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## NEW JERSEY STATE BAR ASSOCIATION

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April 15, 2015

Honorable Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Hughes Justice Complex  
P.O. Box 037  
Trenton, NJ 08625-0037

Re: Comments on Rules Committee Reports

Dear Judge Grant:

The following represents the recommendations and comments of the New Jersey State Bar Association (NJSBA) regarding the 2015 reports of the Complementary Dispute Resolution, Criminal Practice, Rules of Evidence, Family Practice and Minority Concerns Committees. The NJSBA has additional recommendations not contained in any of the reports, which are noted below as well. Before setting forth the substance of our response I just want to again thank the Court for considering our input and for additionally extending the comment period to allow the NJSBA Board of Trustees an opportunity to adequately review and discuss the reports.

### Complementary Dispute Resolution Committee

1. R. 1:40-2 – The Committee proposes to add language confirming that qualified neutrals and neutrals are subject to the Mediator Standards and review by the Advisory Committee on Mediator Standards. The NJSBA assumes that the Mediator Standards are the Standards of Conduct for Mediators issued on January 4, 2000 and mentioned in a March 6, 2006 Notice to the Bar from Judge Carchman. (See <http://www.judiciary.state.nj.us/notices/2006/n060313a.htm>). The NJSBA recommends that reference to the actual standards be included in the Rule.

2. R. 1:40-4(b) – The Committee's proposed revisions to this rule seek to establish a mediator's fees as set forth on the Rosters of Civil and Family Mediators, subject to Appendix XXVI.

First, the NJSBA believes that any reference to Appendix XXVI should also include reference to its actual title, "Guidelines for the Compensation of Mediators Serving in the Civil and Family Economic Programs," or alternatively, the "Compensation Guidelines."

Second, although well-intentioned, the NJSBA believes requiring fees to be charged as set forth on the Rosters of Civil and Family Mediators is impractical since many judges do not maintain and distribute up-to-date rosters. Therefore, the NJSBA recommends that the rates be eliminated from the Court's rosters, and that the rule be revised to provide for fees at the mediator's current rate. Further, the NJSBA recommends that the current rate be specifically included in the Court's mediation referral order.

To accomplish this, the NJSBA recommends the following: (1) Eliminate the phrase, "Fees shall be as determined by the mediator and the parties." Replace it with, "Fees shall be in accordance with the mediator's current hourly rate"; and (2) Revise paragraph 4 of the Courts' mediation referral order to include, "After the first two hours, mediator shall be compensated at the mediator's hourly rate of \$ \_\_\_\_\_, together with reasonable expenses."

Third, the Committee recommends removing a sentence in the rule that refers to the court as an avenue for addressing non-payment, noting that, "The issue of non-payment is now to be handled in the Special Civil Part as per Appendix XXVI, subparagraph 15." Currently, family mediators routinely make fee applications to the judge assigned to the particular matter, who is already familiar with the parties' circumstances and finances. The NJSBA believes that the Special Civil Part is not the best forum to efficiently address and decide such matters, given its lack of involvement with the overall matter. Therefore, the NJSBA recommends that Rule 1:40-4(b) (as well as Rule. 1:40-5) remain unchanged in this regard, allowing the practice of having the judge assigned to the particular matter handle non-payment issues.

3. R. 1:40-4(g) - The Committee report expresses an intention to allow the mediator or any of the parties to terminate a mediation session, but not allow an individual who is simply participating in the mediation session to do so. The Committee therefore recommends changing reference to "participant" in the rule to "party." The NJSBA agrees with this, but believes a party's attorney should also be allowed to terminate a mediation session. Accordingly, the NJSBA recommends that the rule include a specific reference to a party's attorney as someone who may terminate a mediation session.

4. R. 1:40-4(i) - The Committee appears to suggest an intent to bring this rule in line with Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC, 215 N.J. 242 (2013), which requires that, to be enforceable, mediation agreements must be reduced to writing and signed. The Committee's recommendations do not actually say this, however. Therefore, the NJSBA recommends amending the language in Rule 1:40-4(i) to specifically state that agreements must be reduced to writing and signed in order to be enforceable. It is also recommended that any reference to filing with the Court be eliminated, since that is not required. Thus, the NJSBA proposes the following specific language:

If the mediation results in the parties' total or partial agreement, and the parties intend for it to be enforceable, said agreement must be reduced to a writing and signed by each party [it shall be reduced to writing and a copy thereof furnished to each party. The agreement need not be filed with the court, but]. ...

5. R. 1:40-5 - Although not addressed by the Supreme Court Committee, the NJSBA recommends that a new subparagraph (c) be added to Rule 1:40-5, as follows, to duplicate the language in Rule 1:40-6(g):

(c) Compensation of Mediators. Mediators shall be compensated as provided by Rule 1:40-4(b) and Appendix XXVI (Guidelines for the Compensation of Mediators Serving in the Civil and Family Mediation Programs.)

6. R. 1:40-6(g) - Although not addressed by the Supreme Court Committee, the NJSBA recommends that the reference to mediators serving in the "Civil Mediation Program" be modified to refer to mediators serving in the "Civil and Family Economic Programs."

#### Criminal Practice Committee

1. R. 3:28 - The NJSBA joins in the concerns expressed in the two dissents authored by Richard D. Barker and John Cannel and attached to the Committee's report. The NJSBA agrees with Mr. Barker that

the current Pretrial Intervention (PTI) Rules and Guidelines should remain intact, as the proposed rule changes shift much of the initial approval and screening process to the prosecutor and thereby deny defendants and their attorneys the opportunity to advocate for their admission based on their individual and unique circumstances. The NJSBA further agrees with Mr. Cannel that the barring of certain defendants from PTI through Court Rule violates the separation of powers established by Winberry v. Salisbury. For these reasons, the NJSBA urges the Court to reject the Committee's recommendations for amendments to Rule 3:28 concerning Pretrial Intervention.

#### Rules of Evidence Committee

1. N.J.R.E. 534 - The NJSBA previously supported the adoption of a unified mental health service provider evidentiary privilege, and continues to support such a rule now. As the Committee notes, there are currently different and sometimes inconsistent privileges that exist for mental health service providers, so adoption of one unified privilege is an important step forward. Again, the NJSBA supports adoption of the proposed rule.

#### Family Practice Committee

1. R. 5:4-2 – The NJSBA believes that requiring attorneys to complete standard non-dissolution forms in addition to the attorney-prepared pleadings adds nothing substantive to the non-dissolution application. It does, however, add additional and unnecessary costs to litigants. Therefore, the NJSBA recommends adding a new sentence at the end of Rule 5:4-2(e)(2) to clarify that attorneys do not need to file such forms in a non-dissolution matter. Specifically, the NJSBA recommends adding the following, “Attorneys may draft and submit complaints and post-judgment applications in non-dissolution actions without the necessity of filing the non-dissolution forms promulgated by the Administrative Office of the Courts.”

2. R. 5:7-1 - Although not addressed by the Supreme Court Committee, the NJSBA recommends that this rule be amended to allow non-resident civil union couples to terminate their relationship, just like out-of-state domestic partners are permitted to terminate their domestic partnerships in New Jersey courts. Specifically, the NJSBA recommends the following modification:

For the purposes of this rule, in actions brought under N.J.S.A. 26:8A-10 for termination of a domestic partnership or under N.J.S.A. 2A:34-2.1 for dissolution of a civil union where both parties are non-residents, venue shall be laid in the county where the Certificate of Domestic Partnership is filed or in the county where the civil union was solemnized.

3. R. 5:7-4 - To clarify that when child support orders are silent, payments are to be made through probation, the NJSBA recommends adding the following, “All child support orders, whether or not so stated, shall be presumed to be payable through and enforceable by probation or the New Jersey Family Support Payment Center, unless the order clearly and unequivocally states that the child support payments are to be made directly between the parties and not through probation.”

4. Standardized Notices - There are a myriad of notices required to be included with judicial orders in child support actions. The required notices are available on the judiciary website. To bring ease and uniformity to the process, however, the NJSBA recommends that the required notices be included as part of the Court Rules Appendix in a form that can be printed and made part of attorney or court-prepared orders (other than USSOs).

Committee on Minority Concerns

The NJSBA is strongly supportive of the Committee's recommendations to collect additional data in various programs and areas of the Judiciary. The NJSBA notes that other states have begun to collect similar data to assist those states in better serving the users of the judicial system. The NJSBA recommends, however, that the Court expand the categories in which it is collecting information to include both sexual orientation and gender identity and expression. The specific recommendations are as follows:

1. Recommendation 15:03.2 – The NJSBA recommends that the intake form used in the Ombudsman Program include information on sexual orientation and gender identity and expression, as well as the other information noted in the report.
2. Recommendation 15:04.1 – The NJSBA recommends that the Judiciary expand its workforce data collection to include voluntary self-reported information on gender identity and expression, as well as the other information noted in the report.
3. Recommendation 15:04.2 – The NJSBA recommends that the voluntarily submitted information on the annual attorney registration process include fields in which attorneys can voluntarily submit information on gender identity and expression, as well as the other information noted in the report.

Additional Recommendations

1. The NJSBA recommends that the Supreme Court establish an FD Commission to exclusively study and review the myriad of issues associated with the non-dissolution docket of the family court.
2. With the continued availability of domestic partnerships and civil unions in New Jersey, and the unique issues presented by those relationships, the NJSBA recommends that the Court permanently add an LGBT family lawyer as a member of the Family Practice Committee.

The New Jersey State Bar Association thanks the Supreme Court for publishing the rules committee reports and allowing the bar to submit comments and recommendations. We also look forward to addressing the Court in the public hearing when it is scheduled. We appreciate the opportunity to participate in all aspects of the rule-making process, which has a significant impact on the practice of law in New Jersey. If you have any questions regarding our recommendations, please do not hesitate to contact me.

Very truly yours.



Paris P. Eliades  
President

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cc: Miles S. Winder, III, Esq., NJSBA President-Elect  
Angela C. Scheck, NJSBA Executive Director