his daughter. Prior to Arthur losing most of his custody, a Mini-Evaluation was ordered. In a Mini-Evaluation, an evaluator is appointed to examine the mental health of both the parents and the child, as well as various other factors that go into whether or not custody has been adequately determined, such as observing parent-child interactions and reviewing pertinent documents related to custody, for example, police records.⁸⁰ The evaluator is then called to testify during the custody trial. Arthur spoke more favorably about the financial portion of the divorce case. He was pleased that he did not have to contribute to his daughter's private schooling. Also, Arthur believes that the deductions he has been allowed to take have been completely justified. He found the

⁷⁸ *See id.*

⁷⁹ Telephone interview with Arthur, Divorce Litigant, CA (July 2003).

⁸⁰ Cal. R. of Court R. 5.220(e) (2)(a)&(b) (West 2003).

mediation process to be fair. The mediator asked both him and Lynda to speak. Arthur also felt that his attorney's presence at the mediation session was unnecessary. He and Lynda were able to answer questions, ask questions, and adequately maintain a sense of decorum in the mediator's office.

Mediation and other forms of Complementary Dispute Resolution, such as Early Settlement Panels, appear to be making great strides in dissolution cases in the judicial arena. For example, divorces today can be finalized in eighteen months, whereas the process would have taken several years in the 1970's and 1980's. Now that New Jersey has pilot mediation programs that appear to work quite well, perhaps it would be best to incorporate these programs permanently and have litigants choose Early Settlement Panels or mediation, as Michigan will in the near future.⁸¹ When litigants are offered a choice in the process regarding the resolution of their disputes, they may feel more confident in the legal system. It is typical during judicial proceedings for attorneys to speak for their clients. Yet, with various forms of Complementary Dispute Resolution, such as Early Settlement Panels, the litigants are given the opportunity to more actively participate. This process will undoubtedly work well when couples are filing for divorce. Since marriage is a personal matter as compared to other issues in dispute, it seems clear that dissolution cases would be appropriate for alternative forms of resolution. Additionally, it would prove beneficial in terms of judicial economy to utilize programs that would help reduce the amount of cases that would otherwise proceed to trial.

⁸¹ See *supra* note 59.