New Jersey Law Journal

VOL. CLXXIII – NO. 5 – INDEX 417 AUGUST 4, 2003 ESTABLISHED 1878

Family Law

Divorcing Parties May Seek To Limit Their Lawyers' Scope of Representation

A lawyer's duty of zealous advocacy must yield to a client's voluntary decision to settle without full information

By Hanan M. Isaacs, M.A., J.D., A.P.M.

In *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003), the Appellate Division has established for the first time in New Jersey's legal history the proper balance between clients' rights to and interests in self-determination and informed consent. It has also determined that a lawyer's duty of zealous advocacy must yield to a client's voluntary decision to settle a case based on little or no information gathering, analysis or exchange.

In *Lerner*, the Appellate Division has definitively ruled that New Jersey clients and review counsel may, properly and within expected standards of care, define and limit the scope of attorney services.

The court recognized that parties in mediation are engaged in a process that differs fundamentally from litigation. By design, the roles of clients and lawyers in mediation and post-mediation review are not the same as they would be in a fully adversarial encounter. Clients have the right of self-determination in the negotiation process, whether or not it involves mediation.

Importantly, *Lerner* means that a client may validly waive complete or partial information, as long as the client expressly and in writing confirms that (1) she voluntarily accepts the known and unknown risks of settling without full information and (2) the lawyer is unable to make a recommendation regarding settlement, based on the client's decision to abbreviate or eliminate ordinary and customary information processes.

Underlying Facts

In September of 1999, Lynne Lerner sued William Laufer, her former attorney, for professional negligence. Lerner's lawsuit alleged that Laufer had failed to protect her in settlement negotiations that resulted in a property settlement agreement.

Before Lerner first contacted Laufer for independent attorney review, the parties had reached a proposed agreement in mediation with Brett Meyer, a close personal friend and an attorney who had done legal work for both of them. The parties knowingly chose to mediate rather than litigate the issues surrounding the dissolution of their marriage. They both wished to avoid the financial and emotional cost of a protracted litigation.

Lerner chose to participate in mediation because of her concern for the effect of a litigated proceeding on her family and, in particular, on her children. Thus, she stated that she selected mediation because she was "very concerned about my children and [their] wellbeing in general"; she wanted to avoid the children's alienation from her; she felt "a fair amount of guilt and distress" about her children in the context of an extramarital affair; and "by mediating this [she] would avoid ... litigation and antagonistic situations and a lengthy time of turmoil."

The parties mediated their proposed settlement agreement under Meyer's supervision in January and February of 1994. Once the parties reached a mutually acceptable agreement, Meyer advised Lerner and her husband to seek independent counsel to finalize the agreement and obtain the divorce. Lerner chose Laufer from a list of lawyers provided to her by Meyer.

Given Lerner's stated satisfaction with the proposed agreement she had negotiated in mediation, Laufer memorialized the limited scope of representation that Lerner requested. Specifically, Laufer stated that at Lerner's request he would not conduct "full and complete discovery in this matter, including but not limited to appraisals of real estate and business interests, depositions and interrogatories."

Laufer later sent Lerner a standard form retainer agreement, reciting a $2,500 retainer deposit to cover work he had already performed and was expected to perform in this settled case. The letter also memorialized that Laufer was:

> not in a position to advise [Lerner] as to whether ... the Agreement is fair and equitable

---

Isaacs is a solo practitioner in Princeton and is accredited by the New Jersey Association of Professional Mediators as a professional mediator in general civil and divorce matters. He argued on behalf of NJAPM as amicus curiae in Lerner v. Laufer. *Materials presented herein also form the basis of a seminar on* Lerner *he is presently giving for NJICLE.*

and whether ... you should execute the Agreement as prepared. Accordingly, it is difficult for me to make a recommendation as to whether you should accept the sum of $500,000 and 15 percent of the stock that the two of you have acquired during the marriage[,] in consideration for waiving your right to 85 percent of the stock that was acquired during the marriage.

In sum, I am not in a position to make a recommendation or determination that the Property Settlement Agreement as prepared represents a fair and reasonable compromise. ... or whether the amount of alimony and/or child support ... is an amount that would be awarded to you if, in fact, this matter proceeded to trial.

I have reviewed and suggested various modifications to the Property Settlement Agreement to the mediator. I have discussed the contents of the Agreement with you, and in your opinion you are satisfied that the Agreement represents a fair and reasonable compromise of all issues arising from the marital relationship. You have indicated to me that you are entering into the Agreement freely and voluntarily and that you have been satisfied with the services of the mediator in this matter. You have further indicated to me that the Agreement will be providing you with a substantial amount of assets in excess of Three Million Dollars, and that you will be receiving alimony payments as specifi[ed] in the Property Settlement Agreement.

After reviewing the Agreement with you and Mr. Meyer, I am satisfied that you understand the terms and conditions of the Agreement; that you feel that you are receiving a fair and equitable amount of the assets that were acquired during the marriage; and that the amount of support that is provided in the Agreement will, in fact, provide you with an income that will allow you to maintain a

FORM: WAIVER OF INFORMATION GATHERING, ANALYSIS, AND/OR EXCHANGE AS PERMITTED UNDER RULE 1:2(c) AND *LERNER v. LAUFER* TO BE USED AS PART OF A GENERAL RETAINER AGREEMENT BETWEEN PROFESSSIONAL AND CLIENT — [INITIAL EVERY PAGE]

Prepared by Hanan M. Isaacs, M.A., J.D., A.P.M.

THE LAW FIRM HAS ADVISED YOU THAT YOU HAVE THE RIGHT TO REQUEST A LIMITATION ON THE SCOPE OF THE LAW FIRM'S REPRESENTATION. Specifically, you are permitted by law to direct the Law Firm to engage in either limited or no information gathering, analysis, and/or exchange with the other party (parties) to this dispute. If you choose to limit the Law Firm's representation in this regard, and unless specifically stated otherwise below or in a later-signed writing, **the law firm will undertake no information gathering, analysis, and/or exchange**. For example, the Law Firm will not prepare written questions for the other party (parties) to answer, under oath, which are called "interrogatories"; will **not** take formal and sworn statements from the other party (parties), which are called "depositions"; will **not** issue Notices to Produce/Inspect/Copy Documents; will not seek formal appraisals of any assets or liabilities that are the subject of this dispute; will **not** retain experts to evaluate the issues in controversy and/or make recommendations within the scope of their expertise as to the resolution of those issues; and will **not** take any other steps, whether formal or informal, to gather, analyze, and/or exchange with the other party (parties) any other and similar types of information.

If you had **not** directed the Law Firm to limit the scope of representation regarding information gathering, analysis, and/or exchange, as stated above, the Law Firm ordinarily and customarily would have taken some or all of these steps in the course of representing you. **By signing this limitation of representation section of the Retainer Agreement, you are confirming your understanding that your decisions as to whether, when, and how to settle your case, and as to economic and other positions to be taken with respect to issues in the case, will be less than fully informed.** You have made the decision to give up information gathering, analysis, and/or exchange with the other party (parties) freely and voluntarily, without coercion, undue pressure, or undue influence having been applied by anyone, including the Law Firm.

You specifically acknowledge to the Law Firm, and, if required, will later acknowledge to a Judge of Superior Court, that without such full information gathering, analysis, and/or exchange with the other party (parties), **THE LAW FIRM IS NOT IN A POSITION TO ADVISE YOU WHETHER OR NOT ANY SETTLEMENTS REACHED IN THIS NEGOTIATION PROCESS ARE FAIR TO YOU OR IN YOUR OWN BEST INTERESTS.**

You are willing to fully accept the risks of such information nondisclosure, which in fact could produce an agreement that is different from and less beneficial to you than a Judge might have ordered in your case after a full hearing based on full information, or what the Law Firm could have negotiated on your behalf based on full information.

You specifically affirm that you have been advised of the risks you are taking, both known and unknown, in pro-

respectable lifestyle.

The parties executed a final property settlement agreement, signed an amendment to the agreement and incorporated their amended agreement into a final judgment of divorce on April 11, 1994. The settlement terms were placed on the record before Judge Herbert Glickman, at which time Lerner acknowledged under oath that her entry into the settlement agreement was knowing and voluntary; that the agreement was the result of a mediation with Meyer; that she had relied upon her husband's representations to Meyer and had relied upon Meyer; that she was satisfied with the services of both Meyer and Laufer; that Laufer's participation and role in the matter had been limited; and that she had previously signed a waiver of appraisals and other discovery.

At some point after the parties' entry into their settlement agreement, Lerner sent Meyer a thank you note. She was, in her words, "extremely relieved that this horrible period in [her] life was over" and she expressed her gratitude to Meyer:

> Dear Brett, I just want to say thank you for all you've done for us. I know this wasn't easy for you to do. You saved both of us a lot of pain and anguish for which I am forever grateful. It's comforting to have a friend like you. Fondly, Lynne.

Nevertheless, Lerner was distressed when she learned several months later, in or about June of 1994, that her former husband's closely held business had "gone public," an event that was contemplated on the face of the parties' settlement agreement.

On July 29, 1994, having engaged new legal counsel, Lerner successfully moved before Glickman to vacate the final judgment as the product of both parties' fraud, namely the husband's false testimony regarding the cause of action and Lerner's acquiescence in that false testimony.

Glickman set aside the divorce judgment, but reserved on the validity and enforceability of the settlement agreement. Thereafter, he encouraged the parties to mediate their remaining disputes with a prominent New Jersey attorney, which resulted in a second amendment to the settlement agreement, dated April 12, 1999.

The parties' separation agreement, as amended, was then incorporated into a final dual judgment of divorce, which Glickman signed and entered on April 12, 1999. Lerner once again testified as to the

proceeding with negotiations upon less than full information. You also specifically affirm that your decision to so proceed was made in good faith and neither with the purpose nor with the effect of defrauding a party (or parties) to this negotiation nor of defrauding the State or federal tax authorities.

You also affirm that you are over the age of 18 and of sound mind, and that your waiver of information gathering, analysis, and/or exchange with the other party (parties) will not jeopardize the best interests of your child(ren), and that no other known public policy interests will be adversely affected by such information waiver.

If, at any time, you decide to change your mind about engaging in information gathering, analysis, and/or exchange with the other party (parties), or if your circumstances should change such that any of the foregoing representations made by you are no longer accurate, then you understand and agree that you are obligated to and will in fact so notify the Law Firm, promptly and in writing. You further understand and agree that the Law Firm is entitled to and does rely upon the accuracy of the foregoing representations and of any future representations made by you on these important issues.

If there are any exceptions to the waiver of information gathering, analysis, and/or exchange with the other party (parties), as stated above, then all such exceptions as may exist are specifically set forth below, and nowhere else in this document or in any other document.

I SPECIFICALLY DIRECT THAT THE FOLLOWING LIMITED INFORMATION SHALL BE GATHERED, ANALYZED, AND/OR EXCHANGED IN THIS CASE, AS FOLLOWS: IF THIS SECTION IS FILLED OUT AT A DATE LATER THAN THE ORIGINAL DATE OF RETENTION AND EXECUTION, THEN THE MODIFYING DATE SHALL ALSO BE INSERTED AND INITIALED BY THE CLIENT AND THE LAW FIRM:

(List here in detail)

IMPORTANT FOOTNOTE: The foregoing information waiver should be specifically modified for use by general civil and family law attorneys for use in those fields and by general civil and family law mediators for use in their practices as well. When used in any retainer agreement, its text should NOT be contradicted by any standard form retainer language stating that the Law Firm/Mediator will undertake information gathering, analysis, and/or exchange steps as such contradictory language will at least cloud if not void the effectiveness of the limited scope of representation/mediation.

If a client starts out declining all information, has a "midstream" change of mind, and then authorizes limited information gathering, analysis, and/or exchange, then the initial waiver form may still be used. However, if a party's midstream change is in the direction of full information, then a separate letter between the party or parties and the professional will have to be drawn, specifically outlining the changes requested and that the previous document should be deemed superseded in whole or in part as specified.

Also, in circumstances where the client or another lawyer or law firm may be handling part of the responsibilities, the information waiver should describe the specific assignment of responsibilities.

The foregoing principles are not to be construed as the author's specific legal advice to anyone based on any actual set of facts. ■

voluntariness of her agreement, her satisfaction with the terms of settlement and her satisfaction with her second legal counsel's representation. As a term of the revised settlement, Lerner agreed to dismiss with prejudice a civil action she had filed against Meyer, the parties' first mediator.

In September of 1999, Lerner sued Laufer, alleging that he had deviated from professional standards in his representation, thereby causing her to sustain money damages.

Following extensive discovery by both sides, Laufer moved for summary judgment. In opposing Laufer's motion, Lerner relied primarily on the opinion of Judith Bielan, a certified matrimonial specialist.

In her letter opinion of July 3, 2001, Bielan stated that Laufer, also a matrimonial specialist, had breached his duties of competence, faithfulness and good judgment by "failing to discuss the current state of the law with his client and in failing to advocate on her behalf for a truly 'equitable distribution' of the marital assets."

While specifically opining that Laufer did not "make an independent evaluation as to whether or not the agreement was fair and equitable [to Lerner], nor did he make a determination of conscionability ... In my opinion, he had a duty to do so and he breached said duty," Bielan cited no New Jersey case law or other standard of professional care for the proposition that Laufer, despite his contractually restricted role, had a duty to perform an independent evaluation of the agreement's fairness.

In reaching her conclusions about the unfairness of the mediated property settlement agreement, Bielan placed no value whatsoever on Lerner's clearly stated priorities, including her need for closure, aversion to litigation and desire to remove strife from her life and the lives of her children. These considerations obviously weighed heavily in Lerner's decision to settle her financial disputes rather than litigate them. Bielan's factual and legal analyses were based solely upon a litigation standard that bore no relationship to the parties' underlying motivations for settlement, nor did they relate to the actual circumstances of settlement.

On Nov. 16, 2001, Judge David Cramp ruled that Lerner had failed to demonstrate Laufer's deviation from standards of care expected of matrimonial attorneys, in that Lerner had entered into a limited engagement with Laufer. He found that Bielan's proffered standards — which would not permit any limitation of engagement — were personal to her. Cramp specifically found that:

> there's something wrong with th[e] whole concept.[Lerner] testifies before a judge that she's satisfied once. Then she renegotiates. She testifies before a judge a second time, ["]I'm satisfied["] ... Then you can turn around and bring a lawsuit against the attorney who said I'm not giving you any advice. And say, ["O]kay, now you owe me the difference between 50/50 and what I got[."]
>
> ... I'm going to grant the motion for summary judgment. I find it's just a preposterous argument that a person can get a settlement with the husband, get the divorce ... and agree that the settlement is satisfactory. Agree on the record that the attorney was not giving the full advice. That there was a limitation on the hiring of the attorney.
>
> Then get the thing set aside and have another chance to negotiate [through] an attorney who tells the ... client during the time she's under oath on the record before Judge Glickman that you have a right to have a hearing on this issue. Right in front of Judge Glickman. You have a right to have a hearing. You're giving up that right by entering into this agreement. And, again, she says I'm satisfied that it's fair and reasonable under all the circumstances.
>
> I cannot believe that the law is now that she can turn around and sue the attorney who has this limitation[.]
>
> In addition to that, I don't see anything in [Bielan's] report and nothing has been shown to me here to indicate what standard is supposed to be applied when an attorney is faced with a mediation agreement.
>
> And all of a sudden we have an expert who now says well, you can't have a limitation. Well, ... where is there any law that says you can't have a limitation? ... [I]n the matrimonial field, there must be a recognition that an attorney who is just there to put through the agreement that a mediator has resolved is entitled to have some kind of a limitation put on his representation, as long as he tells the client what it is and the client agrees with it.
>
> That's what ... RPC [1.2(c)] says. You can do it if you consult with a client and the client agrees. And ... there isn't a word in the expert's report about what the standard of care is under those circumstances. And there's nothing in the expert's report that says if you negotiate anything about the agreement, such as an increase in alimony, that you now undertake an obligation to review ... everything.

Cramp signed and entered an order granting summary judgment on Nov. 16, 2001. Lerner's appeal followed.

The Last Word

In affirming Cramp's rulings, the Appellate Division has now determined that for public policy reasons (and absent special circumstances), parties to general civil and matrimonial cases may now consent to settle their cases without what lawyers would ordinarily consider informed consent:

> [T]he law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them. ... The voluntary settlement of disputes is a central policy dictate of the judiciary and is expressly encouraged. [Citations omitted]. The courts approve

> hundreds of such settlements in all kinds of cases without once looking into their wisdom or the adequacy of the consideration that supports them. ... [T]he court daily approves settlements upon the express finding that it does not pass upon the fairness or merits of the agreement, ... so long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable.

In so ruling, the Appellate Division distinguished *Lerner* from *Ziegelheim v. Apollo*, 128 N.J. 250 (1992). In *Ziegelheim*, a former client sued her former divorce attorney based on that attorney's failure to engage in certain promised discovery that, according to the client's trial expert, would have significantly changed the probable outcome of the client's settlement negotiations. The client was permitted to proceed to trial, despite her on-the-record statements of subjective satisfaction with the settlement agreement and her lawyer's services.

In *Lerner*, unlike *Ziegelheim*, it was the client who requested a limitation on the scope of attorney services. The *Lerner* court noted that "To us that means if the service is limited by consent, then the degree of care is framed by the agreed service. ... We, therefore, see no just reason in law or policy to deny attorneys ... the right to assert as a defense to claims of malpractice that they were engaged under a precisely drafted consent limiting the scope of representation."

Clearly, the Appellate Division upheld Laufer's warning to Lerner that, absent traditional discovery tools, the use of which Lerner had rejected, Laufer simply was not in a position to recommend for or against settlement on the terms Lerner and her husband had reached in mediation.

Special Circumstances

The special circumstances articulated by the Appellate Division, which could yield a different result on different facts, include a party's mental incapacity, duress or the existence of domestic violence.

Less clearly articulated, but of particular concern to lawyers and mediators, was the appellate panel's reference to factors such as a settlement agreement's violation of any law or public policy, failure to protect the best interests of children or the agreement's "fostering" of nondisclosure to appropriate tax authorities.

As to the last item listed, in family law cases and often in general civil cases, the decision to mediate is sometimes driven by the parties' (or their counsels') reluctance to expose sensitive tax issues to a trial court and consequent referral to the tax authorities. The Appellate Division has left open and unresolved how practitioners are expected to handle these difficult issues, but strongly suggests that such circumstances would modify the standards of expected care.

Some possible conclusions to be drawn from these special circumstances are that attorneys have a heightened duty to question clients about their decision to settle in mediation, attend all mediation sessions and, if the circumstances are extreme enough — e.g., a lawyer's concern about a client's mental capacity — to object to settlement and withdraw from the case.

However, absent those special circumstances, the deeper meaning of *Lerner*, for general civil and family law attorneys and mediators, is this: In the tension between a lawyer's duty of zealous representation/advocacy — which protects people from their own ignorance — and a person's stated good faith desire to proceed in partial or full ignorance — which could turn out to be a mistake — advocacy must yield to self-determination.

Indeed, self-determination, according to the court, trumps all other considerations, except for the best interests of children, fraud, duress or similar supervening policy interests.

Importantly, in footnote 2 at page 220 of the opinion, the *Lerner* court "suggested," for the protection of attorneys and the public, that "any party's consent to limit the scope of representation ... should be fully disclosed to the [trial] court *and, if the court requests it, the executed retainer agreement should be offered to the court for review*." (Emphasis added.)

I believe that in every case involving parties' settlement, whether mediated or not, where the parties have expressly waived complete or partial information, legal counsel ordinarily and customarily should introduce the written and signed limiting language into evidence and get the parties' sworn acknowledgement of same into the record.

In cases involving stipulations of settlement or default proceedings based on submissions without testimony, the parties should be required (as a matter of good attorney practice) to execute certifications stating their voluntary waiver of partial or complete information, including previously signed retainer agreements or, in appropriate cases, revisions to such agreements.

While the Appellate Division expressed a strong preference for "a single, specifically tailored form of retainer agreement," (359 N.J. Super. at 220), the court did not address the common reality that parties may change their minds midstream, after the initial "full information" retainer agreement has been executed.

I do not believe the court would be offended by, and in fact expect that it would specifically approve, a letter agreement duly signed by the client and the lawyer that modifies an earlier drafted retainer agreement, and operates much like a codicil to a will.

The Road Not Taken

A final word about "the road not taken." In its amicus curiae brief, the New Jersey Association of Professional Mediators asked the court to expressly articulate the expected standards of care by lawyers reviewing an agreement reached in mediation or otherwise, as follows.

1. That attorneys have an obligation to understand available dispute resolution options and to inform their clients of them, consistent with R. 1:40-1, as amended.

2. That attorneys have an obligation to ask their clients about their subjective satisfaction with the mediation process and the mediator.

3. That attorneys have an obligation to inform clients of their inability to recommend a specific course of conduct, given the limited role the clients have asked them to perform.

4. That attorneys have an obligation to point out and seek correction of any problems or defects that they could

observe on the face of a draft settlement agreement.

5. That attorneys have an obligation to support clients' self-determined choices to negotiate their disputes, whether in mediation or otherwise.

6. That attorneys have an obligation not to impose invasive litigation and discovery procedures on adult parties of sound mind who, after receiving advice concerning the possible consequences of their decisions, nevertheless request less intense and less expensive methods of dispute resolution.

While the court limited its articulated standards of care for lawyers and did not accept the amicus curiae's request for a fuller set of standards, nevertheless, I believe the foregoing principles are fully supported by the dispute resolution community nationally and in New Jersey.

If the Uniform Mediation Act becomes the law in New Jersey (*A-3542* is pending in the Legislature and is awaiting action by the General Assembly), it will fill in some of the public policy blanks. Until that time, however, and as a community of judges, lawyers and mediators, we should consider these principles as "operational," although not formally adopted by the Supreme Court, the Appellate Division or the Legislature.

A month after *Lerner* was decided, the Appellate Division decided *Kamaratos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003), which, citing *Lerner*, stands for the proposition that attorneys may properly enforce arbitration agreements reached voluntarily with clients, where the clients clearly understand they are waiving an absolute right to fee arbitration under the Rules of Court.

As a result of *Lerner* and *Kamaratos*, New Jersey attorneys and clients have been encouraged to change the operating rules between them and, in so doing, to crystallize and limit the scope of the lawyer's representation if that is what the client wants.

I believe we should embrace the court system's invitation to innovate and customize our agreements with clients, in the spirit of giving consumers as close to what they want as possible, while also protecting ourselves against unfair and after-the-fact claims of failed due diligence. ■