

Matrimonial Early Settlement Panels: What They Do and Why They Are Important

By: Jerry S. D’Aniello*
Megha R. Thakkar

The Matrimonial Early Settlement Program can be an extremely useful tool for matrimonial attorneys in facilitating a global settlement. Since it was established, the Early Settlement Program has been instrumental in settling an abundance of cases. The program originally began in an informal setting in Morris County with attorneys volunteering to assist in settling cases of other matrimonial practitioners in 1977. Other counties took notice and began establishing such programs.

By 1981, the Supreme Court Committee on Matrimonial Litigation created uniform procedures heading towards the statewide implementation of the Early Settlement Panel. The Early Settlement Program continued to benefit through various focus groups and committees. The Supreme Court created a Committee on Complementary Dispute Resolution and a Task Force on Dispute Resolution which addressed Early Settlement Program practices through the 1980s.

Thereafter, a Matrimonial Early Settlement Panel Workgroup rendered recommendations to further develop the program in 1995. Finally, the Supreme Court Best Practices Report issued in 1999 directly resulted in many of the Early Settlement Program practices that we now see statewide.

Today, New Jersey Court Rule 5:5-5 governs the Early Settlement Program:

All vicinages shall establish an Early Settlement Program (ESP), in conjunction with the County Bar Associations, and the Presiding Judges, or designee, shall refer appropriate cases including post-judgment applications to the program based upon review of the pleadings and case information statements submitted by the parties. Parties to cases that have been so referred shall participate in the program as scheduled. The failure of a party to participate in the program or to provide a case information statement or such other required information may result in the assessment of counsel fees and/or dismissal of the non-cooperating party’s pleadings. Not later than five days prior to the scheduled panel session, each party shall be required to provide a submission to the ESP coordinator in the county of venue, with a copy to the designated panelists, if known.¹

* **Jerry S. D’Aniello** is a partner at Norris McLaughlin & Marcus, P.A. where he focuses his entire practice on Family Law. He is a Fellow of the American Academy of Matrimonial Lawyers and he is Certified by the Supreme Court of New Jersey as a Matrimonial Law Attorney.

¹ Pressler, Current N.J. Court Rules, R. 5:5-5 at 2163 (2014).

The Early Settlement Program date is generally fixed at the time of the initial Case Management Conference and scheduled after the conclusion of discovery. Litigants and their attorneys attend the Early Settlement Program. Through the Early Settlement Program, experienced matrimonial attorneys volunteer their time to serve on a panel wherein they review facts of matrimonial matters to assist litigants in resolving financial issues. Panelists do not deal with custody and parenting time issues.

The panel is typically comprised of two (2) or three (3) attorneys. The number of panelists varies by county, e.g., Ocean County routinely has only one (1) panelist. While there is no rule as to who may serve as a panelist, each county's Early Settlement Program coordinator will require panelists to be fairly experienced matrimonial attorneys. The panelists generally should have several years of practice in matrimonial law, although there is no bright line experience level required. They should be skilled in all aspects of matrimonial law. Attorneys seeking to serve as a panelist should contact the county bar association or Early Settlement Program coordinator. It is likely that the panelists will know or even be friendly with an attorney presenting a case. However, it is important that the panelists appear neutral and not be too outwardly friendly to any specific attorneys. Remember the litigants; their perception is important.

The panelists will hear information about the case, review the parties' submissions and Case Information Statements, deliberate, and render confidential recommendations regarding settlement. While the recommendations are not binding on either party, their recommendations often carry considerable weight in the settlement negotiation process since the panelists, as experienced matrimonial practitioners, have a good sense as to how a Family Part Judge may rule on contested financial issues.

Court Rule 5:5-5 Court and panelists are to receive copies of written submissions five (5) days prior to the scheduled panel date. The submissions set forth each party's position as to issues including alimony, child support, college or private school costs, equitable distribution of assets and debts, life insurance, tax issues, and counsel fees. While the counties seek generally the same information by way of the submission form, the form is different for each county that provides a form. Again, R. 5:5-5 requires the parties to submit case information statements or "such other required information" and since individual county bar associations are generally in charge of the form, this varies slightly county to county.

Although our Court Rules are supposed to be uniformly applied throughout the state, they are not as it relates to the requirement that submissions be provided five (5) days in advance. As a matter of practice, the requirement for submissions varies county to county. For instance, Somerset and Hunterdon counties require the submission to be provided to the court's panel coordinator five (5) days in advance, but not to the panelists. Both Somerset and Hunterdon counties have relaxed this requirement and

permit panel submissions to be provided on the day of the scheduled Early Settlement Panel. Meanwhile, Morris and Union Counties have a fairly strict requirement that panel submissions are to be provided to the panel coordinator and the panelists five (5) days in advance. Essex County requires submissions to be sent to the panelists with the cover letter going to the court. Middlesex County, on the other hand, does not require panel submissions to be sent to the court or to the panelists in advance. Attorneys appearing for Early Settlement Panel in Middlesex County typically hand their submissions directly to the panelists when their case is called. These local practices are subject to change, so it is always prudent to check before proceeding in a county in which you are unfamiliar.

Counties also differ greatly in terms of the length of the Early Settlement Panel. Certain counties, such as Ocean County, will only assign one (1) or two (2) cases to each panel allowing them to spend a significant amount of time on each case. On the other hand, counties like Somerset and Middlesex can have five (5) cases assigned to each panel, resulting in each case being afforded less time with the panel.

The Early Settlement Panel is a prime opportunity for matrimonial practitioners to focus on the disputed issues in each matter. In preparing an Early Settlement Panel submission, attorneys must review the facts of a case, update Case Information Statements as needed, review completed discovery, and set forth a reasonable settlement position as to each issue in dispute. It is also important to provide a brief background section to describe important facts and your theory of the case, along with a list of basic information (i.e. date of marriage, date of complaint, length of marriage, ages of parties, names and ages of children, highest education level of each party, employment and income of each party, etc.). Done properly, an Early Settlement Program submission can be the foundation for future mediation submissions or even a trial brief in the event that a matter does not settle.

For litigants, this is often the first time that they will appear in court. Therefore, they may feel a great sense of anxiety. It is important that attorneys inform their clients of exactly what happens through the Early Settlement Program well in advance of the scheduled date. Litigants should be aware that they will not be forced into accepting the panel's recommendation, and that recommendations made at the panel are not told to the Judge unless both parties wish to disclose that information. They should also be aware that the panel will not hear testimony from any witnesses and the attorney does all the talking. It is a good idea to reinforce your explanation of the Early Settlement Program process in writing when you send the client the Early Settlement Program scheduling notice. This is also often the first time litigants will ascertain exactly what their spouses are seeking in connection with a divorce. While matrimonial practitioners have heard the Superior Court Judge's "pre-MESP speech" countless times, it is important to ensure that the litigants are present for same. The Judge's comments help

to prepare litigants for what to expect from the panel and often underscore the importance of achieving settlement.

The role of the panelists is critical. The panelists will frequently hear from counsel first to summarize the facts of their case prior to meeting with litigants. Again, this is a practice that varies county to county. Panelists should try to fully settle all issues in dispute. If that is not possible, the panel should attempt to resolve as many of the issues in dispute as possible. Attorneys should inform panelists of issues that the parties may be close to resolving or may have resolved. Panelists should generally try to refrain from making recommendations as to such issues as a recommendation better or worse for one party than the resolution the parties have reached may result in undoing the deal or unnecessary litigation. Thereafter, the panelists will confer with one another and render a recommendation to counsel and the litigants. Panelists should explain what a Superior Court Judge may do in such a case but they may also offer creative alternatives as a recommendation for settlement. While a Judge is limited in the relief he or she can order, the panelists can think outside of the box, and render recommendations outside of that scope (i.e. lump sum alimony). They may also offer to answer any questions that the litigants or attorneys may have.

Once the panel renders a recommendation, attorneys should discuss the recommendation with their clients. The parties can elect to accept the recommendation, reject the recommendation, or utilize the recommendation to engage in further negotiations. If both parties accept the recommendation, they can place their agreement on the record and proceed with an uncontested divorce that day. If the matter is not settled based upon the panel's recommendation, the matter will then be referred to economic mediation. Pursuant to R. 5:5-6(b), after the Early Settlement Panel, litigants who do not resolve their matter, are required to participate in a mandatory economic mediation program for at least two (2) hours, allocated as one (1) hour of mediator preparation time, and one (1) hour of mediation time. The matter may also be scheduled for a pre-trial conference and/or an intensive settlement conference and trial at the conclusion of the Early Settlement Panel.

Some counties, including Mercer and Morris, have Blue Ribbon Early Settlement Panel programs. This is similar to the standard Early Settlement Panel, but is utilized for more complex matters. Judges in other counties that do not have a formal Blue Ribbon Panel program sometimes order private Blue Ribbon Panels in the appropriate case. Generally, the Blue Ribbon panelists are more experienced matrimonial attorneys. The issues at hand often deal with valuation of a marital business and/or income from self-employment. Forensic accountants may also attend the Blue Ribbon Early Settlement Panel.

Statistically, most divorces in New Jersey do not result in a trial and settle at some point through the litigation process. The benefit for litigants of reaching a

settlement on or shortly after the Early Settlement Panel is that costs are conserved by reaching a resolution earlier rather than later in the process. With a backlog of matrimonial matters in most counties, the Early Settlement Program is usually the first and best opportunity offered for the parties to settle their matter. Settlement also allows the parties to move forward with their personal and financial matters, enabling them to sell a house or rent an apartment, knowing what their financial liabilities, assets, and income will be. Their divorce proceedings will be concluded preventing them from having to take additional time away from work and other obligations. With the assistance of skilled, neutral panelists, the Court has created a valuable program for attorneys to attempt to resolve their contested matrimonial matters. This opportunity should be prepared for and taken seriously as it is an important part of the divorce process which should not be underestimated.