Lehr v. Afflitto and its Impact on Matrimonial and Mediation Practice

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INTRODUCTION

New Jersey leads the nation in family law, as well as in mediation policy and practice. On January 19, 2006, the Appellate Division published Lehr v. Afflitto, 382 N.J. Super. 376 (App. Div. 2006), an important decision that brings family law and mediation policy together, successfully and in one case. It is a decision that will be cited nationally, and for good reasons.

LEHR'S ANTECEDENTS

Lehr is the culmination of several recent legal developments, as follows:

1. In Lerner v. Laufer, 359 N.J. Super. 201 (App. Div.), 177 N.J. 223 (2003), the Appellate Division highlighted important distinctions between litigated and mediated dispute resolution, but recognized that parties' self-determination was at the heart of both. The Lerner case permitted parties to negotiate a settlement upon less than full exchange of information, and insulated attorneys from parties' after-claims of professional negligence when the attorney-client relationship has been appropriately restricted under

RPC 1.2(c) (as amended, post-decision)("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

Self-determination has always been a hallmark of mediation in New Jersey and nationally (see, e.g., N.J. Supreme Court Standards of Conduct for Mediators in Court-Connected Programs, Standard I ("Principle of Self-Determination: . . . mediation is based on the fundamental principle of [party] self-determination.") and ABA, AAA, and ACR Model Standards of Conduct for Mediators, Standard I ("Self-Determination"). However, the Lerner court recognized that self-determination is a core concept in divorce litigation as well, citing Appendix XVIII to the Rules of Court (Statement of Client Rights and Responsibilities in Civil Family Actions, Section A(10): "Clients have the right to make the final decision as to whether, when, and how to settle their cases and as to economic and other positions to be taken with respect to issues in the case.").

2. In State v. Williams, 184 N.J. 432 (2005), a criminal law decision, the New Jersey Supreme Court considered the limits of mediation confidentiality. The trial judge had determined that Rule 1:40-4(c) does not permit an exception to the rule against mediator testimony, even when balanced against the accused's sixth amendment right to defend himself at

trial. In Williams, the defendant asserted that the mediator had heard exculpatory admissions by the alleged victim in the case . The Appellate Division affirmed the trial court's exclusionary ruling. The Supreme Court granted certification on that issue 10 days after Acting Governor Codey signed the Uniform Mediation Act ("UMA-NJ") into law, N.J.S.A. 2A:23C-1, et seq.

Even though the case arose prior to the UMA-NJ's effective date, the Supreme Court grounded its Rule 1:40-4(c) constitutional analysis on the UMA-NJ's balancing test for evidentiary use of mediation communications. New Jersey's was the first state high court in the country to construe the UMA. In its 5-2 decision upholding the lower courts' rulings, the Supreme Court held that Mr. Williams's need for the mediator's testimony did not outweigh the public's interest in mediation confidentiality. The dissenting opinion did not disagree with the majority on statutory analysis grounds, but rather felt that the defendant had made a sufficient showing of need to overcome the general prohibition on mediator testimony.

3. The UMA-NJ took effect on November 22, 2004, and applies to all agreements to mediate made on or after that date. It creates a set of privileges against disclosure of mediation communications. These privileges are the heart and soul of the law, which is unique in New Jersey's legal history.

The National Conference of Commissions on Uniform State Law ("NCCUSL") and the American Bar Association took five years to develop the bill template. The drafters of UMA-NJ took two more years to customize it to New Jersey's unique legal and mediation cultures. UMA-NJ therefore represents the product of many thousands of professional work hours, built upon arduous discussion, debate, and multiple revisions by the national and state dispute resolution communities.

UMA-NJ represents a significant change in New Jersey law, which previously gave **no** confidentiality protection and **no** statutory privilege regarding mediation communications in the private sector, and only limited protection in the court-referred setting. The new law protects confidentiality of communications and creates enforceable privileges for all participants and the mediator. It also:

- Broadly defines both the mediation process and protected mediation communications, for the maximum protection of participants, their representatives, and the mediator;
- Advises parties that they have the right to create their own rules of confidentiality and exceptions to privilege;
- Explicitly provides that any writings signed by the parties are not privileged or confidential, such as mediation retainer agreements and signed settlement agreements arising out of mediation;

- Establishes other important exceptions to privilege, such as when a party sues the mediator or another professional who participates in the mediation, or when communications amount to a physical threat, or present evidence of a plan to commit a crime, or evidence of child abuse;
- Creates a "Tony Soprano" waiver and preclusion of privilege for organized crime activities that take place in a mediator's office;
- Prohibits mediators' substantive reports to the court (unless the parties expressly agree otherwise), but allows process reports about the status of mediation, whether settlement was reached, and attendance of parties and counsel;
- Codifies that parties' contractually agreed confidentiality provisions, as well as pre-existing confidentiality rules or laws, shall be incorporated into the mediation process. For example, Rule 1:40-4(c), in which the Supreme Court declares virtually all mediation communications protected and non-admissible, would continue to govern court-connected mediations, subject to the parties' agreement to modify those rules, and further subject to possible public policy overrides contained in the UMA-NJ itself.

- Requires mediators' due diligence and reportage about possible conflicts of interest, which, once disclosed, the parties are then permitted to ignore; and
- Permits attorneys or anyone else designated by a party to accompany the party and participate in the mediation. (Clearly, however, the mediator retains control of the proceedings, and unruly non-party participants may be invited to leave, or the mediator may cancel the process.)

LEHR v. AFFLITTO: ITS MEANING AND SIGNIFICANCE FOR FAMILY LAWYERS, MEDIATORS, AND TRIAL JUDGES

Today, it is the rare Family Part dissolution case that goes to trial. The vast majority of cases settle before trial, whether they are negotiated by counsel, mediated, or litigated up through (and sometimes beyond) Matrimonial Early Settlement Panel. The Lehr case was destined to be one of the settled ones, until it wasn't.

Lehr arose from a divorce proceeding that commenced in 2002 between Karin Lehr and John Afflitto, after a 22-year marriage that produced two children, then ages 15 and 10. The Family Part referred the couple to economic mediation, following MESP, under the then-existing mediation pilot program in Morris County.

The parties had several meetings with the court-appointed mediator, Sanford Kahan. The parties' attorneys attended a portion of the sessions, but the parties allegedly reached a final settlement in mediation, without their attorneys present. The mediator sent a letter to the lawyers outlining the proposed settlement on thirteen issues but listed three major financial issues that remained unresolved. Left unresolved were: 1) the parties' respective contributions towards children's college costs, 2) the amount of the father's child support, and 3) payment of interim marital expenses through to final judgment.

At some point, Mr. Afflitto countered that he rejected the settlement altogether. The trial court nevertheless accepted the settlement as outlined in Kahan's letter, and put through the parties' divorce. Afflitto appealed, arguing that there was no settlement; the trial court erred when it reviewed and relied upon the mediator's letter, which was protected from disclosure by the Supreme Court's confidentiality rule, Rule 1:40-4(c); and that no settlement could occur unless the review attorneys drafted and the parties signed the ultimate Settlement Agreement. The UMA-NJ played no part in the first appeal, because it was not yet in effect.

On the initial appeal, the Appellate Division, without addressing the mediation confidentiality argument, remanded the case for a "Harrington"

hearing, Harrington v. Harrington, 281 N.J. Super. 39 (App. Div.), certif. denied, 142 N.J. 455 (1995), as to whether the parties had in fact settled their case. During the remand hearing, Lehr's counsel called the mediator to testify. The mediator testified that his letter was not a settlement agreement. Nevertheless, after testimony by both parties and both legal counsel as to the mediation sessions and what the parties did or did not agree to, the trial judge found that "there was an agreement and the agreement was [supposed] to be reduced to writing." Thirteen out of sixteen was good enough.

When the case returned to the Appellate Division, the panel stated that the mediator's subpoena and testimony were "troubling," as confidentiality of mediation proceedings "is a matter of great public and systemic importance." They said: "Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs the need for confidentiality," which embraces the UMA-NJ standard.

In his opinion for the three-judge appellate panel, the Honorable Robert Fall, J.A.D., wrote that New Jersey has a strong policy favoring protection of mediation communications from disclosure and held, consistent with the UMA-NJ, that a party's need for testimony ordinarily

does not outweigh the need to maintain mediation confidentiality, absent an express waiver by all of the parties and also by the mediator.

The Appellate panel said that, although the case arose before the UMA-NJ became law, its analytical framework was appropriate to determine whether to pierce the mediator's privilege and allow the use of mediation communications in a subsequent litigation proceeding.

Rule 1:40-4(c) provides that no mediation communication may be used in a subsequent proceeding, and that mediators are prohibiting from testifying in subsequent proceedings. The UMA-NJ provides a privilege for parties, third party participants, and mediators to refuse to disclose -- and prevent others from disclosing -- mediation communications, unless all agree in writing to a waiver or a court finds that the need for the information substantially outweighs the need to protect the communications.

The Appellate Division turned to the New Jersey Supreme Court's recent decision in State v. Williams for the proposition that, as a general rule, mediators are prevented from testifying in a court proceeding related to the mediated case. Confidentiality is central to encouraging parties to participate in mediation, because parties expect that nothing they say will be used against them in a later court proceeding. The Lehr court said that a mediator's after-the-fact testimony would damage the process and bring into question the mediator's impartiality: "Applying these principles and

guidelines, we conclude that since there was no express waiver of the confidentiality provisions of R. 1:40-4(c), the trial court erred in permitting Kahan to testify at the Harrington hearing."

The Appellate Division also said, consistent with its UMA-NJ analysis: "When balancing the need for the mediator's testimony with the interest in confidentiality, it is clear that the need for Kahan's testimony did not substantially outweigh the private and public interests in protecting confidentiality."

The Lehr court lamented the fact that alternative dispute resolution had failed to bring the parties together in this case. It said: "The advent of mediation and other alternative dispute resolution methods as tools to assist parties in resolving their disputes as early as possible and with the least amount of financial and emotional strain is an admirable and worthwhile effort of the court system. Ultimately, however, in an adversarial system with limited resources, the success of mediation is dependent on the good faith, reasonableness and willingness of the litigants to participate."

Finally, while the UMA-NJ technically was not before the Lehr court -- since the facts of the case arose before the UMA-NJ was signed into law -- nevertheless, the Appellate Division missed a golden opportunity to explain and apply the most relevant section of the law to this matter of importance. Specifically, N.J.S.A. 2A:23C-6(b)(2) establishes an **exception** to its

privilege provisions, when a party seeks to offer a mediation communication in a contract enforcement proceeding, such as a Harrington hearing. In that context, either party is permitted to testify about mediation communications, without both parties consenting to a waiver, and each party is entitled to elicit the other party's testimony about such communications.

It makes no sense to require both parties to agree to a waiver before such testimony may be taken, because only the enforcing party has the motivation to testify or compel the other party's testimony. The resisting party should not be permitted to control the testimonial flow for both sides, and the law so holds.

Under the cited UMA-NJ provision, and for the very policy reasons recognized by the Supreme Court in Williams and the Appellate Division in Lehr, only the mediator may refuse to provide such testimony. Although this author thinks it is never a good idea to do so, the mediator may testify to mediation communications in that setting on a voluntary basis.

Thus, the Lehr court got the right results, but arguably for the wrong reasons. The court's Rule 1:40-4(c) analysis was substantially stronger. However, once the UMA-NJ became law, the Rules of Court and Rules of Evidence should yield to the Legislature's declarations of privilege, as they have since time immemorial.

CONCLUSIONS

The Lehr case stands for the important proposition that settlements are not complete until **all** major issues are resolved; thirteen out of sixteen are not enough to mandate full and final settlement. Said the court, "[F]inancial issues in a matrimonial case are, by their nature, interrelated . . . . It is clear that 'the termination of a marriage involves an economic mosaic comprised of equitable distribution, alimony[,] and child support[,] and . . . these financial components interface.'" (Citations omitted).

The Lehr court's directives about settlement have become even more important since the publication – and then unpublication -- of Costanza v. Clemente, A-0545004T5 (App. Div., March 27, 2006), which cited Rule 5:7-8 (as did Lehr) for the proposition that bifurcation of issues is the rarest of exceptions, and that written settlement agreements should accompany final judgments of divorce, Rule 4:42-1(a)(4) and (b).

In short, Lehr gave a major boost to the sanctity of confidential mediation communications, ruling that a mediator is prohibited from testifying in subsequent proceedings without an express waiver from all the parties, and unless the mediator also consents.

Lehr was not appealed to our Supreme Court. In this writer's view, the Supreme Court would not have disturbed the Appellate Division's handiwork, even if an appeal had been filed. Lehr supports the idea that

mediation is not ancillary to litigation, but rather exists as a free-standing proceeding that must be respected and protected according to its internal rules and logic. The trial courts should order disclosure of mediation communications in after-litigated matters only in the rarest of cases and for good cause shown.

Based on Laufer, Williams, Lehr, and the UMA-NJ, this author believes it should now be standard New Jersey practice that mediators and parties must have a written and signed agreement to mediate before mediation starts. The UMA-NJ sets forth broad outlines and guidance regarding mediation privilege and confidentiality, but anticipates that parties and the mediator will fill in the significant blanks in a customized way. To avoid foreseeable problems down the road, agreements to mediate should provide parties, third parties (especially experts retained for the mediation), lawyers, and trial judges with a clear understanding of everyone's intentions with regard to mediation confidentiality and privilege.

As in many other areas of life and law, so too in divorce mediation: an ounce of prevention is worth many pounds of cure.

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