2009-2011 Rules Cycle

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

January 18, 2011

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I. PROPOSED RULE AMENDMENTS RECOMMENDED

Overview of the Report of the CDR Committee on Civil Presumptive Mediation

The Supreme Court Committee on Complementary Dispute Resolution (CDR Committee) established the Presumptive Mediation Working Group to consider and address the concerns, raised by the Conferences of Civil Presiding Judges and Civil Division Managers, regarding the effectiveness and labor-intensive nature of the Civil Presumptive Mediation Program in light of shrinking court resources. The Working Group met on August 24 and again on September 24, 2010 and reviewed proposals submitted by the New Jersey Association of Professional Mediators (NJAPM), the State Bar Association's Dispute Resolution Section and the AOC.

The Working Group recommended a number of revisions to the Civil Presumptive Mediation Program to enhance its effectiveness and reduce the burden it now places on judges and staff. The CDR Committee discussed these recommendations at its October 5, 2010 meeting. This Report incorporates the recommendations of the Working Group, modified somewhat to reflect the views of the full Committee.

A. Proposed Amendment to *Rule* 1:40-12(b)(2) Mediator Training Requirements: Continuing Training

The Conferences of Presiding Judges and Civil Division Managers have expressed ongoing concerns regarding the benefits of the Civil Presumptive Mediation Program (PMP) in light of its perceived labor intensive nature. Specifically the Civil Division judges and staff have identified mediator quality concerns as both impeding the program's effectiveness and draining stressed judicial resources. Their concerns are shared by the Advisory Committee, chaired by Judge Stephan Hansbury, which investigates complaints against mediators. At the core of the complaints against mediators, both formal and informal, are three major areas of concern: 1. compliance with mediator standards; 2. awareness of and adherence to programmatic guidelines, and 3. mediator competence in managing and mediating cases so as to facilitate productive settlement discussions.

The CDR Committee, through its Education Subcommittee, has been researching the most effective and innovative mediator training requirements and modalities nationwide. Increasing the training hours substantially, enhancing the curricula, and integrating the most effective training methods are all being explored. However, implementation of major changes in the training requirements necessitates supportive infrastructure accommodations which must be accomplished over time. The CDR committee, while supporting, in principle, the concept of adopting major reforms in the initial and ongoing instruction of mediators required to join or remain on the roster, must nevertheless ensure the practicality of all recommendations. Therefore, the Committee's goal is to fine tune these comprehensive training proposals in the next upcoming rules cycle so that they would be ready for implementation if ultimately adopted.

During the interim period, however, the Committee recognizes a compelling need to triage mediator instruction in the three core areas of concern outlined above. Currently *R.* 1:40-12(b) requires mediators to complete four hours of continuing education on an annual basis to remain on roster. The continuing education requirement does not mandate instruction in any specific area. The Committee recommends that this rule be amended to require that this four hour component include some specific instruction in mediator ethics, program guidelines and case management. Some roster mediators may have forgotten or have not kept up with changes in the mediation program. Others may have received quality initial skills training out of state but are not familiar with the nuances of New Jersey's Civil Presumptive Mediation Program (PMP). It is the consensus of the Committee that this rule change will be a first firm step in improving the Civil PMP as outlined below without burdening the court with additional implementation and compliance issues.

1. A review of mediator standards should improve mediator quality and reduce ethical complaints against mediators;
2. A review of Civil PMP guidelines should reduce extraneous mediator inquiries to judicial staff on routine program matters, and
3. Training in case management techniques should facilitate more productive mediation discussions reducing the need for court assistance during mediation and promoting trial readiness should the mediation be unsuccessful.

The proposed amendments to *R.* 1:40-12(b)(2) follow:

1:40-12(b). Mediator Training Requirements

(1) …no change.

(2) 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 shall include instruction in ethical issues associated with mediation practice, program guidelines and/or case management and should cover at least one of the following: (A) reinforcing and enhancing mediation and negotiation concepts and skills, or (B) [ethical issues associated with mediation practice, or (C)] other professional matters related to mediation. Mediators who have been approved to serve as mentors under subsection (b)(1) of this Rule may apply the time spent mentoring to satisfy this requirement.

(3) …no change

(4) …no change

(5) …no change

(6) …no change

B. Proposed Amendment to the Mediator Compensation Guidelines (Appendix XXVI of the Rules of Court)

1. Paragraphs 2 and 12 of the Guidelines should be amended expressly to permit the mediator to charge a retainer fee *once the two free hours have been exhausted*. This proposed change seeks to reduce the number of instances in which parties who elect to continue with mediation after the two free hours fail to pay the mediator for his or her time.

2. To conform with *Rules* 1:40-4(b) and 1:40-6(b), as well as with the proposed Order of Referral to Mediation, paragraphs 1 and 4 of the Guidelines should be amended to make it clear that mediators on the court's rosters of Civil and Family mediators, whether selected by the parties or designated by the court, must provide the first two hours of service at no charge, whereas non-roster mediators may negotiate a fee from the outset.

3. Paragraph 15 should be amended to make it clear that a mediator seeking payment pursuant to an agreement with the parties should not resort to an Order to Show Cause but rather should bring an action in the Special Civil Part of the county in which the underlying case was filed.

The proposed revised Guidelines (Appendix XXVI of the Rules of the Court) follow:

APPENDIX XXVI

GUIDELINES FOR THE COMPENSATION OF MEDIATORS SERVING IN THE CIVIL AND FAMILY ECONOMIC MEDIATION PROGRAMS

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 and, where applicable, to mediators serving in the Family Economic Mediation Program.

1. First Two Hours Free: Mediators on the court's Rosters of Civil and Family Mediators shall serve free for two hours in a mediation that is court-ordered. The two free hours shall be divided equally between (a) reasonable preparation time, administrative tasks, the organizational telephonic conference, and (b) an initial mediation session. Travel time may not be included as part of the free first two hours.

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 must announce when the free mediation time will be over. 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. Unless otherwise provided in these guidelines, no fee,

retainer or other payment may be charged or paid prior to the conclusion of the two free hours.

3. …no change

4. [Alternate] Non-Roster Mediators: [In the Civil, General Equity and Probate Mediation Program, i] **I**f the parties select a[n alternate] mediator [from the approved roster] who is not on the court's rosters, [other than the mediator appointed by the court,] that mediator may [charge a negotiated rate] negotiate a fee and need not provide the first two hours of service free.

5. …no change.

6. …no change.

7. …no change.

8. …no change

9. …no change.

10. …no change.

11. …no change.

12. Submission of Mediator's Bills: In the absence of other payment arrangements, mediators should bill the parties following each mediation session for which payment is due. Generally, a mediation session should not begin unless the parties are current in their payments for previous sessions. [No retainer fee or advance may be requested by the mediator at any time.] Counsel have a responsibility to facilitate prompt payment of mediator fees.

13. …no change.

14. …no change.

15. Collection of Unpaid Mediator's Bill/Failure to Mediate in Accordance with Order: [If the court receives a written report (sent to the CDR Point Person in the county of venue or to the assigned judge in the Family Part) that a mediator has not been timely paid or that the mediator and/or 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 issue a *sua sponte* Order to Show Cause why the mediator's bill should not be paid or why a consequence, *e.g.*, imposition of costs or fees, should not be imposed by the court.] If a mediator has not been timely paid or a mediator and/or a party has incurred unnecessary costs or expenses because of the failure of a party and/or counsel to participate in the mediation process in accordance with the Order of Referral to Mediation, the mediator and/or party may bring an action to compel payment in the Special Civil Part of the county in which the underlying case was filed.

C. Proposed Amendment to *Rule* 1:40-6(b) Mediation of Civil, Probate, and General Equity Matters: Designation of Mediator

The current presumption is that the court will designate a mediator, but the parties have 14 days to select a mediator of their choosing. This approach is reflected in *R.* 1:40-6(b). The proposed Order (see Section IIA of this document) flips this presumption, stating in the first paragraph that the parties may select the mediator. Only in the second paragraph does the proposed Order advise that if no party-selected mediator is named, the court-designated mediator (whose name is inserted in the Order) will serve. *Rule* 1:40-6(b) should be amended accordingly.

The proposed amendments to *R.* 1:40-6(b) follow:

1:40-6 Mediation of Civil, Probate, and General Equity Matters

The CDR program of each vicinage shall include mediation of civil, probate, and general equity matters, pursuant to rules and guidelines approved by the Supreme Court.

(a) …no change.

(b) Designation of Mediator. [If the parties have not selected the mediator prior to entry of the mediation referral order, the court shall in its referral order designate a mediator from the court-approved roster. The parties may, however, within 14 days after entry of the mediation referral order stipulate in writing to the designation of a different mediator. Within that fourteen-day period, the stipulation shall be filed with the Civil CDR Coordinator and a copy thereof served upon the mediator designated by the mediation referral order. A mediator designated by such stipulation shall comply with all terms and conditions set forth in the mediation referral order.] Within 14 days after entry of the mediation referral order, the parties may select a mediator, who may, but need not, be listed on the court's Roster of Civil Mediators. Lead plaintiff's counsel must provide the CDR Point Person in the county, as well as the individual designated by the court in the mediation referral order, with the name of the selected mediator, in writing. If the parties do not timely select a mediator, the individual designated by the court in the mediation referral order shall serve. All mediators on the court's roster as well as those not on the roster, whether party-selected or court-designated, shall comply with the terms and conditions set forth in the mediation referral order.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

(g) …no change.

II. PROPOSED NON-RULE RECOMMENDATIONS – CIVIL PRESUMPTIVE MEDIATION

A. Modify the Order of Referral to Mediation

1. The Order should emphasize that the parties may select, within 14 days of the date of the Order, an individual to mediate the case (the Party-Selected Mediator).

2. The Party-Selected Mediator may be anyone on the court's Roster of Civil Mediators or any other individual. If a non-roster mediator is selected, the individual may negotiate a private fee arrangement with the parties, but the mediator selected must abide by all other terms and conditions of the Order. If the Party-Selected Mediator is on the court's Roster of Civil Mediators, he or she shall be bound by the Mediator Compensation Guidelines and by *R*.1:40.

3. If the parties do not select a mediator within 14 days of the date of the Order of Referral to Mediation, the mediator named in the Order (the Court-Designated Mediator) shall be the mediator in the case.

4. When the parties select the mediator, plaintiff's lead counsel must within the 14-day period notify the Civil CDR Point Person in writing (fax or e-mail is acceptable) of the name, address and telephone number of the Party-Selected Mediator, with a copy to the Court-Designated Mediator.

The proposed draft Order of Referral to Mediation follows:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
_____ COUNTY
_____ DOCKET NO.

…….vs……..

CIVIL ACTION

MEDIATION REFERRAL ORDER

(no stay of discovery)

Pursuant to *R*. 1:40-1 et seq. IT IS on this day of , **ORDERED** THAT:

MEDIATOR SELECTION

1. **PARTIES MAY SELECT A MEDIATOR WITHIN 14 DAYS**. If the parties designate a "party selected mediator" within 14 days of the date of this order, lead plaintiff's counsel shall provide to the CDR Point Person and the individual named in paragraph 2 below, in writing, the name, address, telephone and e-mail address of the selected mediator (fax or e-mail is acceptable).

2. _____ [1] **IS APPOINTED TO MEDIATE IF PARTIES DO NOT TIMELY DESIGNATE A PARTY SELECTED MEDIATOR**.

MEDIATION PROCESS[2]

3. **THE MEDIATOR SHALL NOTIFY COUNSEL OF THE DATE AND TIME FOR AN ORGANIZATIONAL CONFERENCE CALL** to be conducted within 35 days of this order. The mediator shall explain the mediation process, set ground rules, facilitate focused information exchange, and identify those persons with negotiating authority needed by each side to participate in the mediation process in order to assist in effectuating a resolution of the case. In consultation with counsel, the mediator shall schedule the mediation session and may require the attendance of the person(s) with authority.

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[1] Mediator phone number, address and billing rate are set forth on the Roster of Civil Mediators Search Page on the Judiciary's Internet website. See link "Search Civil Mediators" on the Judiciary's website homepage at njcourtsonline.com.

[2] A full description of the Civil mediation program can be found on the Judiciary's Internet website. Go to "Mediation, Civil" in the drop-down box on the homepage.

4. **THE PARTIES AND ATTORNEYS SHALL PARTICIPATE IN MEDIATION IN GOOD FAITH AND WITH A SENSE OF URGENCY**. Failure to participate in the conference call or attend the first mediation session may result in an assessment of costs or other consequences, pursuant to *R*. 1:2-4(a).

5. Any party may withdraw from the mediation process after the expiration of the initial one-hour in-person mediation session. Withdrawal of one or more parties from the mediation shall not prevent the remaining parties from continuing the mediation.

6. Lead plaintiff's counsel shall be responsible for providing the mediator with an updated party/counsel list.

7. This referral to mediation **DOES NOT STAY DISCOVERY**. Mediation under this order shall be completed by the discovery end date.

MEDIATOR COMPENSATION

8. Compensation of Party-Selected or Court-Designated Mediators shall be handled in accordance with the "Guidelines for the Compensation of Mediators" contained in Appendix XXVI of the Rules of Court. Mediators on the roster, whether party-selected or court-designated, shall serve without compensation for the first two hours, which shall include a mandatory organizational telephone conference with counsel and *pro se* parties and an in-person mediation session of a least one hour. Any mediator not on the Roster of Mediators may be selected by the parties and such non-roster mediator may negotiate a fee with the parties, but is bound by all other terms and conditions of this Order and the court's mediation procedures.

MISCELLANEOUS

Any inquiry regarding the mediation process or this order shall be resolved by the mediator in collaboration with the Mediator Facilitating Committee identified at:
http://www.judiciary.state.nj.us/civil/med_ment_comm_list.pdf

_____, J.S.C.

cc: Court-Designated Mediator
All Parties/Counsel
CDR Point Person

FAX number for CDR Point Person
found at www.njcourtsonline.com
E-mail address is firstname.lastname@judiciary.state.nj.us

B. Eliminate the Fax-in 35- and 90-Day Reports, and Revise the Discovery End Date (DED) Reminder Notice and the Trial Notice.

1. At present, within 35 days from the referral of the case to mediation, mediators are required to fax in a report to the court that they have held the organizational telephonic conference and, if not, to explain why. If they report that a party or attorney is resisting the process, vicinage staff step in and try to enlist cooperation. If the mediator fails to send in the 35-day report, staff spend time reaching out to the mediator to obtain the report. This reporting requirement, which puts a heavy burden on staff, should be eliminated.

2. At present, cases are sent to mediation for 90 days. If after 90 days following referral of the case to mediation staff have not heard from the mediator either that mediation has been completed or that an extension of the 90 days is needed, staff send out a reminder to the mediator advising that the case will be presumed not settled in 10 days and returned to the trial list. It often then happens that staff then hear from the mediator asking for an extension or for an OSC because one or more parties or attorneys is resisting the scheduling of or participation in the mediation. This reporting requirement, which puts a heavy burden on staff, should be eliminated.

3. Instead of requiring the mediator to provide the court with 35-day and 90-day reports, it is proposed that cases referred to mediation and not resolved through that process will simply be scheduled for trial at the expiration of the discovery period. The DED reminder notice would be revised to include an advisory that mediation should be wrapped up and that no discovery extension will be granted simply because a case is in mediation. Similarly, the trial notice would be revised

to state that there will be no adjournments based upon the parties being close to settlement due to mediation. Mediators should be encouraged to use their facilitative skills to aid the parties in prioritizing their information exchange.

III LEGISLATION

The Committee has made no recommendations regarding legislation.

IV. MATTERS HELD FOR CONSIDERATION

A. Expand The Mediator Facilitating Committee to Establish a Resource Panel to Handle Complaints and Questions From Mediators, Including Issues of Non-Cooperation.

The membership of the current Mediator Facilitating Committee should be expanded to form a resource panel of seasoned mediators and experienced attorneys to serve as the first line of complaint or inquiry on the part of a mediator (alleviating calls to vicinage or AOC staff), when the published guidelines do not cover the issue at hand. The mediators serving on the resource panel should all be on the Civil Mediator Roster and should be recommended by the Garibaldi Inns of Court, the State Bar's Dispute Resolution Section and the New Jersey Association of Professional Mediators, with each group designating several members. This proposal was presented to and supported by the Conference of Civil Presiding Judges.

B. Resolve issue of Applicants or Current Mediators with Criminal Charges, Convictions or Disciplinary Issues

The Advisory Committee on Mediator Standards should develop a procedure and recommend language to be added to the court rules to address the problem of applicants to or mediators currently on the roster who may have criminal charges, criminal convictions or disciplinary issues.

C. Case Settlement Procedures in Special Civil Part Summary Dispossess and Small Claims Matters:

Note: This concern was included in the "Matters Held for Consideration in the Committee Report for 2007-2009. It was not reached because the recently-concluded cycle was both shortened and focused on the issue of civil presumptive mediation. However, it is of sufficient importance to merit consideration and action by the Committee during the cycle commencing in 2011.

Concerns have been raised by several members of the Committee regarding CDR practices in the Special Civil Part, especially in the summary dispossess and small claims divisions. Both of the latter involve a very high volume of cases and a disproportionate number of lower-income and unrepresented defendants. The Committee Chair noted that these proceedings represent the "face of our courts" to much of the community. It is critically important that the CDR procedures used to resolve many of them yield fair, equitable and just results.

Although often denominated "mediation," CDR in tenancy and small claims matters generally takes the form of case settlement negotiations, facilitated by law clerks and other third-parties. Assigned or recruited by each vicinage, these "case settlers" are provided with limited training by the AOC. They are charged with resolving as many cases as possible before trial. Some Committee members noted that time and volume pressures can result in settlements requiring displacement or excessive payments despite the existence of compelling, even jurisdictional, defenses which are ignored or unknown to the participants. Committee members also reported instances where defendants related feeling coerced by the process into accepting unreasonable or impossible settlement terms.

In response to the above, the Committee has decided to undertake a comprehensive review and evaluation of the case settlement procedures employed in Special Civil Part summary dispossess and small claims matters. Relevant data and information will be compiled and analyzed, and appropriate revisions to existing procedures will be proposed if and where necessary. The goal is to insure that this form of CDR results in settlements that are fairly negotiated, equitable and just.

D. Miscellaneous Family Matters Held for Consideration

Upon recommendation of the State Domestic Violence Working Group, the Conference of Family Presiding Judges recommended that the Complementary Dispute Resolution Committee consider the following:

1. Revision of Rule 1:40-12 to include domestic violence training as part of the Mediator training requirements;
2. Revision of the form orders of referral to post-MESP mediation currently contained in Directive #1-07;
3. Revision of Rule 1:40-4 can to include reference to the Uniform Mediation Act (PL 2004, chapter 157);
4. Recommendations concerning utilization of an Information Sheet for Parties Referred to Custody/Parenting Time Mediation or Consent Conferencing

Each of the above recommendations is currently under consideration by the Family Programs Subcommittee of the CDR Committee.

V. MISCELLANEOUS MATTERS

A. Municipal Court Presumptive Mediation Pilot Program

In 2005, the Supreme Court approved an eighteen month presumptive mediation pilot program. The pilot program, developed by the Municipal Court Programs Subcommittee, was initiated in 2006 in seven Municipal Courts to evaluate the merits of using presumptive mediation. Municipal Court presumptive mediation is built on the premise that all mediation eligible cases, as defined by *Rules* 1:40-8 and 7:8-1, are to be presumptively sent to mediation.

As identified by this Committee in our 2007-09 Rules cycle report, the program results were somewhat inconclusive, due to implementation issues and limited participation by several of the pilot courts. As a result, in that same report, we recommended the continuation and expansion of the pilot to further test the concept that a Municipal Court presumptive mediation program makes sense. Specifically, we asked the Court to expand the pilot to include additional courts and suggested that the Conference of Presiding Judges-Municipal Courts be consulted to help identify viable pilot courts. In the fall of 2009, the Supreme Court approved the continuation and expansion of the pilot program for an additional twelve months.

The expanded pilot program was initiated on July 1, 2010 and is scheduled to conclude on June 30, 2011. Due to the ongoing nature of the program, it is not possible to draw any firm conclusions regarding the program merits. However, based on the limited data available, the initial results appear promising. Our final recommendations and report regarding the viability of using presumptive mediation in the municipal courts will be submitted following completion of the pilot program.

The remainder of this section is intended to brief the Court on our efforts to implement the expanded pilot.

In early 2010, the Municipal Court Presumptive Mediation Pilot Program Working Group (hereinafter Working Group) was formed to oversee the continuation, expansion and evaluation of the pilot. Membership includes representation from the Conference of Presiding Judges-Municipal Court, the Conference of Municipal Division Managers, and staff from the Municipal Court Services Division and Programs and Procedures Unit. The Working Group is chaired by Paul Catanese, PJ-MC (current chair of the Conference of Presiding Judges-Municipal Courts).

During the early part of 2010, the Working Group focused its efforts on reviewing and modifying the forms and materials used in the original pilot program. Changes were made, as necessary, to help ensure greater program efficiency and participation. The Working Group also spent time coordinating with the Conferences of Municipal Presiding Judges and Division Managers to identify possible pilot courts. In total, 45 pilot courts (three from each vicinage) were selected and approved by Administrative Director Glenn A. Grant for inclusion. (Note: only 7 courts were involved in the original pilot). These 45 courts form a cross section of our system, in that they include large and small courts, urban and rural courts, and include at least one court from each county.

In anticipation of the July 1, 2010 start date, mandatory trainings were held to familiarize participating judges and staff with program requirements. These trainings not only emphasized the general concept of presumptive mediation, but also familiarized judges and staff with the forms and evaluations that would be used as part of the program. It should be noted that the program's evaluation component requires completion of surveys by participating mediators, participating citizens, judges and staff.

Finally, a significant distinction between the original pilot and this newly expanded one is the level of oversight and support available to the participating courts. A concerted effort continues to be made by the Working Group, the Municipal Presiding Judges and the Municipal Division Managers to help monitor and support the mediation-related activities of the pilot courts.