THE SUPREME COURT ARBITRATION ADVISORY COMMITTEE

REPORT ON RECOMMENDATIONS REGARDING THE ARBITRATION PROGRAM AND THE QUALIFICATION AND TRAINING REQUIREMENTS FOR ARBITRATORS

June 2016

INTRODUCTION

In May 2014, the Supreme Court suspended the requirement set forth in Rule 1:40-12(c) that arbitrators serving in the court-annexed arbitration program attend a two-hour biennial training course to provide the Supreme Court Arbitration Advisory Committee with an opportunity to develop and recommend an improved and more efficient training course for arbitrators.

In response to the Court's directive, the Chair of the Arbitration Advisory Committee, the Honorable Jamie D. Happas, formed the Program Review Subcommittee to provide an "All Issues on the Table" review of the current Court-Annexed Arbitration System in the New Jersey Superior Court and to make recommendations for changes or modifications to the Program. The Subcommittee held meetings, reviewed extensive materials, communicated by telephone, conference call and e-mails to discuss these issues. A review of the specific areas that were discussed are set forth below together with the recommendations of the Subcommittee, as endorsed by the full Arbitration Advisory Committee.

I. RECOMMENDATIONS REGARDING THE FEE FOR A DEMAND FOR TRIAL *DE NOVO* AND ARBITRATOR FEES

Arbitration was first incorporated into the Rules of Court in 1986. At that time, the cost of filing a demand for trial *de novo* was $150. Additionally, the compensation for a single arbitrator was $350 per day and for two arbitrator panels, the compensation was $450, of $225 per arbitrator. Since 1986, the compensation amounts have not changed. Notably, however, since that time other filing fees have increased significantly. These include the fee for filing a complaint, which experienced a 233% increase from $75 to the current amount of $250, and the civil motion fee, which experienced three increases from originally having no filing fee to the current amount of $50. In order to effectuate the change in the complaint fee, *N.J.S.A.* 22A-2.6 was amended on several different occasions. In 1991, the fee was increased from $75 to $135; in 1996 the fee was increased to $175.00. By 2002, the fee had become $200 and by calendar year 2014, the fee rose to its current rate of $250 pursuant to *Rule* 1:43.

Since the *de novo* fee of $150.00 was originally determined at the same time that the fee for a Complaint was $75.00, there was clearly an intention to make the *de novo* fee greater than the cost of the complaint fee. After reviewing the historical increase of the fees, the Subcommittee found that there is no real justification for allowing the *de novo* fee to remain at its current rate other than the fact that the program has functioned in such a prudent and fiscal manner such that the need to resort to higher *de novo* fees has not been necessary. Therefore, the Committee submits that raising the *de novo* rate to $250, while at the same time raising the compensation for the arbitrators by the same amount of $50 is not only fair and reasonable, but also long overdue.

When the Arbitration Program was first created, it quickly became known as the "Lawyers Program" because it was a Program in which the decision makers were lawyers who were serving as arbitrators. The amount of daily compensation was never intended to serve as recompense for even a modest hourly rate, but rather, to provide a reasonable stipend for the attorney's time, the costs associated with the arbitration such as travel and parking, and the utilization of that attorney's skill and experience in helping to adjudicate and resolve cases in the Superior Court.

As noted above, the Program itself has remained in a self-funded state for a significant number of years, so if the filing fee for a demand for a trial *de novo* is raised, it should be raised in a concomitant manner with the daily arbitrator compensation to ensure that sufficient funding remains. Based upon a rudimentary analysis, a simple raise in the trial *de novo* fee, from $200 to $250, with a concomitant raise of $50 for the arbitrator compensation, would continue to maintain the Program on a sound financial basis. Accordingly, the Committee unanimously recommends that the fee for a single arbitrator be changed from $350 to $400 per day and for a two arbitrator panel the joint fee be changed from $450 to $500 per day. The Committee also unanimously recommends that the trial *de novo* fee be raised to $250 from $200. This proposed increase, though modest, is certainly not full compensation for an arbitrator's time spent in the service of the Court, but recognizes at least the practical necessities of the costs associated with serving with a concomitant increase in the *de novo* fee to ensure that the Program remains adequately funded into the foreseeable future.[1]

Rule 4:21A-6 sets forth the requirement of a $200 fee for the demand for a trial *de novo* and will require amendment if the recommendation to raise the fee is adopted. Notably, the text of the rule contains support for the recommendation for an increase, as well. Specifically, paragraph (c) of *Rule* 4:21A-6 states in pertinent part:

> "A party demanding a trial de novo must tender with the trial *de novo* request a check payable to the "Treasurer, State of New Jersey" in the amount of $200.00 towards the arbitrator's fee..." (Emphasis added).

Thus, the Rule clearly indicates the intended use of at least a portion of the trial *de novo* fee would be paid "towards the arbitrator's fee." Since that is a stated pre-determined purpose of that fee, providing a one-time increase in both the arbitrator's fee and the trial *de novo* fee by the very modest amount of $50 is strongly recommended. This analysis simply discusses the cost of a trial *de novo* and the arbitrator's fee, but

[1] The following are statistics on the number of arbitrated cases where a *de novo* request was filed:

Calendar Year	# Cases Arbitrated	# Cases *De Novo* Request	Amount of Fees Collected for *De Novo* Requests at $200	Amounts Expended for Arbitrator Fees	Amounts Collected if Increase *De Novo* Request Fee to $250
2013	15,653	12,257	$2,451,400	$1,435,875	$3,064,250
2014	14,714	11,355	$2,271,000	$1,352,100	$2,838,750

does not refer to the rise in other costs associated with this Program. Significantly, those other costs can be offset by the revenues from the increase in the trial *de novo* fee which are not used to pay the new arbitrator's fee.

II. RECOMMENDATIONS REGARDING ARBITRATOR QUALIFICATION AND TRAINING

Rule 1:40-12(c) sets forth the requirements for arbitrator qualification and training including the content of the initial and continuing training courses. That Rule refers to *Rule* 4:21A-2 which, as found in paragraph (b), provides:

> "Inclusion on the roster shall be limited to retired judges of any court of the State who are not on recall and attorneys admitted to practice in this State having at least seven years of experience in New Jersey in any of the substantive areas of law subject to arbitration under these rules, and who have completed the training and continuing education required R.1:40-12 (c)."

Thus, the standard to become an arbitrator of simply being an attorney is sufficiently broad to allow inclusion of attorneys who fulfill the stated requirements of the rule but whose actual qualifications are lacking. For instance, an individual who is an associate in a law firm who never has appeared at arbitration and who never has tried a case but who works in his firm on personal injury cases is qualified to be an arbitrator as far as the strict requirements of the Rule are concerned if he has worked there for 7 years. In addition, the word "experience" is used in the Rule but the Rule does not modify or define "experience" other than to use the length of time that the attorney actually has experience in "any of the substantive areas of law subject to arbitration under these Rules." Thus, an attorney who handles some personal injury work, perhaps five cases over a period of ten years, is theoretically qualified under the rule because the rule does not define the type or quality of experience required. While there is a local Arbitrator Selection Committee in each county, the selection committees are bound only by the stated requirements are in the Rule. The Arbitrator Selection Committee cannot decide to create an enhanced standard, perhaps based on whether or not somebody is a Certified Civil Trial Attorney, and impose that standard contrary to the provisions of the rule.

It is the unanimous opinion of this Committee that the arbitration system in New Jersey will only be able to serve its purposes to the extent that its arbitrators are able to fulfill those purposes. Moreover, the quality of the program itself is only as good as the quality of the arbitrators that it uses. To this end, barely experienced or minimally experienced attorneys, who do not know the value of cases or the substantive law that must be applied in various cases and who do not have experience with jury verdicts in the county in which the case is venued, can provide arbitration awards that are so unrealistic, whether too high or too low, such that the arbitration awards actually serve as a detriment to the eventual resolution of the case. In short, the Program has now been in existence for approximately 30 years and the practice of civil trial law in New

Jersey, which would encompass automobile arbitrations, personal injury arbitrations, or expanded arbitrations (inclusive of commercial cases) has changed considerably.

From a time where the decade of the 1970s required oral argument on every motion to the disposition of most motions now on the papers, there have been extensive changes in motion practice which has limited access to the courtroom by less experienced attorneys. In addition, obtaining trial experience is very difficult for newer attorneys and seven years is no longer a realistic period of time to expect that an attorney will acquire the experience and skill necessary to serve as an arbitrator, render an award that is meaningful and will serve not as a detriment but rather as an impetus to settlement or eventual disposition of the case.

To this end it, is the unanimous opinion of the Committee that the standard of seven years' experience should be increased to ten years' experience and that the Court Rule be changed to modify the word "experience" with "consistent and extensive" to read: "at least ten years of consistent and extensive experience in New Jersey in any of the substance areas of law subject to arbitration under these Rules . . ." This standard would then be applied by the local Arbitrator Selection Committees. It is also the Committee's recommendation that that a new proposed arbitrator submit the names of three attorneys with whom he or she has had a matter in the substantive area in which he or she seeks to be an arbitrator within the last three years. Although trial experience would be helpful, recognizing the limited nature of such experience for newer attorneys, we think it best to leave this as an enhancement with regard to the qualifications, but not as a specific requirement. It is the Committee's unanimous opinion that Certified Trial Attorneys be automatically qualified for purposes of inclusion in the roster of arbitrators provided that their certification is in one of the substantive areas for which they are seeking to become an arbitrator.

It is very important that the arbitrator sitting in the county at the time of the arbitration understands the values in that county. Values in jury verdicts, and therefore in settlements, vary considerably from county to county in New Jersey. An attorney who regularly practices in Cape May County, for example, would not have experience with regard to values in Essex County. Likewise, an Essex County attorney would not have regular knowledge of values in Burlington County. Committee members are all aware of the disparities in values and note that must be taken into consideration with regard to inclusion on the roster of arbitrators. For this reason, an attorney who does not regularly practice in the county in which he or she seeks to be an arbitrator should not be admitted as an arbitrator in that county because the values themselves will be based upon those of other counties. The arbitration process is an adjudicatory process and also a process which was designed to encourage settlements. If the values being placed on cases are out of character for the county, whether too high or too low, then they will result in trials *de novo* being filed and also provide a value in a case which now must be provided as an award in the presence of the party, which can result in the eventual lack of settlement in the case. An attorney calling a case with too high a value in a county where that same case would be worth 33 1/3% less, is doing neither the case, the litigants, nor the system any benefit. It is the Committee's recommendation

that the Rule be changed to include a requirement that an attorney regularly practice in the county in which he or she seeks to be an arbitrator.[2]

Thus, with regard to qualifications, it is the Committee's recommendation that the time period be changed from seven years to ten years and that the type of experience be modified in the court rule to include, "consistent and extensive" experience and that the proposed arbitrator regularly practice in the county in which he or she seeks to be an arbitrator. Finally, a Certified Civil Trial Attorney should be subject to automatic inclusion in the panel of arbitrators, as well. With regard to new proposed arbitrators it is also the Committee's recommendation that that proposed arbitrator submit the names of three attorneys with whom he or she has had a matter in the substantive area in which he or she seeks to be an arbitrator within the last three years.

III. THE TRAINING AND RETRAINING OF ARBITRATORS FOR THE COURT-ANNEXED ARBITRATION PROGRAM IN NEW JERSEY

Paragraph (c) of *Rule* 1:40-12 requires that arbitrators serving in the court's arbitration program be annually recommended for inclusion on the approved roster by the local Arbitrator Selection Committees and approved by the Assignment Judge or designee. The Rule further provides that all arbitrators shall attend an initial training session of at least three classroom hours and continuing training every two years of at least two hours in courses approved by the Administrative Office of the Courts. Subparagraphs (c)(1) and (c)(2) of *Rule* 1:40-12 provide a basic outline as to the course content to be provided in initial training as well as the content to be provided in the continuing training or retraining with a concentration on procedure and conduct. The Rule does allow for training as to "other relevant information" or "other matters related to court-annexed arbitration." As stated above, it is the opinion of the Committee that there is a direct correlation between the quality, training, experience and skill of the arbitrators and the effectiveness of the arbitration program itself and, the fairness of the arbitration award in helping to resolve or dispose of the case. A discussion regarding the analysis by the Subcommittee on the necessity of including training as to substantive issues as well is set forth below after the discussion as to the training courses themselves.

[2] A minority of the Committee suggested that individuals seeking to serve as arbitrators in commercial cases be excluded from the requirement of having to practice in the county(ies) in which they seek to be arbitrators. The minority contends that they should be able to serve as arbitrators in any county because commercial matters are governed by uniform law and are not influenced by local jury verdicts. A vast majority of the Committee, however, disagreed concluding that individuals should be familiar with the local practice in the counties in which they seek to be arbitrators regardless of whether it is a personal injury or commercial case.

A. RECOMMENDATIONS REGARDING INITIAL TRAINING OF ARBITRATORS

First and foremost for any arbitrator, whether one who has served previously or one who is seeking to become an arbitrator by way of initial training, must have an understanding of any applicable amendments to the Rules of Court which impact upon arbitration. For example, the Committee, after a recognition of the inconsistent manner that arbitrations were being conducted with regard to parties in default in the vicinages, proposed a unifying rule, *Rule* 4:21A-9, which was adopted by the Supreme Court in July 2012 and became effective on September 4, 2012.[3] It is the Committee's recommendation that initial trainings and retrainings discuss this Rule amendment in depth. The Committee believes that the training for this new rule will not only be of value with regard to the service of the participants at the training session in their service as arbitrators but also as lawyers understanding that a new rule has, in fact, been passed which specifically deals with an issue which had been unresolved since the inception of the program. If any further clarification of the rule is made, the training can address those changes, as well.

It is the opinion of the Committee that emphasis be made in the initial training on the procedures to be followed in an arbitration proceeding and these would include a general discussion followed by "video-vignettes" of what not to do and also what to do with regard to conducting an arbitration. The rules that govern an arbitration allow for an arbitrator to have a pre-arbitration conference with the attorneys alone and require that the arbitrator(s) ask the parties if they wish to make any consensual disclosures to the arbitrators such as offers, demands, opinions as to value or any other disclosures deemed to be relevant. For example, a disclosure as to a prior injury to the same parts

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[3] *Rule* 4:21A-9 requires that a party against whom an arbitration award is sought either be in default for less than 6 months or has had default judgment on liability entered against them pursuant to *Rule* 4:43-2(b). If the default is less than 6 months old or there is default judgment on liability then notice must be provided under paragraph (b) of *Rule* 4:21A-9 no later than 30 days prior to the arbitration hearing through a form developed by this Committee which is set forth in Appendix XXIX. The Rule specifically advises where the notice should be served, the method of service, and the fact that proof of service of the notice of arbitration hearing is to be filed with the clerk of court prior to the arbitration. A copy of the filed proof of service is to be provided to the arbitrator at the hearing who is required to indicate same in his/her arbitration award. The Rule also provides and anticipates a potential adjournment of the arbitration and provides that notice shall also be promptly provided to the defaulting party as to the new hearing date.

One of the procedural issues that had not been addressed under the original set of rules for arbitration was the method of proceeding when a party who had default or default judgment on liability entered against it and did not appear at the arbitration hearing after notice. In paragraph (c) of *Rule* 4:21A-9, this situation is covered in detail and it also provides the method of notice and the timing of notice on the party in default who did not appear at the arbitration. Paragraph (d) of *Rule* 4:21A-9 refers to the procedure that is to be followed when a party moves for confirmation of the arbitration award and entry of judgment when the defaulted party does not appear and the fact that compliance with *Rules* 1:5-7 and 4:43-2 is required together with proof of same being supplied.

of the body in an automobile accident personal injury case would key the arbitrator to the fact that a *Polk*[4] comparative analysis would be required in the expert reports. This is information that, when received by the arbitrator in a pre-arbitration conference, will allow the refinement of the issues in order to make a proper decision in the case. The pre-arbitration conference must be emphasized as a part of the process that must be undertaken if the parties agree to make pre-arbitration disclosures which could potentially include a *pro se* party. If there is no consent among all parties, no such disclosures can be made and the arbitration then proceeds.

The Committee has developed various "video-vignettes" which include skits that demonstrate first inappropriate then appropriate behavior by arbitrators for frequently occurring situations. This tool is superior to merely telling arbitrators how to act because the skits actually demonstrate how situations commonly arise. These vignettes include topics such as the appearance of impartiality, the necessity of allowing witnesses the opportunity to testify, proper and respectful behavior towards counsel and litigants, and the removal from the process of any display of bias or favoritism. Each vignette concludes with a slide that includes discussion questions about the vignette which the Committee anticipates these questions will give rise to spirited discussion. The Committee recommends that a compilation of prior vignettes be utilized to train the new arbitrators as to proper procedure in conducting arbitrations. Formerly, these vignettes were used only for retraining but the Committee believes that based upon the response from both the vicinages and the arbitrators, these videos are valuable and should be used for the initial training, as well.

In addition to the older vignettes, an entire new series of vignettes was filmed recently which covered issues that were brought to the attention of the Committee by the vicinage Arbitration Administrators for specific problems they have encountered. Those issues included arbitrator decorum, tardiness, neutrality, *Rule* 4:21A-9 on default, the proper manner to handle *pro se* litigants, and ministerial issues as the completion of the arbitration award in a clear and legible manner. Other issues relating to the manner in which the litigants were addressed and the efficiency in arbitrating cases raised by the Arbitrator Administrators were addressed in the vignettes. It is the recommendation of the Committee that a compilation of the older training vignettes with the newest vignettes be used for the initial training of arbitrators as well as the retraining of arbitrators.

Additionally, when the materials are given out to the new arbitrators, there should at least also be a brief discussion of substantive issues that are frequently encountered in arbitrations and the applicable law and the manner in which to handle them as an arbitrator. The Committee recommends that the training include a live mock arbitration hearing for new arbitrators. That mock arbitration would include the pre-arbitration conference with the attorneys, the testimony of the parties, and the presentation of the award in front of the parties. It would then be followed by a question and answer session not only for the mock arbitration proceeding but also as to

[4] *See Polk v. Daconceicao*, 268 *N.J. Super.* 568 (App. Div. 1993).

all of the items that have been discussed. The important point is to emphasize that an arbitrator does not have the right to disregard either the rules of arbitration or the Rules of Court in conducting the arbitration. It is also a requirement that the arbitration be conducted in a respectful and dignified manner and that the litigants, especially those whose only interaction with the Superior Court is usually through arbitration, understand the nature of the process, the reasons for it, the solemnity attached to the of arbitration despite its informal nature, and that the hearing is part of our system of justice.

B. RECOMMENDATIONS REGARDING RETRAINING OF ARBITRATORS

As stated previously, it is presently a requirement that each arbitrator be retrained every two years for a period of two hours. The subcommittee carefully reviewed this requirement. The subcommittee determined, and full Committee agreed, that the requirement should be amended. Several vicinages have reported the loss of experienced arbitrators over an unwillingness to submit to this retraining every two years. However, that is not a factor to any large extent with regard to the Committee's opinion and is being expressed herein for informational purposes only because it served as the genesis to begin a discussion as to this requirement. Since we now have the experience of having several arbitrator initial training and subsequent retraining sessions, it is clear that it is unnecessary to require only a two year interval for retraining for experienced arbitrators. It is the further recommendation of the Committee that after the initial training, new arbitrators will have to submit to the first retraining after two years. Following that second training session (which is actually their first retraining session), then an additional four years can elapse before an additional training course is required. The Committee requests that this recommendation be considered and implemented as soon as possible. Considering the vignettes that have been already shown, the training that was already provided to the arbitrators already who have had the initial training and probably more than one retraining session, this change is both reasonable and recommended to provide balance to the program into the future.

The Committee also recommends that the retraining of arbitrators take place on a local level and that the Arbitrator Selection Committees in the respective vicinages be responsible for that training with the assistance of a member of this Committee, if available. The reasons for the devolving of the retraining from a central location to the actual vicinages are obvious. In the first instance, the Arbitration Administrators and their respective vicinages are best situated to know what the specific problems are with respect to those vicinages and what aspects of arbitration training should be emphasized. Secondly, the local retraining provides for an opportunity for the Court to address the arbitrators in a given vicinage regarding the program itself and serves often a positive means of reinforcement to the arbitrators. It is envisioned that the retraining at the local level include the vignettes that were recently developed for the topics that were provided by the Arbitration Administrators which should be covered together with a discussion of more substantive issues for those arbitrators who are now being

retrained. Those topics should include the effect of various liens such as Medicaid, Medicare, ERISA, and workers' compensation and also a discussion of more recent issues that have arisen such as whether medical bills go into evidence in an automobile accident when there is a limited PIP policy and whether the standard is on the basis of the fee scheduled amounts or gross amounts.

The local vicinages should also be encouraged to discuss any issues in addition to those set forth in a teaching syllabus to be developed by the Committee which may be pertinent to them. The vicinages should also be permitted to consider presentations by experts on other issues. The Committee recommends that the retraining sessions consist of the new vignettes being played, with discussion to be engendered as the result of the questions asked at the end of the new vignettes, together with an in depth analysis of Rule 4:21A-9, and a discussion of the substantive law with regard to issues that recur in arbitration, using the syllabus.

The Committee therefore recommends a short outline or syllabus with pertinent cases and law to serve as a guide for the local arbitrator selection committees to be utilized when discussing the issues of substantive law and to provide these as handouts to the arbitrators so that they may have them at the time the arbitrations are conducted. Notably, the problems that are attempted to be addressed with these vignettes are the result of input received from the vicinages and while the vignettes are entertaining, there are important messages in each one that must be reinforced through the local vicinages as stated above. Having the arbitrators from a given vicinage together for a retraining session also gives the Court an opportunity to utilize that time to discuss important issues in a further effort to attempt to improve the system.

In late April 2016, the Committee met with the local arbitrator selection committees to discuss the proposed recommendations contained in this report. The local committees were not opposed to the proposals, and in fact welcomed the proposed changes.

1. Brief Summary of Substantive Topics to be Covered During the Retraining of Arbitrators

Since automobile personal injury cases represent the majority of cases that are subject to court-annexed arbitration, any retraining should begin with a discussion of the requirements of *N.J.S.A.* 39:6A-8 and the landmark decision of *DiProspero v. Penn*, 183 *N.J.* 477 (2005). If the arbitrator finds that the injury does not exceed the verbal threshold based upon the proofs, he/she is to be bound to return an award of no cause on the issue of damages based upon *DiProspero* and its progeny. Further, since the arbitration award must be delivered in the presence of the parties, the arbitrator should accentuate the proof requirements of the statute, and the fact that the proofs do not meet the test of either objective credible evidence of an injury or a permanent injury as defined in the statute. Finally, the same should be set forth in the award and stated in the delivery of the award in the presence of the parties.

Another typical case that is subject to arbitration is a premises liability case. Therefore, the retraining session should emphasize the proofs required for those cases involving both actual and constructive notice, the rule set forth in *Hopkins v. Fox and Lazo*, 132 *N.J.* 426 (1993), and Model Civil Jury Charge 5.20F which provide a summary the requirements to establish liability in the case of a social guest. Additionally, those requirements should be contrasted with those necessary in a case dealing with a landlord for liability as to residential tenants as set forth in Model Civil Jury Charges 5.20C and 5.20D. Those charges and a copy of the cases set forth herein should be part of a packet and made available at all arbitrator training sessions.

Another case type that an arbitrator will likely encounter is a Dram Shop Case under *N.J.S.A.* 2A:21A-1 et seq., which deals with the liability of a social host for damages to a third party as a result of alcohol service to a guest under *N.J.S.A.* 2A: 15-5.6. Training should also include reference to claims under the New Jersey Tort Claims Act *N.J.S.A.* 59:1-1, et seq. and case law which interprets the requirements of proof for claims for personal injury cases under the statute. Some pertinent cases include: *Brooks v. Odom*, 150 *N.J.* 395 (1997), *Gilhooley v. County of Union*, 164 *N.J.* 533 (2002), and *Knowles v. Mantua Township Soccer Association*, 176 *N.J.* 24 (2003). Also, "dog bite cases," as set forth in *N.J.S.A.* 4:19-6 and Model Jury Charge 5.60A should be included. For these cases, arbitrators should be aware that in the event there is not an actual dog bite, liability must be shown separately and that a resort to Model Jury Charge 5.60B must be made.

Finally, since many carriers now have clauses in their policies which allow the carriers the right to choose litigation rather than arbitration in uninsured motorist and underinsured motorist coverage claims, *N.J.S.A.* 17:28-1.1, the pertinent statute should be discussed. This statute states that the tort threshold chosen by the insured applies to a UM or UIM claim. There are also issues of stacking or non-stacking of available policies, proration of payments, and the threshold question as to whether or not a vehicle comes within the definition of an uninsured vehicle or a hit and run vehicle, the latter being set forth in *N.J.S.A.* 39:6-78.

The Committee also recommends that a discussion regarding liens should be included as part of the initial training and retraining. Indeed, perhaps the most misunderstood lien in New Jersey is that which is set forth in N.J.S.A. 34:15-40, commonly referred to as the "workers' compensation lien." Essentially, the statute allows the workers' compensation carrier to recover back from the proceeds of a third party settlement (in this sense a third party is anyone other than the employer or fellow employee of the plaintiff) amounts paid for medical expenses, temporary disability payments, otherwise known as indemnity, and any permanency award. Although the carrier is allowed to be reimbursed for those payments, the reimbursement is pursuant to a certain formula. The process for determining the net workers' compensation lien is to divide the workers' compensation lien by the percentage of actual attorney's fees in the third party action (usually 33 1/3%), and then subtract that amount from the gross amount of the lien. Next, one must subtract the amount of costs incurred in the prosecution of the case up to $750.00 from the amount that remains.

Notably, admissibility is a different issue and the amount of medical expenses and lost wages must be proven. The permanency award is not evidential since the workers' compensation statute does not change what is admissible as items of special damages or economic damages in a trial. In this respect, *Dias v. A.J. Seabra's Supermarket*, 310 *N.J.* Super. 99 (*App. Div.* 1998) sets forth the procedure to be followed which begins with the total amount of the medical bills incurred being introduced into evidence subject to proof, of course, that they are reasonable and causally related and medically necessary with regard to the subject accident. Once the bills are placed into evidence, the Trial Court, after return of the verdict awarding these bills, molds the sum awarded by the jury on the basis of out-of-pocket losses and collateral sources. See *Thomas v. Toys "R" Us, Inc.*, 282 *N.J. Super.* 569 (*App. Div.* 1995), *certif. denied*, 142 *N.J.* 574(1995).

In general, the arbitrators should be advised that under *Perreira v. Rediger*, 169 *N.J.* 319 (2001), standard contractual health insurance liens in New Jersey are not enforceable or recoverable. The exceptions are those liens that are not private health insurance liens from carriers, but rather those which operate by virtue of Federal Law such as Medicare, Medicaid, and ERISA liens, such as those held by the Teamsters' Union or corporations which have filed the appropriate documents, usually with a presence on a national level. Due to relatively new changes in Medicare, those liens are frequently the subject matter of arbitration in premises liability cases. Medicare applies a formula to the lien which is usually based upon the combined percentage of attorney's fees and costs to the ultimate settlement in the case. Thus, if the attorney's fees are 33 1/3% and the costs comprise an additional 2% when compared to the gross amount of the settlement, the Medicare net lien will be approximately 64 2/3% of the amount of the payments they actually made. With ERISA liens, there is sometimes the ability to negotiate them, as well, but these are facts that are ordinarily outside the purview of arbitration but should be nevertheless touched upon in any discussion of these liens. Also outside the purview of arbitration would be child support liens which require that the amount of child support be satisfied by the payment through the plaintiff's attorney out of the proceeds of the settlement, exclusive of a $2,000.00 exemption if the recovery to the client is not greater than that amount. (See *N.J.S.A.* 2A:17-56.23b).

Finally, as to the adequacy of proof for net lost wages, whether as a result of a workers' compensation accident or not, *Caldwell v. Haynes*, 136 *N.J.* 422 (1994) sets forth the measure of proof with regard to net lost wages and that it is plaintiff's burden to show same affirmatively.

CONCLUSION

In sum, the Committee recommends that the current fee for filing a demand for a trial *de novo* be increased from $200 to $250; that the fee for a single arbitrator be increased from $350 to $400 per day; and that the fee to be equally split for two arbitrator on a panel be increased from $450 to $500 per day. The Committee believes

that the Arbitration Program will continue to be financially self-sufficient while at the same time providing long, overdue increases in the fees for both the filing of a demand for a trial *de novo* and also for arbitrators.

The Committee also recommends that the period of time for practice in the substantive area of the law for the qualification of an arbitrator be increased from seven years to ten years and that the type of experience be designated "consistent and extensive experience" in order to ensure that there has been more than only moderate exposure to that area of substantive law.

Further, the Committee recommends that the period of time for the second arbitrator retraining session be extended from two years to four years and that the retraining sessions be conducted by the local Arbitrator Selection Committees with a member of the Supreme Court Arbitration Advisory Committee present, if possible. The Committee believes that these changes to the program will also have a targeted effect on improving not only the quality of the arbitrators but also the Program, itself.

For the proposed new initial arbitrator training, the Committee recommends that a compilation of old and new vignettes be used, that there be a general discussion of the areas of the law that are frequently encountered in arbitration, and that a handout be provided with regard to substantive law for each of the new arbitrators. The training should also include a live mock arbitration with a question and answer session to follow. With regard to the proposed new retraining, new vignettes should be used with an emphasis on substantive law, allowing the local Arbitrator Selection Committees to determine other matters they wish to include in their arbitrator retraining session as long as all of the mandated portions of the retraining program as set forth in the syllabus provided by the Committee are followed.

If the Court agrees with the recommendations of the Committee, certain Court Rules will need to be amended to carry out the recommendations - Rule 1:40-12(c) ("Arbitrator Qualification and Training"); Rule 4:21A-2(b) ("Appointment from Roster") and Rule 4:21A-6(c) ("Trial De Novo"). Attached for the Court's consideration are proposed amendments to those Rules.

Respectfully submitted,

Hon. Jamie D. Happas, P.J.Cv., Chair

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Attachment to Report

Proposed Rule Amendments

1:40-12. Mediators and Arbitrators in Court-Annexed Programs

(a) ...no change.

(b) ...no change.

(c) Arbitrator Qualification and Training. Arbitrators serving in judicial arbitration programs shall have the minimum qualifications prescribed by *Rule* 4:21A-2 and must be annually recommended for inclusion on the approved roster by the local arbitrator selection committee and approved by the Assignment Judge or designee. All arbitrators shall attend initial training of at least three classroom hours and continuing training [every two years] of at least two hours in courses approved by the Administrative Office of the Courts.

(1) New Arbitrators. After attending the initial training, a new arbitrator shall attend continuing training after two years. Thereafter, an arbitrator shall attend continuing training every four years.

(2) Roster Arbitrators. Arbitrators who have already attended the initial training and at least one continuing training, shall attend continuing training every four years.

[1] (3) Arbitration Course Content — Initial Training. The three-hour classroom course shall teach the skills necessary for arbitration, including applicable statutes, court rules and administrative directives and policies, the standards of conduct, applicable uniform procedures as reflected in the approved procedures manual and other relevant information.

[2] (4) Arbitration Course Content — Continuing Training. The two-hour [biannual] continuing training course should cover at least one of the following: (a) reinforcing and enhancing relevant arbitration skills and procedures, (b) ethical issues associated with arbitration,

or (c) other matters related to court-annexed arbitration recommended by the Arbitration Advisory Committee.

(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; caption amended and paragraph (a)(4) caption and text amended June 15, 2007 to be effective September 1, 2007; new paragraph (a)(6) caption and text adopted, paragraph (b)(1) amended, paragraph (b)(2) deleted, paragraphs (b)(3) and (b)(4) redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)(5) amended and redesignated as paragraph (b)(4), and paragraphs (b)(6) and (b)(7) redesignated as paragraphs (b)(5) and (b)(6) July 16, 2009 to be effective September 1, 2009; subparagraphs (b)(2) and (b)(4) amended July 21, 2011 to be effective September 1, 2011; subparagraph (a)(3) caption and text amended, subparagraphs (a)(4), (a)(6), (b)(1), (b)(2) and (b)(4) amended, former subparagraph (b)(5) redesignated as subparagraph (b)(6), former subparagraph (b)(6) redesignated as subparagraph (b)(7), new subparagraphs (b)(5) and (b)(8) adopted July 27, 2015 to be effective September 1, 2015; paragraph (c) amended _____ to be effective _____.

4:21A-2. Qualification, Selection, Assignment and Compensation of Arbitrators

(a) By Stipulation. All parties to the action may stipulate in writing to the number and names of the arbitrators. The stipulation shall be filed with the civil division manager within 14 days after the date of the notice of arbitration. The stipulated arbitrators shall be subject to the approval of the Assignment Judge and may be approved whether or not they met the requirements of paragraph (b) of this rule if the Assignment Judge is satisfied that they are otherwise qualified and that their service would not prejudice the interest of any of the parties.

(b) Appointment From Roster. If the parties fail to stipulate to the arbitrators pursuant to paragraph (a) of this rule, the arbitrator shall be designated by the civil division manager from the roster of arbitrators maintained by the Assignment Judge on recommendation of the arbitrator selection committee of the county bar association. Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least [seven] ten years of consistent and extensive experience in New Jersey in any of the substantive areas of law subject to arbitration under these rules; who regularly practice in the county(ies) in which they seek to be an arbitrator; and who have completed the training and continuing education required by *R.* 1:40-12(c). A Certified Civil Trial Attorney with the requisite experience and who regularly practice in the county(ies) in which he or she seeks to be an arbitrator will be entitled to automatic inclusion on the roster. The arbitrator selection committee, which shall meet at least once annually, shall be appointed by the county bar association and shall consist of one attorney regularly representing plaintiffs in each of the substantive areas of law subject to arbitration under these rules, one attorney regularly representing defendants in each of the substantive areas of law subject to arbitration under these rules, and one member of the bar who does not regularly represent either plaintiff or

defendant in each of the substantive areas of law subject to arbitration under these rules. The arbitrator selection committee shall review the roster of arbitrators annually and if appropriate, shall make recommendations to the Assignment Judge to remove arbitrators from the roster. The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators. The Assignment Judge shall file the roster with the Administrative Director of the Courts. A motion to disqualify a designated arbitrator shall be made to the Assignment Judge on the date of the hearing.

(c) Number of Arbitrators. All arbitration proceedings in each vicinage in which the number and names of the arbitrators are not stipulated by the parties pursuant to paragraph (a) of this rule shall be conducted by either a single arbitrator or by a two-arbitrator panel, as determined by the Assignment Judge.

(d) Compensation of Arbitrators.

(1) Designated Arbitrators. Except as provided by subparagraph (2) hereof, a single arbitrator designated by the civil division manager, including a retired judge not on recall, shall be paid a per diem fee of [$350] $400. Two-arbitrator panels shall be paid a total per diem fee of [$ 450] $500, to be divided evenly between the panel members.

(2) Stipulated Arbitrators. Arbitrators stipulated to by the parties pursuant to *R.* 4:21A-2(a) shall be compensated at the rate of [$70] $80 per hour but not exceeding a maximum of [$350] $400 per day. If more than one stipulated arbitrator hears the matter, the fee shall be [$70] $80 per hour but not exceeding [$450] $500 per day, to be divided equally between or among them. The parties may, however, stipulate in writing to the payment of additional fees, such stipulation to specify the amount of the additional fees and the party or parties paying the additional fees.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended July 10, 1998 to be effective September 1, 1998; caption amended, paragraph (c) amended, and new paragraph (d) adopted July 5, 2000 to be effective September 5, 2000; paragraphs (b) and (d)(1) amended, and former paragraph (d)(3) deleted July 12, 2002 to be effective September 3, 2002; paragraphs (b), (c), (d)(1), and (d)(2) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended July 27, 2006 to be effective September 1, 2006; paragraphs (b), (d)(1) and (d)(2) amended to be effective_____.

4:21A-6. Entry of Judgment; Trial De Novo

(a) Appealability. The decision and award of the arbitrator shall not be subject to appeal.

(b) Dismissal. An order shall be entered dismissing the action following the filing of the arbitrator's award unless:

(1) within 30 days after filing of the arbitration award, a party thereto files with the civil division manager and serves on all other parties a notice of rejection of the award and demand for a trial de novo and pays a trial de novo fee as set forth in paragraph (c) of this rule; or

(2) within 50 days after the filing of the arbitration award, the parties submit a consent order to the court detailing the terms of settlement and providing for dismissal of the action or for entry of judgment; or

(3) within 50 days after the filing of the arbitration award, any party moves for confirmation of the arbitration award and entry of judgment thereon. The judgment of confirmation shall include prejudgment interest pursuant to *R.* 4:42-11(b).

(c) Trial De Novo. An action in which a timely trial de novo has been demanded by any party shall be returned, as to all parties, to the trial calendar for disposition. A trial *de novo* shall be scheduled to occur within 90 days after the filing and service of the request therefor. A party demanding a trial de novo must tender with the trial de novo request a check payable to the "Treasurer, State of New Jersey" in the amount of [$200] $250 towards the arbitrator's fee and may be liable to pay the reasonable costs, including attorney's fees, incurred after rejection of the award by those parties not demanding a trial de novo. Reasonable costs shall be awarded on motion supported by detailed certifications subject to the following limitations:

(1) If a monetary award has been rejected, no costs shall be awarded if the party demanding the trial de novo has obtained a verdict at least 20 percent more favorable than the award.

(2) If the rejected arbitration award denied money damages, no costs shall be awarded if the party demanding the trial *de novo* has obtained a verdict of at least $ 250.

(3) The award of attorney's fees shall not exceed $ 750 in total nor $ 250 per day.

(4) Compensation for witness costs, including expert witnesses, shall not exceed $ 500.

(5) If the court in its discretion is satisfied that an award of reasonable costs will result in substantial economic hardship, it may deny an application for costs or award reduced costs.

(d) Attorney Fees. In all actions where by statute or otherwise an award of attorney fees is allowed, all such issues are reserved for court resolution unless the parties otherwise agree to submit a fee demand to the arbitrator. In all cases in which attorney fees are sought, the party seeking attorney fees must comply with the provisions of *R.* 4:42-9(b).

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraphs (b)(1) and (c) amended November 2, 1987 to be effective January 1, 1988; paragraph (c)(5) amended November 7, 1988 to be effective January 2, 1989; paragraphs (b)(1) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended May 3, 1994 to be effective July 1, 1994; paragraph (b)(1) amended July 10, 1998 to be effective September 1, 1998; paragraphs (b) and (c) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended June 7, 2005 to be effective immediately; new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012; paragraph (c) amended_____ to be effective _____.

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