



NEW JERSEY CIVIL COMPLEMENTARY DISPUTE RESOLUTION NEWSLETTER

Published by the Administrative Office of the Courts

Arbitrator Continuing Education Course Coming

Pursuant to R. 1:40-12(c), all arbitrators serving in the court-annexed arbitration program must complete two hours of continuing training every two years. In this regard, the Supreme Court Arbitration Advisory Committee has developed a stop-action video to be used by each county in local training sessions that will be offered at no charge in the courthouses in the late fall. Additional information on the training will be posted in the near future on the Judiciary's Internet Web site www.njcourtsonline.com under "Civil Practice Division."

Failure to Mediate in Accordance With Order of Referral to Mediation

Guideline #15 of the *Guidelines for the Compensation of Mediators Serving in the Civil Mediation Program* provides in part that if the court receives a written report that a mediator or a party has incurred unnecessary costs or expenses due to the failure of a party and/or

counsel to participate in mediation in accordance with the Order of Referral to Mediation, the court will either make an effort to resolve the matter or *sua sponte* issue an Order to Show Cause why a consequence, e.g., assessment of costs or fees, should not be imposed by the court. The Conference of Presiding Judges has agreed that, pursuant to the language in the Order of Referral to Mediation requiring parties and counsel to participate in mediation in good faith and with a sense of urgency, judges will attach consequences to the failure to do so. In particular, when a mediator encounters a problem, such as someone not returning telephone calls for a telephone conference or mediation session, being late or not showing up or submitting pre-mediation submissions in a timely manner, not exchanging paper discovery as agreed or refusing a mediator's direction to have a person with negotiating authority available, the mediator will fax a letter to the CDR point person detailing the problem. The receipt of a faxed letter will result in the court trying informally to resolve the matter or will trigger the issuance of an Order to Show Cause.

Excess Mediator Preparation Time

Did you know that under some circumstances, the parties may be responsible to pay for mediator time spent in excess of the one hour free time for preparation and administrative purposes? Guideline #2 of Appendix XXVI to the Court Rules, the *Guidelines for the Compensation of Mediators Serving in the Civil Mediation Program* provides as follows:

Guideline #2: Time Spent Before Initial Mediation Session: At the beginning of the initial mediation session, the mediator shall disclose to the parties the amount of time the mediator has spent in handling the case thus far and also when the two free hours will be expended. If the amount of time spent by the mediator will exceed two hours and if the mediator intends to charge the parties for that additional time should they agree to continue with mediation on a paying basis, then the mediator must advise the parties of this fact prior to commencing the initial mediation session.

Therefore, if:

- a mediator has spent in excess of the one free hour for preparation and administration under *Rule* 1:40-4(b); and
- discloses the details of the excess time spent prior to or at the beginning of the initial one hour mediation session and makes it known that he or she intends to bill for the excess time if the parties do not stop the session after the expiration of one hour; and
- if knowing this, the parties continue the mediation beyond the one hour; then
- the parties are responsible to pay at the mediator's market rate not only the excess time spent in mediation beyond the one free hour of time but also the excess time spent for preparation and administration.

Recent Mediation Rule Amendments

At its June 15, Rules Conference, the Supreme Court approved a number of amendments to the Rules of Court relating to Civil CDR. The following amendments to relevant mediation court rules and Appendix XXVI became effective on September 1:

- *R.1:40-4(c)* provides that a mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the *New Jersey Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13*. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence;
- *R.1:40-4(d)* provides that unless the participants in mediation agree otherwise or to the extent disclosure is permitted by subsection (d), no party, mediator, or other participant in

mediation may disclose any mediation communication to anyone who was not a participant in the mediation. A mediator may disclose a mediation communication to prevent harm to others to the extent such mediation communication would be admissible in a court proceeding. A mediator has the duty to disclose to proper authority information obtained at a mediation session if required by law or if the mediator has a reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm;

- *R.1:40-4(f)* requires an individual, before accepting a case for mediation, to make a reasonable inquiry to determine whether there are any known facts that a reasonable person would consider likely to affect the individual's impartiality. These facts include a financial or personal interest in the outcome or an existing, past or foreseeable relationship with any party or participant in the mediation. If any such information is found, the individual must disclose it as soon as practicable to the mediation parties before accepting the case. Similarly, if such information becomes known to a mediator after accepting a case, the mediator must also disclose it as soon as practicable;
- *R.1:40-4(g)* expressly empowers mediators to require the participation of persons with negotiating authority. It also provides that an attorney or other individual designated by a party may accompany the party and participate in the mediation; and allows for rescission of a previous waiver of representation or participation;

- *Rules* 1:40-5, 1:40-6, 1:40-10 and 1:40-11 contain updated references to subsections of *R. 1:40-4* which are being renumbered to accommodate the changes discussed above; and
- Guideline #15 of Appendix XXVI to the Court Rules, Compensation Guidelines, provides that if the court receives a written report that a mediator has not been timely paid or that the mediator and/or a party has incurred unnecessary costs or expenses due to the failure of a party and/or counsel to participate in the mediation process in accordance with the Order of Referral to Mediation, the court will either make an effort to resolve the matter and/or *sua sponte* issue an Order to Show Cause why the mediator's bill should not be paid or why a consequence, *e.g.*, imposition or costs or fees, should not be imposed by the court.

Prehearing Submissions

Rule 4:21A-4(a) requires that the parties to an arbitration hearing exchange a concise statement of the factual and legal issues in the case. This is to be done ten days prior to the scheduled hearing date and should be in the form set forth in Appendix XXII-A or XXII-B to the court rules. The arbitrator should receive a copy of all the documents exchanged on the day of the hearing.

The purpose of this rule requirement is fourfold. First, it ensures that the parties are prepared for the arbitration hearing, by imposing an obligation to review the case file. Second, it focuses the parties and their attorneys on the main issues in the cases and causes them to prioritize them in order to better present their needs and positions. Third, it provides the

arbitrator with the essential information needed to conduct a meaningful arbitration session. Lastly, it encourages the efficient and expeditious conduct of an arbitration hearing.

The prehearing submission should not be a mere duplication of the file, including complete deposition transcripts and answers to interrogatories. Instead, attorneys preparing the submissions should be distilling the file, removing illegible or extraneous documents such as hospital notes, highlighting relevant portions of the transcripts and interrogatories, and itemizing damage claims, for example. While there is no page limit on the length of the submission, it should be a succinct summary aimed at assisting all parties and the arbitrator in

making the hearing a positive and constructive experience.



This newsletter was prepared by
Administrative Office of the Courts
Civil Practice Division

Hon. Stuart Rabner
Chief Justice

Philip S. Carchman, J.A.D.
Acting Administrative Director of
the Courts

John P. McCarthy, Jr.
Director, Trial Court Services

Jane F. Castner
Assistant Director, Civil Practice

Editor

Michelle V. Perone
Chief, Civil Court Programs

Staff
Mary F. Rubinstein
Attorney II

Nanette L. Lind
Administrative Specialist IV

Donna M. Albanese
Administrative Specialist I

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October 2007