

2002 - 2004 RULES CYCLE

REPORT OF THE

NEW JERSEY SUPREME COURT

COMMITTEE ON

COMPLEMENTARY DISPUTE

RESOLUTION

January 15, 2004

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INTRODUCTION

The Supreme Court Committee on Complementary Dispute Resolution, appointed in August of 1990, continues to provide guidance for the development of CDR programs throughout the judicial system of the State of New Jersey. During the 2002-2004 Rules cycle, the Committee worked on a new pilot program for presumptive mediation in the Municipal Courts and continued to refine both the Economic Mediation Pilot in the Family Part and the Presumptive Mediation Program for Civil, General Equity and Probate cases. This report sets forth proposed rule changes needed to fine-tune aspects of the mediation programs.

I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendment to Rule 1:40-4. Mediation - General Rules

The Committee recommends amendments to sections (d)(2) and (d)(3) of Rule 1:40-4 regarding limitations on who can serve as mediators. Under the current Rule no elected official, or candidate for elected office can serve as a mediator within the geographic boundary of the elected office, and the approval of the Assignment Judge is required in order for an appointed public official to serve as a mediator or for an elected official or candidate for elected office to serve outside the geographic boundaries of the elected office. These provisions of the Rule were originally adopted to apply to the Municipal mediation program prior to the implementation of the Civil and Family mediation programs, and before the Standards for Mediators in Court-Connected Programs were adopted. During this rules cycle a number of individuals fitting one of the categories above applied for admission to the Roster of Mediators for Civil, General Equity and Probate. The result was a recommendation to change the limitations so that a person holding a public office or position or who is a candidate for a public office or position could function as a mediator in many instances but could not mediate a matter directly or indirectly involving the governmental entity in which that individual serves or is seeking to serve. The expectation is that if there were other instances in which such an individual should not serve as a mediator, that individual would be so guided by the principles of the Standards for Mediators in Court-Connected Programs.

1:40-4. Mediation - General Rules

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) Limitations on Service as a Mediator

(1) ...no change.

(2) [No elected official or candidate for elected office shall serve as a CDR mediator] No one holding a public office or position or any candidate for a public office or position shall serve as a court approved mediator in a matter directly or indirectly involving the governmental entity in which that individual serves or is seeking to serve [within the geographic boundary of the elected office.]

(3) The approval of the Assignment Judge is required for service as a mediator by any of the following: (A) [appointed public officials; (B)] police or other law enforcement officers employed by the State or any local unit of government; [C] (B) employees of any court; or [D] (C) government officials or employees whose duties involve regular contact with the court in which they serve.; or [E] elected officials, or candidates for elected office, who wish to serve outside the geographic boundaries of the elected office.]

(4) ...no change.

Note: Adopted July 14, 1992 to be effective September 1, 1992; paragraph (c)(3) amended and paragraph (c)(4) adopted June 28, 1996 to be effective September 1, 1996; paragraphs (a) and (c)(2). amended and paragraph (c)(3)(v) adopted July 10, 1998 to be effective September 1, 1998; caption amended, former paragraph (a) amended and redesignated as paragraphs (a) and

(b), former paragraph (b) amended and redesignated as paragraph (c), former paragraph (c) amended and redesignated as paragraph (d), former paragraph (d) amended and redesignated as paragraph (e), former paragraph (e) amended and redesignated as paragraph (f), and former paragraph (f) amended and redesignated as paragraph (g) July 5, 2000 to be effective September 5, 2000; paragraphs (d)(2) and (d)(3) amended _____ to be effective _____.

B. Proposed Amendment to Rule 1:40-12. Guidelines Governing the Qualifications and Training Requirements for Court Mediators

The Committee recommends changes to the co-mediation requirements for mediators to be newly admitted to the Civil, General Equity and Probate roster. The first recommendation concerns amendments to the language of section (b)(1) to change the concept of co-mediation to that of being mentored by an experienced mediator on the roster in accordance with guidelines promulgated by the Administrative Office of the Courts. The second change (to that same section) is for a provision that the mentoring requirement be waived if an individual demonstrates previous service as a mediator in at least 5 cases under R. 1:40-4 or a comparable mediation program or has satisfactorily completed at least 10 hours in an approved advanced mediation course. These changes reflect the program as it has been implemented.

A third proposed change is to the language of section (b)(3) allowing mediators who provide mentoring to other individuals to use the time spent in satisfaction of the requirement for continuing training. This is proposed in order to provide some small incentive for experienced mediators to serve as mentors.

1:40-12. Qualification and Training of Mediators and Arbitrators

(a) Mediator Qualifications.

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) ...no change.

(5) ...no change.

(b) Mediator Training Requirements

(1) General Provisions. Unless waived pursuant to subparagraph (2), all persons serving as mediators shall have completed the basic dispute resolution training course as prescribed by these rules and approved by the Administrative Office of the Courts as follows: [mediators on the civil, general equity, and probate roster of the Superior Court,] volunteer mediators in the Special Civil Part, and Municipal Court mediators shall have completed 18 classroom hours of basic mediation skills complying with the requirements of subparagraph (4) of this rule. Mediators on the civil, general equity and probate roster of the Superior Court shall have completed 18 classroom hours of basic mediation skills complying with the requirements of subparagraph (4) of this rule and at least five hours [spent co-mediating with] being mentored by an experienced mediator on the roster in accordance with guidelines promulgated by the Administrative Office of the Courts in at least two cases in the Superior Court. However, individuals may obtain a waiver of the mentoring requirement from the Administrative Office of the Courts upon the successful demonstration that the individual has previously served as a mediator in at least 5 cases under R. 1:40-4 or comparable mediation program or have satisfactorily completed at least 10 hours in an approved advanced mediation course. Family

Part mediators shall have completed a 40-hour training program complying with the requirements of subparagraph (5) of this rule; and judicial law clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph (6) of this rule.

(2) ...no change.

(3) Continuing Training. Commencing in the year following the completion of the basic training course or the waiver thereof, all mediators shall annually attend four hours of continuing education and shall file with the Administrative Office of the Courts or the Assignment Judge, as appropriate, an annual certification of compliance. To meet the requirement, this continuing education should cover at least one of the following: (A) reinforcing and enhancing mediation and negotiation concepts and skills, (B) ethical issues associated with mediation practice, or (C) other professional matters related to mediation.

Mediators who have been approved to serve as mentors who provide mentoring to other individuals in accordance with subsection (b)(1) of this Rule may use the time spent mentoring in satisfaction of this requirement.

(4) ...no change.

(5) ...no change.

(6) ...no change.

(7) ...no change.

(c) ...no change.

(d) ...no change.

Note: Adopted July 14, 1992 as Rule 1:40-10 to be effective September 1, 1992; caption amended, former text redesignated as paragraphs (a) and (b), paragraphs (a)3.1 and (b)4.1 amended June 28, 1996 to be effective September 1, 1996; redesignated as Rule 1:40-12, caption amended and first sentence deleted, paragraph (a)1.1 amended and redesignated as paragraph (a)(1), paragraph (a)2.1 amended and redesignated as paragraph (a)(2), paragraph (a)2.2 amended and redesignated as paragraph (b)(5), new paragraphs (a)(3) and (a)(4) adopted, paragraph (a)3.1 redesignated as paragraph (a)(5), paragraph (a)3.2 amended and incorporated in paragraph (b)(1), paragraph (a)4.1 amended and redesignated as paragraph (b)(6), paragraph (b)1.1 amended and redesignated as paragraph (b)(1), paragraphs (b)2.1 and (b)3.1 amended and redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)4.1 redesignated as paragraph (b)(4) with caption amended, paragraph (b)5.1 amended and redesignated as paragraph (b)(7) with caption amended, new section (c) adopted, and paragraph (b)5.1(d) amended and redesignated as new section (d) with caption amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3); (b)(1); and (b)(4) amended July 12, 2002 to be effective September 3, 2002; paragraphs (b)(1) and (b)(3) amended _____ to be effective _____.

II. PROPOSED RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendment to Rule 1:40-1. Purpose, Goals

The Committee considered a proposal from the New Jersey Association of Professional Mediators (NJAPM) that Rule 1:40-1 be amended to require attorneys for both Plaintiff and Defense to include in a certification agreement a clause stating that the client was duly informed by the attorney of the option of mediation. The rule currently states in part that “[a]ttorneys have a responsibility to become familiar with available CDR programs and inform their clients of them”. While no specific language was proposed by NJAPM, the Committee considered the proposal at its March 26, 2003 meeting and voted against recommending such a revision. The Committee noted that the issue of requiring such a certification for all CDR options had been discussed in previous years and rejected because of potential ethics issues.

NJAPM also proposed that the Court inform pro se litigants about the option of mediation. There are currently a number of brochures available describing the various CDR options, including mediation. In addition the Family Programs Subcommittee will be looking further at this aspect in the next rules cycle.

III. OTHER RECOMMENDATIONS

The Committee has made no other recommendations during this Rules cycle that require action here. Section VI. Miscellaneous Matters, includes a discussion of programmatic changes that have been approved and enacted during the current cycle.

IV. LEGISLATION

The Committee has made no recommendations regarding legislation.

V. MATTERS HELD FOR CONSIDERATION

A. Municipal Court Mediation Matters

For the last two Rules cycles the Municipal Programs Subcommittee has been discussing the need to recommend changes to Rule 1:40-8 and Rule 7:8-1 to clarify the referral process for both the pre-complaint referral to mediation (Notice in Lieu of Complaint) and the post-complaint referral to mediation. The Municipal Programs Subcommittee began this work during the 2000-2002 Rules Cycle in conjunction with the Conference of Municipal Presiding Judges and the Conference of Municipal Division Managers. The two conferences developed and distributed a mediation survey to all municipal court judges, court administrators, and others such as CDR Coordinators who are involved with oversight of municipal mediation programs. The survey gathered information about how various courts run their programs, and identified best practices so that standards could be developed for statewide operation. The survey also inquired about which case types are most adaptable to mediation, and whether the Conferences would support a pilot program in which the presumption would be that certain case types would go to mediation. Based on the work of the Conferences, during the 2002-2004 Rules Cycle the Municipal Programs Subcommittee drafted a proposed presumptive mediation program that is currently under discussion with the Conferences. In addition, the Committee through its Municipal Programs Subcommittee will be working with the Supreme Court Municipal Practice Committee and the Conferences of Municipal Presiding Judges and Municipal Division Managers to resolve issues around how cases will get to mediation in the Municipal Courts, including whether the Notice in Lieu of Complaint Process will continue. Resolution of these issues will result in proposed changes to both Rule 1:40-8 and Rule 7:8-1.

B. Family Programs

During the 2004-2006 Rules Cycle the Family Programs Subcommittee plans to work with the New Jersey State Bar Association Dispute Resolution Section, the New Jersey State Bar Association Family Law Section, and the New Jersey Association of Professional Mediators to prepare a brochure describing available CDR programs that would be disseminated to matrimonial litigants after issue has been joined and as early in the litigation process as is practicable. It is anticipated that the brochure would describe available mediation and arbitration programs and the Matrimonial Early Settlement Program process.

VI. MISCELLANEOUS MATTERS

A. Family Economic Mediation Pilot

The Family Economic Mediation Pilot has been evolving since it was first implemented in July 1, 1999. It was originally approved as a six-county two-year pilot program to test mediation of the economic aspects of matrimonial cases both prior to and after proceedings before the Matrimonial Early Settlement Panel (MESP). However, the Committee was concerned about the low number of referrals in two of the three pre-MESP counties and therefore recommended to the Court that a seventh county, Ocean, be added to refer cases both pre- and post-MESP, and that the end date be extended from June 30, 2001 to December 31, 2001. An interim evaluation of the pilot program continued to show a low number of cases being referred in the pre-MESP counties and a lower rate of settlement in those counties compared to the post-MESP counties. In addition to the statistical evidence, there was anecdotal evidence from the judges and staff in the pre-MESP counties about the difficulties encountered in referring cases to the program pre-MESP. Such as the level of staff and judicial resources required to determine which cases are appropriate for referral, and attorney resistance on the grounds that sufficient discovery had not been completed to allow for mediation. The Committee therefore recommended, and the Supreme Court approved, converting the three pre-MESP counties to post-MESP, with the understanding that in all seven of the pilot counties parties could voluntarily request mediation at any time. That change was effective January 1, 2002. At the same time the pilot was further extended through August 31, 2002. The pilot program has subsequently been extended through June 30, 2004. As the Family Programs Subcommittee continued its evaluation and monitoring work during the 2002-2004 Rules Cycle, it determined that there have not as yet been a sufficient number of cases referred to mediation to permit the

pilot to fulfill all of its original objectives. The pilot program did not start or come up to full speed as rapidly as might have been hoped and more time is needed for the pilot to gain the general acceptance that would be required should statewide implementation be recommended. The full Committee has therefore agreed with the Subcommittee recommendation to request an extension of the pilot through the 2004-2006 Rules Cycle and implement the program in two additional counties, one large urban county in the northern part of the state, and one southern county.

B. Presumptive Mediation Pilot for Civil Cases

During the 2002-2004 Rules Cycle, the Civil/Special Civil Programs Subcommittee continued its work in monitoring the Presumptive Program and making recommendations to make it run more effectively. The pilot was first approved by the Supreme Court in 1999 to operate in Hudson, Mercer, and Union counties (and Gloucester County shortly thereafter) for the presumptive referral of a number of Civil case types to mediation at the earliest time when enough information is available to the parties so that there can be meaningful discussion towards resolution. Program implementation began in early January 2000, but proceeded piecemeal both because no automated process was in place to identify cases and to generate necessary orders and other materials, and because of limited staffing. Since the automated process took effect in June 2001 the number of referrals to the pilot has increased dramatically. Also in June 2001 the Supreme Court approved the addition of Cumberland and Salem Counties to the pilot, thereby expanding the Gloucester program to the entire vicinage. In the ensuing years more counties requested to participate, and at this time 17 counties are participating in the program, with the remaining four sending cases to mediation under the statewide program that also includes the referral of general equity and probate cases.

During the 2002-2004 Rules Cycle a special joint committee of the CDR Committee and the Conference of Civil Presiding Judges developed Guidelines for the Compensation of Mediators that were promulgated October 24, 2003 as approved by the Judicial Council. These guidelines were prepared to address questions and problems that arose in the course of mediation. The Civil/Special Civil Programs Subcommittee also developed guidelines for the Civil Mediation Mentoring Program to govern the co-mediation requirement under R. 1:40-12 and subsequent revisions to them that were also approved by the Judicial Council. The Subcommittee also continued its work with the Marie L. Garibaldi ADR Inn of Court, the Dispute Resolution Section of the Bar and ICLE to provide both the basic mediation training program and the 4-hour continuing education programs required under Rule 1:40-12, as well as programs for the Judicial College.

C. Collaborative Efforts with the Bar

The Committee continues to benefit from extensive discussion of CDR issues among the members of the Judiciary, the bar and the dispute resolution community. The ICLE mediation training noted above is an excellent example of the result of collaborative efforts, as well as provision of the 40 hours of mediation training required for Family mediators. Committee members and staff have participated in providing the ICLE training, and in meetings of the Dispute Resolution Section of the State Bar, and ICLE's annual ADR Days held in cooperation with the Dispute Resolution Section, the New Jersey Association of Professional Mediators, and other professional groups. The Committee looks forward to continued support, input and collaboration with the organized bar in its on-going work to guide the development of CDR in New Jersey.

Respectfully Submitted,

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