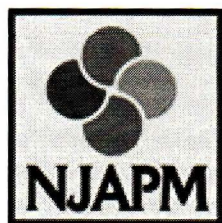


#003



## New Jersey Association of Professional Mediators

March 15, 2017

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

### **Via electronic mail and first class mail**

Re: 2015-2017 cycle comments on proposed rules changes regarding mediation

Dear Judge Grant:

The New Jersey Association of Professional Mediators (NJAPM) appreciates the opportunity to submit comments on the proposed rule and procedure changes in the recently published reports of the Committee on Complementary Dispute Resolution ("CDR Report") and the Family Practice Committee ("Family Report"). As the largest and most diverse organization of mediators in the state, we have a high degree of interest of the work of the Committee and the CDR rules promulgated by the court.

We would also like to thank the court again for permitting NJAPM a seat on the CDR Committee. We believe our organization and our representative, retired Judge John J. Harper, imparts valuable insights and suggestions to the Committee.

NJAPM offers the following comments:

The CDR Report seeks to require that court-assigned mediators who incurred unnecessary costs (either because a party failed to timely pay the mediator for services rendered under the court's mediation referral order ["MRO"] or a party failed to follow the MRO) to seek remedy by filing a case in Superior Court. We thought this issue was settled four years ago when Guideline 16 of Appendix XXVI was amended to remove the sua sponte Order to Show Cause procedure in exchange for the mediator's ability to collect a retainer fee after expiry of the free time. The mediator also gained the ability to sue in the county that issued the MRO.

In making this change, the CDR Report proposes to remove the language allowing the mediator to file in the county that issued the MRO. By removing this provision, the venue selection clause would revert to Rule 6:1-2 for Special Civil Part cases, which stipulates the proper venue is where the defendant resides. NJAPM respectfully objects to the deletion of the venue clause from Guideline 16 in Appendix XXVI. A mediator in a Bergen County assigned case might have to sue a non-paying client in Cape May County (or vice versa). In civil cases, geographic diversity is common, especially cases with multiple parties. The mediator already gave the court



and parties two free hours under court rules and should not have to “donate” four additional hours of travel time for a remedy. Parties should not be able to use the potential four-hour drive as “leverage” against the mediator when court rules bar mediators from collecting a retainer before expiry of the free time. If a mediator agrees to accept cases from a specific county, he/she should be able to sue in that county. Please retain that clause in the Guideline.

In addition, the proposed associated addition to Rule 1:40-4(b) does not follow the convention used in the rest of the same rule. It should read “Guideline 16 in Appendix XXVI” and “Guideline 17 in Appendix XXVI” and not paragraph. Appendix XXVI contains Guidelines.

The Family Report also weighs in on Appendix XXVI by proposing an amendment to allow Family Economic Mediators to seek relief in the Family Part in addition to suing in the appropriate Part of Law Division. The amendment would also allow the Family Part to impose other remedies to compel payment. NJAPM is supportive of this change. The court will need to coherently merge the proposals from the two reports.

The CDR Report also proposes allowing co-mediation in Rule 1:40-12(a)(3)(D) in order to meet the mediation experience requirements for admission to the Civil, General Equity and Probate (“Presumptive”) Mediation Roster. While this amendment is an improvement over the current rule, NJAPM believes that the Court needs to take a much more in-depth look at how the court accounts for mediation experience in roster admission requirements. NJAPM has long advocated to the court that significant mediation experience is a necessity before admission to any court mediation roster where the mediator is paid by the parties.

In judging a candidate’s mediation experience, the court needs to balance two concepts. One is gaining general mediation skills, which a mediator can acquire in many places, including lower court levels such as Special Civil Part, Small Claims Section and Municipal Court. The other is the ability to adapt those mediation skills to more complex cases seen in the Civil Part of Law Division and the General Equity and Probate Parts of Chancery Division.

The mediation experience requirement currently only measures experience with two complex cases from Civil, General Equity and Probate Parts. The rules further requires “mentoring” in two additional presumptive mediations before roster admission. This requirement is a vestige from when the presumptive mediation experience requirement involved lower level cases. The mentoring in both the presumptive and family economic programs are simply mediation observations. Mentored candidates are not required to be on any organizational conference calls or go through any pre-mediation meeting or post-mediation debrief with the mentor. NJAPM questions the value of the mentoring program to the candidate or the court, as it currently exists.

Further, the rule as currently configured does not allow for admission of a candidate with significant mediation experience to the roster without the two Civil, General Equity and Probate cases. For instance, the rule would not allow an Equal Opportunity Employment Commission staff mediator admission to the roster without mediating and observing two cases each. That makes little sense.

For admission to the presumptive roster, the rules ideally would contain some amount of lower level court experience (20 hours), and one mediated or co-mediated case of a matter cognizable in the Civil, General Equity or Probate Parts. All mediators on all rosters should experience a meaningful mentoring experience. The rules should also clarify that Family Economic Mediation Roster candidates can attain his/her experience in private cases.

Rule 1:40-12(a)(3)(D) also exempts retired judges from the mentoring requirement for roster admission. NJAPM questions the underlying assumption that retired judges are presumptively qualified for the court's mediation roster. There are many styles of mediation. The court's mediation programs mandate a facilitative style of mediation. Judges in settlement conferences (and when they mediate) typically practice an evaluative style of mediation. These styles are mutually exclusive. Judges would benefit from formal facilitative mediation training and mentoring – both for the court's roster and for private cases.

Finally, NJAPM requests that the court amend the educational and work experience requirements for admission to the Family Economic Mediation roster in Rule 1:40-12(b)(6) to match that of the Civil Presumptive Mediation roster in Rule 1:40-12(a)(3), namely a minimum of a bachelor's degree and 5 years of professional experience. As we have mentioned to the court before, particularly when the court removed the advanced degree requirement for admission to the civil roster, there is no proven correlation between education level and mediation effectiveness. The advanced degree requirement needlessly excludes otherwise qualified and quality mediators from the court's rosters.

NJAPM again thanks the court for the opportunity to serve on the CDR Committee and to submit these comments on the proposed changes regarding mediation. We hope the court will strongly consider the suggestions we set forth in this submission. We look forward to working with the CDR Committee and the court in implementing the approved changes and on developing other improvements for the Presumptive, Family Economic and other Court Mediation Programs.

Respectfully submitted on behalf of the NJAPM Board of Directors,



Karen P. Sampson, Esq., APM  
NJAPM President

cc: NJAPM Board of Directors  
Judge (ret.) John J. Harper, NJAPM Judiciary Relations Chairman