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JUSTICE MARIE L. GARIBALDI
AMERICAN INN OF COURT FOR ALTERNATIVE DISPUTE RESOLUTION

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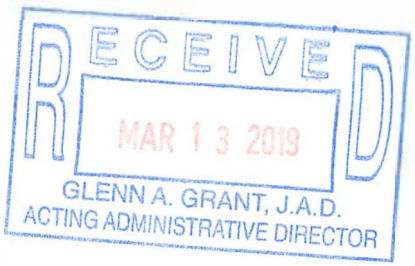

Hon. Glenn A. Grant., Acting Administrative Director
Administrative Office of the Courts
Hughes Justice Complex
25 W. Market Street
P.O. Box 037
Trenton, NJ 08625

Re: Recommendation to Amend *R.* 1:40-4(b)
Compensation and Payment of Mediators

Dear Judge Grant:

In *R* 1:40-1, *et seq.* among the panoply of dispute resolution processes, mediation has been embraced by the court system, lawyers and litigants as an efficient and effective technique to resolve cases. Judge Linda Feinberg, Former Chair of the Supreme Court Complementary Dispute Resolution Committee, in a public address, commented that there is an "...incredibly

solid foundation for mediation in this state",[1] recognizing that the court and mediators must maintain momentum to continue to enhance the program.

Richard Chernick, former Chair of the ABA Dispute Resolution Section predicted, based on a national prospective, that the dispute resolution demand will grow robustly and the expectation of professionalism and skill level for neutrals will continue to heighten."[2]

Central to the administration of the non-adjudicative mediation process is an individual designated as mediator who is required to have educational or professional qualifications under *R.* 1:40-12(a) and (b) (1) as well as complete a training course of 40 hours of classroom basic mediation skills along with at least five hours of co-mentoring with an experienced mediator. A professional cadre of mediators, who have met these qualifications, is beginning to mature in the state.

The AOC maintains a list of approved civil mediators that is currently 470 in number on the civil side and 605 in number on the family side. Because of the requirement that each mediator donate two free hours for each case assigned by court order, the approved civil roster has been reduced over the years from a high point of about 700 mediators. Once mediators become experienced, they often withdraw from the roster. Considering access and fairness to parties this recommendation is intended to encourage highly qualified former roster mediators to rejoin. For instance, Hanan Isaacs, a Boskey Award recognized mediator, when approached with this recommendation, would agree to rejoin the roster if this fee modification is adopted.

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[1]Address to New Jersey Association of Professional Mediators, 10/24/03

[2]"ADR" Comes of Age: What Can We Expect In The Future (Address to Masters' Forum, Pepperdine University School of Law - 10/18/03)

Mediation as a process has been available to resolve disputes as an alternative to litigation for as long as court systems were structured. The art of mediation has matured in specific areas such as federal labor disputes and in states such as Florida, Texas and California. New Jersey adopted complementary dispute resolution (CDR) and set up the Supreme Court Committee to study and review implementation in 1992. The short history of civil mediation as a current CDR program sprang from the appointment by each Assignment Judge of three lawyers from each county who were trained and approved on the roster of civil mediators in 1995. Although we built the program, as in the movie, Field of Dreams, literally no one came.

Recognizing the benefits that mediation affords to litigants and to our system of justice, in 1997 the CDR Committee recommended that the Court adopt a mandatory presumptive civil mediation pilot program requiring parties to mediate selected classes of cases, generally multi-party or encompassing more sophisticated issues or claims. An order appointed a mediator on the approved list, but within 14 days of the order any mediator of the parties' choice could be selected. In 2000 *R.* 1:40-1 was amended "to make mediations an integral part of the judicial process" *PRESSLER at Current N.J. Court Rules, Comment R.* 1:40-1 (Gann).

Originally, mediator compensation modeled the mediation program on the New Jersey federal court program which required the mediator to donate six hours of free time after which the mediator would be paid $150 per hour; currently mediators are paid in that program from the initiation of the process. The Supreme Court balanced the disincentive of a mediator's time and energy against the litigant's access to court programs and in 1998 modified the mediation compensation system so that a mediator was required to donate three free hours of time for each mediation after which they could charge their market rate hourly fee. The mediator is expected to provide the facility and may not charge travel time. In order to educate lawyers and the public

on the process, a 1½ hour in person mediation session in addition to preparation and a telephonic organizational conference call was a requisite part of the first three hours. Any party may opt out of mediation after the initial three free hours. *R.* 1:40-4(b). The parties may move to be relieved of mediation participation for good cause. *R.* 1:40-6(d). This rule was changed in 2006 to reduce the free time to two hours.

It is important to distinguish *pro bono* service from the two free hours per case which each mediator donates when assigned by the court to a case. There is a *pro bono* component to the compensation scheme as stated in *R.* 1:40-4 (b) "Any fee or expense of the mediation shall be waived in cases as to those parties exempt, pursuant to *R.* 1:13-2(a) [indigency status]." The rule also designates the court as a gatekeeper relating to mediator fees which are "...subject to court review and allocation to create equity", *R.* 1:40-4b, so that economically disadvantaged, although not indigent, litigants' fees may be discounted, which cost is borne by an approved mediator participating in the program. A mediator's service for two free hours in a usual assigned case does not benefit indigent litigants or those who cannot afford legal services, therefore, in contradistinction to *pro bono* service, it is more properly characterized as time donated to the court system.

Were the Court to permit payment to the mediator for his or her time on a reduced basis for the first two hours, that sum would be equally divided between the parties participating in the mediation, thereby representing only a nominal amount of money compared with the upside potential for resolution or focusing of issues. The parties may still opt out of the process after the first hour of in-person mediation time if, consistent with the concept of self-determination, the process is not fruitful. Considering that the court has already accepted the significant benefit of resolution of thousands of lawsuits through the mediation process, there is no good reason not

to shift the burden of paying for that system from the backs of mediators to the litigants, where they acknowledge the value of the process by remaining at the mediation table.

Even as early as 2001-2002 the court in the Annual Report of The New Jersey Judiciary notes that mediation amongst other CDR programs "...have shown that they save litigants both time and money. Furthermore, in the case of mediation, litigants can fashion outcomes to suit the unique nature of their dispute, rather than being limited solely to monetary damages as a remedy. Because of those benefits, the Judiciary continuously seeks to refine and expand the complementary dispute resolution options available to those we serve." The annual report confirms "...that judicially required mediation has the potential to resolve a wide majority of disputes efficiently and affordably." Even when the entire case was not resolved in mediation, a wide majority of participants have reported that mediation had a positive impact either by resolving part of the case, moving the case significantly toward settlement, or clarifying positions through the mediation process. Most litigants and lawyers who have participated in the program said that they would consider mediation for future matters.

A number of other states have recognized the facility of incorporating a self-determination process such as mediation into their court system. For instance, the Florida Court System has integrated mandatory mediation into their system to a greater extent than any other State in the country. Florida processes about 125,000 mediations per year. Mediation is literally part of the legal culture in Florida. It is the preferred method of resolution of legal disputes. Speaking to Kimberly Kosch, the Senior Court Analyst at the Dispute Resolution Center in Florida, it is apparent that there is no free or donated component of mediator services. Florida's system is essentially a market rate system.

It is important to note that the case types subject to the mandatory presumptive mediation program in New Jersey are for the most part, the more sophisticated, complex and multi-party cases. It should also be noted that studies in other states have consistently demonstrated that there is no different effect when cases come to mediation by court order or on a voluntary basis. This is one of the many counter-intuitive findings surrounding mediation where one otherwise might assume that voluntary participation in mediation should produce a better settlement rate, which it does not.

The current proposal bypasses the constitutional issue of free access to the courts by allowing a charge for the entire mediation process (at a discounted rate for the initial hours) only after the parties recognize the value of mediation by voluntarily participating beyond the free time and an opportunity to participate in the process.

Mediation does not impact discovery except as consentually facilitated by the mediator. The cost of ongoing discovery, both in time and diversion of resources and personnel is often a strong incentive to meaningfully participate in the mediation process. It has been estimated by a Rand Study that over 80% of the cost of litigation is spent on discovery. The parties often appreciate the kind of focused information exchange that can occur during mediation as a vehicle to get to the heart of the issue at hand, thus avoiding the expense and aggravation of usual discovery, much of which is irrelevant to the settlement process. Since the court orders the process, no party need feel that it is demonstrating weakness by requesting a settlement procedure.

For those parties and/or lawyers who have not had a mediation experience, the initial free time permits the parties to be exposed to and hopefully educated in mediation and its benefits directly relating to their case. The enhanced benefits of self-determination as opposed to an

externally imposed adjudication would be gleaned from the process. It is suggested that parties will more fully appreciate the professional nature of the process that they have paid for and participate much more seriously than in a completely free process. Many of the case types include multiparty cases, thus further spreading the cost of the initial mediation time.

Since the average time for resolution of a Superior Court civil case through mediation is just about three hours, the litigants and the court system are receiving a major benefit at the expense of the voluntary professional mediator. This is neither practical, nor fair. It is clear that parties that participate in mediation usually walk away in a better position even if there is not full settlement, since issues, positions and often discovery is refocused. The parties and their lawyer representatives also have a forced opportunity to settle, rather than allow the case to either languish or undergo adversarial posturing through the discovery process. A mediocre voluntary mediation cadre is not an appropriate base upon which to premise a court dispute resolution system.

The mediator payment issue has been considered in the matter, *In re Atlantic Pipe Corp.*, 304 *F.*3d 135, 146 (1st Cir. 2002) by a panel joined by Third Circuit Judge Greenberg. The First Circuit, in the federal context, directly considered the issue of whether parties could be directed into a mediation process and compelled to pay a portion of the mediation fees without an express rule or statute authorizing the order. The court held "...that the district court, in an appropriate case, is empowered to order the sharing of reasonable costs and expenses associated with mandatory non-binding mediation." *Id* at 147.

It is significant to note that the court recognized that mediation is useful "...in complicated cases, where the value of mediation lies not only in promoting settlement but also in clarifying issues remaining for trial". *id.* at 145. The same policy considerations identified by the First

Circuit are convincing authority for the proposition that the New Jersey court would have inherent power consistent with our state constitution to compel the parties to pay this expense. It is unrealistic to expect the legislature to appropriate funds to compensate mediators for the initial two hours.

We know both anecdotally and consistent with studies conducted by the AOC that mediation results in a savings both to the court system and to the parties. Since the system relies on the principle of self-determination, the resolution of the matter either partially or in full saves lawyer's time and expense as well as concomitant and usual expenses of the litigation, including expert and counsel fees.

New Jersey has a significant non-binding arbitration program for civil cases described in *Rule* 4:21(A). Automobile actions, other personal injury actions, except for professional malpractice and other contract actions are mandated into the program. *R.* 4:21A06(c) mandates the payment of $200. "towards the arbitration fee". That program requires a payment of a fee for a substantial number of cases in order to get a trial listing in addition to the filing fee. That rule further provides for penalties for attorney fees and expert fees as high as $1,250 if the ultimate jury verdict is not 20% more favorable than the arbitration award, *R.* 4:21A-6(c)(3) and (4). There is no rationale to justify the trial *de novo* fee and not support compensation of a mediator on a reduced basis for the first two hours of his or her service.

There is a strong argument that the mediator's function is collateral to the litigation process, not unlike that of other professionals, whose services are regularly ordered by the court to be paid by the parties, e.g., discovery masters, masters and court appointed experts. Although not utilized as much in the state courts, the federal courts often utilize court appointed experts, assessing the cost between and among the parties. In multi-party cases the concept of the parties

compensating lead counsel and expense allocation is accepted practice. All parties in today's climate recognize that dispute resolution is not cost free.

The Court should also consider the professional aspect of the mediator cadre that it has relied upon to resolve a substantial number of cases. Since it is estimated that about 4,000 civil cases will be mediated during the next year in the presumptive mediation program, public policy dictates that a strong cadre be available to parties at all economic levels. Those cases, in general, are the more sophisticated cases, many of which have multiple parties. The legal culture has changed. Lawyers are learning how to function in mediation as are their clients. Parenthetically, it is noted that many sophisticated clients and the federal government have adopted policies embracing alternative dispute resolution.

The CPR Institute for Dispute Resolution is a non-profit alliance of 500 global corporations and law firms not only advocating ADR, including mediation; but it claims that worldwide more than 4,000 operating companies and 1,500 law firms have signed a policy statement of alternatives to litigation. In California and Florida parties voluntarily submit to mediation because it is either eventually required in the litigation process or the legal culture has adopted that practice as an efficient and effective means to resolve disputes.

Since New Jersey has engrafted mediation onto its system, it is important that the professional cadre, which is in the process of maturing, be able to financially support themselves. The two free hours poses an unreasonable burden on the mediator when one compares the cost to the mediator with sharing that cost on a reduced basis with the parties. Under this proposal the time is still free to the parties if they opt out of mediation after the first hour of an in-person session. There have been circumstances where parties think they are getting something for free and do not take the process seriously.

The anecdotal experience of mediators relating to the free two hours is troubling. Many top flight mediators have left the program solely for economic reasons. A significant number of the original mediators either put limits on the number of mediations accepted or eventually declined to participate.

The most effective mediators; i.e., those who have the skills to perform the mediation services as well as the desire to vary their law practices to perform mediation must be the professional cadre formed for the task of assisting the Judiciary in dispute resolution connected to the court. Florida's experience is probably predictive of New Jersey's experiment where eventually in a competitive system the most reputable mediators will provide much of the mediation services in a market rate system. The mandatory pilot programs have already demonstrated that New Jersey has enhanced its quality of dispute resolution by diversifying its dispute resolution functions with mediation as a substantial component.

Many who have been performing mediation services and also continue to litigate are firmly convinced that mediation is the best alternative modality to litigation. Acceptance of this proposal would greatly enhance the professional stature of the mediation cadre in New Jersey to perform this dispute resolution function, as well as provide access and fairness to the public with the highest quality mediators in a court-annexed system. Maintenance of a strong professional cadre is essential to a successful program.

Respectfully,

Theodore K. Cheng, President