

From: David Perry Davis, Esq. <dpd@FamilyLawNJ.pro>
Sent: Wednesday, March 29, 2017 2:26 PM
To: Comments Mailbox
Subject: Re: Proposed Change to R. 1:40-4 (b): Compensation and Payment for Economic Mediators

Dear Judge Grant:

In reference to the email comment sent earlier today, I was just advised that the Family Practice Committee did in fact address this issue. Apparently, there is a conflict between the Family Practice Committee Report and the CDR Committee Report.

At page 5, the CDR Committee Report states:

The CDR Supreme Court Committee has considered the request for clarification and has proposed a modification in order to R.1:40-4(b) and Appendix XXVI in order to clarify that a mediator seeking payment for their fees and expenses should file in the appropriate part of the Law Division of the Superior Court, whether Special Civil Part, or Civil Part.... (<https://www.judiciary.state.nj.us/reports2017/cdr.pdf> at 5)

At page 44, the Family Practice Committee states:

The Committee recommends amending Appendix XXVI to provide for collection of an unpaid mediator's bill in the Family Part, in addition to the current procedure in the Special Civil Part... (<http://www.judiciary.state.nj.us/reports2017/family.pdf> at 44).

I respectfully suggest that the two Committees be asked to communicate and resolve or clarify the apparent conflict and no changes be adopted until this occurs.

Respectfully,

David Perry Davis, Esq.

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At 01:29 PM 3/29/2017, David Perry Davis, Esq. wrote:

Dear Judge Grant:

I oppose the proposed amendment to Rule 1:40-4(b) and ask the Supreme Court not to adopt it as written, but to refer the issue for further consideration with participation by both the CDR and Family Practice Committees.

The proposed modification would require an economic mediator in a Family Part case to file a separate action in the special civil part if the parties do not honor an order for compensation rather than, as per the common practice (albeit inconsistent) of either filing an order to show cause or, in some counties, via a less formal letter-request to the court. Family Part Economic mediators donate two hours of their time (during which many cases are resolved, resulting in no payment to the attorney being due). Requiring them to expend the time, effort, and filing fees necessary to collect their court-ordered fee does not honor, as we should, the generous donation of time and talent by the Family Bar.

This modification was proposed following the decision of the Appellate Division in Oberman v. Oberman https://scholar.google.com/scholar_case?case=1172933543429427637 referring the issue of mediator compensation "to the appropriate Rule Committee." According to the Report of the New Jersey Supreme Court Committee on Complementary Dispute Resolution (<https://www.judiciary.state.nj.us/reports2017/cdr.pdf>), this issue was referred to and considered by only the CDR Committee. The issue was not presented to the Family Practice Committee. Economic mediators in the Family Part perform a unique service and, as wise as the CDR Committee is, it does not appear that the special circumstances were taken into account.

I wholeheartedly agree that an amendment is needed to clarify this issue, but suggest that when litigants fail to comply with orders to pay an Economic Mediator, the mediator should have the lowest administrative burden possible: writing the assigned Family Part judge and, if a conference between the court and counsel doesn't resolve it, the filing of an enforcement application and, if necessary, the scheduling of a brief hearing (with the mediator receiving at least some compensation for the time expended on collections efforts if the default is found to have been willful).

I respectfully urge the Supreme Court to hold off on implementing the proposed rule until it can be reviewed by the Family Practice Committee.

Respectfully,

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This proposed change would **mandate that Economic Mediators who need to make application for fees** because the litigants do not make payment (per the Court's Order referring the matter) **start an action in Law Division (Special Civil Part) to collect.**

I do a considerable amount of Economic Mediations (and have since the inception

of the program). This is a very effective program (as you all know) and does move many cases off the Court's impossibly clogged calendar. Beyond the "two hours free" I (as many of you do as well) even discount my hourly rate on these matters as an accommodation to all.

The "method" to get paid, when litigant's decide it is not a priority to pay, has always been to file an application directly with the Judge who appointed you. This has been very effective (and it is fair as the litigant is put on notice and allowed to respond to the application). Usually the filing of such a fee application prompts payment even before the Court is called upon to "rule" on the fee application.

The Economic Mediation program is designed to **CLEAR the Court's calendar**. Allowing mediators to get paid fairly and quickly **encourages** them to serve as Economic Mediators.

Making Mediators file a separate law suit to collect fees will **ADD to the Court's calendar**. Making mediators file a separate law suit may well **discourage** them from serving in this important role.

Bad idea.

I.

PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendments to Rule 1:40 - 4(b) Mediation – General Rules

Compensation and Payment of Mediators Serving in the Civil and Family Economic Programs

In an unpublished Per Curiam Opinion, the Appellate Division in *Oberman v. Oberman*, [https://scholar.google.com/scholar_case?case=1172933543429427637] considered an appeal relating to a claim for allocation and payment of a mediator's fee. In considering the appeal, the Court noted the following: We were informed at oral argument that in several vicinages, this part of the Rule has been interpreted as allowing mediators to bring an order to show cause to get the fees paid.

This assertion referred to Footnote 6 which reads:

We are concerned that this matter is handled differently in different vicinages. Given the need for uniform practice in the State, we refer this matter to the appropriate Rule Committee to clarify and provide guidance on this issue. See *State v. Blann*, 429 N.J. Super. 220, 233 (App. Div. 2013), rev'd on other grounds, 217 N.J. 517 (2014).

The CDR Supreme Court Committee has considered the request for clarification and has proposed a modification in order to R. 1:40-4(b) and Appendix XXVI in order to clarify that a mediator seeking payment for their fees and expenses should file in the appropriate part of the Law Division of the Superior Court, whether Special Civil Part, or Civil Part, in accordance with Appendix XXVI, Paragraph 16. The Rule also clarifies with reference to Appendix XXVI, Paragraph 17 that costs and expenses relating to a Court ordered mediation for either a Civil Roster Mediator or Family Economic Roster Mediator is found in the Appendix. The Appendices had previously referenced the prior practice of a court issuing a sua sponte Order to Show cause for collection in the underlying mediated case, which practice has been changed by rule but not

clarified in the Appendices. The proposed amendments to R. 1:40-4(b) and Appendix XXVI follow.