2004-2007 Rules Cycle

Report of the New Jersey Supreme Court Committee on Complementary Dispute Resolution

January 12, 2007

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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 complementary dispute resolution (CDR) programs in New Jersey's Superior and Municipal Courts. During the current Rules cycle, the Committee implemented a pilot program for presumptive mediation in the Municipal Courts and submitted reports on the Economic Mediation Pilot in the Family Part, the Presumptive Mediation Program for Civil, General Equity and Probate cases, and a request to change the fee structure for mediators in those programs. As a result of the Committee's efforts, several rule changes were adopted effective September 1, 2006. This report sets forth further proposed rule changes.

I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendments to *Rule* 1:40-1 — Purpose, Goals

The Committee recommends an amendment to this rule to require attorneys in all civil matters covered by Part Four of the Rules of Court personally to discuss available CDR options with clients and provide them with the relevant informational materials available on the Judiciary website, prior to filing initial pleadings, and to certify with the initial pleading that the materials were discussed with the clients. The Committee believes that this proposal is consistent with the existing provision of the rule, which requires that attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them. A similar provision is already in effect with respect to divorce matters.

The Committee has recommended to the Civil Practice Committee that *Rule* 4:5-1, General Requirements for Pleadings, be amended to require that the attorney certification proposed herein be provided with all first pleadings.

The proposed amendments to *Rule* 1:40-1 follow.

1:40-1. Purpose, Goals

Complementary Dispute Resolution Programs (CDR) provided for by these rules are available in the Superior Court and Municipal Courts and constitute an integral part of the judicial process, intended to enhance its quality and efficacy. Attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them. In all civil matters covered by Part Four of these Rules, attorneys must personally discuss the available CDR options with clients and provide them with the materials available on the Judiciary website, prior to filing of initial pleadings, and certify with the initial pleading that the materials were discussed with the clients.

Note: Adopted July 14, 1992 to be effective September 1, 1992; amended July 5, 2000 to be effective September 5, 2000; amended _____ to be effective _____.

B. Proposed Amendments to Rule 1:40-4 — Mediation - General Rules

The Committee recommends amendments to several sections primarily to make the language more consistent with the New Jersey Uniform Mediation Act (UMA), *N.J.S.A.* 2A:23C-1 *et seq*.

The first major change proposed is to split the existing section (c) on confidentiality into two sections, with section (c) captioned "Evidentiary Privilege" and section (d) captioned "Confidentiality." This proposed change adopts the distinction between evidentiary privilege and confidentiality that is used by the UMA. The text of the existing Rule covers only the question of evidentiary privilege (although its caption is "Confidentiality") and does not explicitly address whether the mediator or the parties may discuss elsewhere what was communicated in mediation. The proposed revision adopts by reference the UMA's approach to the issue of when mediation communications may be used as evidence, including waiver, agreement of the parties and mediator, and statutory exceptions. It thus incorporates the separate privilege provided to mediators, who may refuse to present evidence in a subsequent proceeding even if all the parties to the mediation waive privilege and seek to have the mediator testify.

With respect to confidentiality, the proposed revision permits the parties and the mediator to make their own agreement as to the scope of confidentiality, with the language "unless the participants in a mediation agree otherwise." This is consistent with the UMA, which provides in Section 8 that confidentiality is established by the agreement of the parties or by rule. The proposed revision gives the mediator some discretion to disclose information voluntarily if disclosure could be required in court. It retains the language of the current Rule requiring the mediator to disclose threats likely "to result in death or seriously bodily injury." It adds an additional disclosure requirement for mediators, mandating disclosure when required by law.

The second major change proposed is a new section (f) captioned "Mediator Disclosure of Conflict of Interest." The language in the proposed revision repeats verbatim the language of the UMA. This should avoid any inference that the requirements of inquiry and disclosure under the revised Rule might be different from the requirements under the UMA.

The third major change proposed is to former section (e), which has been redesignated as section (g). Language is added to be consistent with the UMA provision that a mediation party may have the assistance of a representative even if the representative is not an attorney. The existing Rule suggests that the mediator may exclude non-attorney party representatives from the mediation, which would contravene the UMA. The revision still authorizes the mediator to exclude other non-parties from the mediation.

An additional change to redesignated section (g) had its origin in the Civil/Special Civil Programs Subcommittee and is intended to stress that mediators have the authority to require the attendance of those having key settlement authority, a concept already included in the approved mediation order.

Other proposed changes are simply to redesignate section letters because of the insertion of new sections.

The proposed amendments to *Rule* 1:40-4 follow.

1:40-4 Mediation - General Rules

(a) …no change.

(b) …no change.

(c) [Confidentiality] Evidentiary Privilege. [Except as otherwise provided by this rule and unless the parties otherwise consent, no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding.] Mediation communication made in mediation 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 [disclosure] mediation communication in any such proceeding by independent evidence. [A mediator has the duty to disclose to a proper authority information obtained at a mediation session on the 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. No mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6.]

(d) Confidentiality. Unless the participants in a mediation agree otherwise, or to the extent disclosure is permitted by this Rule, no party, mediator, or other participant in a 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 a proper authority information obtained at a mediation session [on the] 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. No mediator may [participate in any subsequent hearing or trial of the mediated matter] appear as counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6.

[(d)] (e) Limitations on Service as a Mediator.

(1) Mediators shall be qualified and trained in accordance with the provisions of *Rule* 1:40-12.

(2) 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.

(3) The approval of the Assignment Judge is required for service as a mediator by any of the following: (A) police or other law enforcement officers employed by the State or any local unit of government; (B) employees of any court; or (C) government officials or employees whose duties involve regular contact with the court in which they serve.

(4) The Assignment Judge shall also have the discretion to require prior review and approval of the Supreme Court of prospective mediators whose employment or position appears to the Assignment Judge to require such review and approval.

(f) Mediator Disclosure of Conflict of Interest.

(1) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(A) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the

mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(B) disclose any such known fact to the mediation parties as soon as is practicable before accepting a mediation.

(2) If a mediator learns any fact described in paragraph (i.) of subsection 1 after accepting a mediation, the mediator shall disclose it as soon as is practicable.

[(e)] (g) Conduct of Mediation Proceedings. Mediation proceedings shall commence with an opening statement by the mediator describing the purpose and procedures of the process. Mediators may require the participation of persons with negotiating authority. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded. Non-party witnesses may be heard in the discretion of the mediator, and other non-parties shall be permitted to attend only with the consent of the parties and the mediator. Multiple sessions may be scheduled. Attorneys and parties have an obligation to participate in the mediation process in good faith in accordance with program guidelines.

[(f)] (h) Termination of Mediation.

(1) The mediator or a participant may terminate the session if (A) there is an imbalance of power between the parties that the mediator cannot overcome, (B) a party challenges the impartiality of the mediator, (C) there is abusive behavior that the mediator cannot control, or (D) a party continuously resists the mediation process or the mediator.

(2) The mediator shall terminate the session if (A) there is a failure of communication that seriously impedes effective discussion, (B) the mediator believes a party is under the

influence of drugs or alcohol, or (C) the mediator believes continued mediation is inappropriate or inadvisable for any reason.

[(g)] (i) Final Disposition. If the mediation results in the parties' total or partial agreement, it shall be reduced to writing and a copy thereof furnished to each party. The agreement need not be filed with the court, but if formal proceedings have been stayed pending mediation, the mediator shall report to the court whether agreement has been reached. If an agreement is not reached, the matter shall be referred back to court for formal disposition.

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, paragraph (a) amended and redesignated as paragraphs (a) and (b), paragraphs (b), (c), (d), (e), and (f) amended and redesignated as paragraphs (c), (d), (e), (f), and (g) July 5, 2000 to be effective September 5, 2000; paragraphs (d)(2) and (d)(3) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended July 27, 2006 to be effective September 1, 2006; paragraph (c) recaptioned and amended, paragraph (d) recaptioned and amended with caption and contents of former paragraph (d) redesignated as paragraph (e), new paragraph (f) adopted, former paragraph (e) amended and redesignated as paragraph (g), former paragraphs (f) and (g) redesignated as paragraphs (h) and (i) to be effective _____ .

C. Proposed Amendment to Rule 1:40-12 — Guidelines Governing the Qualification and Training Requirements of Court Mediators and Arbitrators

The Committee recommends changes to this rule to incorporate the requirement that all individuals handling settlement of landlord/tenant matters complete substantive and procedural training in landlord-tenant law. The training would be one day (seven hours) for law clerks and attorneys, and two days (14 hours) for all others, such as court staff and volunteers, in addition to the mediation skills training already required by *Rule* 1:40-12 (b) 6.

The proposed amendments to *Rule* 1:40-12 follow.

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

(a) Mediator Qualifications.

(1) …no change.

2) …no change.

(3) …no change.

(4) Special Civil Part Mediators/Settlors. In addition to qualified neutrals on the civil roster, those judicial law clerks, court staff, and volunteers who have completed a course of mediation training approved by the Administrative Office of the Courts may mediate/settle Small Claims actions. In the discretion of the Assignment Judge, such persons may also mediate/settle landlord-tenant disputes and other Special Civil Part actions provided that they complete additional substantive and procedural training in landlord-tenant law of at least seven hours for law clerks and attorneys and at least 14 hours for all others. The training must be approved by the Administrative Office of the Courts. [These requirements also apply to individuals handling the settlement of landlord/tenant cases.]

(5) …no change.

(b) Mediator Training Requirements

(1) …no change.

(2) …no change.

(3) …no change.

(4) …no change.

(5) …no change,

(6) …no change.

(7) …no change.

(c) …no change.

(1) …no change.

(2) …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) and (b)(1) amended July 12, 2002 to be effective September 3, 2002; paragraphs (b)(1), (b)(3), and (c) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) (4) amended _____to be effective_____.

D. Proposed Amendment to Appendix XXVI — Guidelines for the Compensation of Mediators Serving in the Civil Mediation Program

The Committee proposes an amendment to Guideline 15, "Collection of Unpaid Mediator's Bill," that gives the court the option of imposing costs or fees when either the mediator or a party incurs expenses due to the failure of another party and/or counsel to participate in the mediation process in accordance with the Order of Referral to Mediation. While an attorney or party may report non-cooperation, the Committee deemed it inappropriate for the mediator to take such action.

The proposed amendments to Appendix XXVI follow.

APPENDIX XXVI

GUIDELINES FOR THE COMPENSATION OF MEDIATORS
SERVING IN THE CIVIL MEDIATION PROGRAM

These guidelines apply to the compensation that may be charged by all mediators serving in the Statewide Mediation Program for Civil, General Equity, and Probate cases.

1. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change

15. Collection of Unpaid Mediator's Bill/Failure to Mediate in Accordance with Order: [A mediator who is not timely paid may send the CDR Point Person in the county of venue a letter by fax detailing the lack of payment. Thereafter,] In the event that the court receives a written report (sent to the CDR Point Person in the county of venue) indicating 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 [nonpayment] matter and/or [after which the court will issue a] *sua sponte* issue an Order to Show Cause why the mediator's bill should not be paid or why a consequence, *i.e.* imposition of costs or fees, should not be imposed by the court.

Note: Appendix XXVI adopted July 27, 2006 to be effective September 1, 2006; guideline 15 amended _____to be effective _____.

II. PROPOSED RULE AMENDMENTS CONSIDERED AND REJECTED

There were no specific rule amendments considered and rejected by the Committee.

III. OTHER RECOMMENDATIONS

The Committee has made no other recommendations during this Rules cycle that require action here. Section VI. of this Report, Miscellaneous Matters, includes a discussion of other proposed changes to the Rules and programmatic recommendations 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

Municipal Court Mediation Matters

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 final work on this issue has been carried over to the next Rules cycle.

VI. MISCELLANEOUS MATTERS

A. Family Economic Mediation Program

The Family Economic Mediation Pilot has been evolving since it was first implemented on July 1, 1999, and was approved as a statewide program on July 27, 2006 as part of the Rules package effective September 1, 2006. With the need to secure additional trained mediators for a new statewide roster, and otherwise prepare for implementation beyond the pilot counties, statewide implementation was set for January 1, 2007.

As part of the Rules recommendations that went into effect on September 1, 2006, the Supreme Court adopted a new paragraph in *Rule* 5:4-2 that requires the first pleading of each party in a divorce action to include an affidavit or certification "that the litigant has been informed of the availability of complementary dispute resolution (CDR) alternatives to conventional litigation, including but not limited to mediation or arbitration, and that the litigant has received descriptive literature regarding such CDR alternatives." The Court subsequently adopted a clarifying amendment to that paragraph, changing "descriptive literature" to "descriptive material." That descriptive material was also approved by the Court and has been made available on the Internet.

The Committee has continued its work with the Marie L. Garibaldi ADR Inn of Court, the Dispute Resolution Section of the State Bar and ICLE to provide the 40 hours of training, and the four-hour continuing education programs required under *Rule* 1:40-12, as well as programs for the Judicial College.

B. Presumptive Mediation Program for Civil Cases

The Presumptive Mediation Pilot Program for selected civil cases began in four counties in early 2000 after having been approved by the Supreme Court in 1999 to operate in Hudson, Mercer, and Union counties (and Gloucester County shortly thereafter) for the automatic 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. In ensuing years more counties requested to participate, and by the time a Final Evaluation Report was prepared in 2005, 17 counties were 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. As of this writing, 19 counties are participating in the Presumptive Mediation Program; in Atlantic and Cape May counties, team leaders confer with the attorneys in each answered civil case and refer cases to mediation as appropriate.

The Committee has continued its work with the Marie L. Garibaldi ADR Inn of Court, the Dispute Resolution Section of the State Bar and ICLE to provide both the basic mediation training program and the four-hour continuing education programs required under *Rule* 1:40-12, as well as programs for the Judicial College.

C. Mediator Compensation

During this Rules cycle the Committee spent considerable time working on the issue of the payment of mediators. A Report on Mediator Compensation was submitted to the Court in early 2006 and published for comment in March of that year. The Court approved amendments to *Rules* 1:40-4, -6 and Appendix XXVI, changing the free hour requirement from three hours per case to two hours per case, with the obligation that at least one hour of that time be provided for an initial mediation session. The Court also asked the Committee to monitor the impact of the change.

D. Municipal Court Presumptive Mediation Pilot Program

In 2005, the Supreme Court approved an eighteen-month presumptive mediation program developed by the Municipal Court Programs Subcommittee in conjunction with the Conferences of Presiding Municipal Court Judges and Municipal Division Managers. The pilot began in January 2006 in seven participating Municipal Courts in Fair Lawn, Fort Lee, Galloway Township, Hoboken, Lawrence Township, North Wildwood, and West Deptford. The program has an extensive evaluation component, with assessments from the parties, the mediators, the Pilot court judges, court staff and Division Managers.

E. 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. Committee members and staff have participated in providing the ICLE trainings noted earlier, in meetings of the Dispute Resolution Section of the State Bar, and in ICLE's annual ADR Days held in cooperation with the State Bar's 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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