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VIA E-MAIL TO COMMENTS.MAILBOX@NJCOURTS.GOV

April 17, 2019

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

Dear Judge Grant:

Thank you for soliciting comments on the January 11, 2019 Report of the New Jersey Supreme Court Committee on Dispute Resolution. I write to respectfully request that you reconsider several of the proposed Rules changes. Specifically, I ask that you not change the law clerk mediation program to a settlement conference program. I also respectfully recommend that law students who volunteer as mediators be given the same training requirements as law clerks under the Rules.

Personal Background in Mediation

I am a newly licensed lawyer in New Jersey who has volunteered as a mediator for almost 20 years. I was first trained as a mediator in Virginia in 2000 and volunteered as both a civil and family mediator. After my move to New Jersey in 2005, I took the 18-hour basic mediation training and volunteered monthly as a mediator in a local municipal court. While attending Rutgers Law School in Camden, I led the Mediation Pro Bono Project and volunteered in Camden's Municipal Court as well as in Landlord-Tenant, Small Claims, and Special Civil in Camden's Superior Court. During law school my partner and I placed third in the nation in the ABA Law Student Representation in Mediation Competition in 2016. I worked with Dean Jill Friedman of Rutgers Law School to write the curriculum and have twice co-trained the 18-hour basic mediation training for law students who volunteer as mediators in Camden. Most recently, I worked as a judicial law clerk in Camden's Superior Court and mediated cases in that role. With my background in and passion for mediation, I provide the following comments.

Settlement Conferences vs. Mediation - Format

The comments to the proposed amendments to N.J.R. 1:40-7(a) state that "law clerks often facilitate settlement conferences rather than conduct mediation sessions." (Report,

page 12). "Settlement conferences are different from mediation in that settlement conferences are usually shorter and typically have fewer roles for participation of the parties or for consideration of non-legal interests." (https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/settlement_conferences/ last visited 3/21/19).

Settlement Conferences are contemplated in N.J.R. 4:5B-3. "The court may conduct a settlement conference or schedule any other settlement event in any civil action on its or a party's request." Settlement Conferences are typically handled by judges who meet with the parties individually to try to get the two sides to agree to a resolution somewhere in the middle. A judge will give each side an indication of her impression of the strengths and weaknesses of their case and might even suggest a range that the case might be worth. I respectfully submit that law clerks do not have the knowledge or experience to be able to properly conduct a settlement conference.

Mediation is "a process by which a neutral third party facilitates communication between parties in an effort to promote settlement without imposition of the facilitator's own judgment regarding the issues in dispute." N.J.R. 1:40-2(c). One key to success in a facilitated mediation is the party's feeling of self-determination. (Report, page 13). Parties are typically more likely to adhere to an agreement if they have some ownership over it. It is axiomatic that settlements are more successful when reached with full participation of the parties. Krikorian, Adrienne L. & Tidus, Jeffrey A., *The Benefits of Active Party Participation in Mediation,* Mediate.com, February 2002 (https://www.mediate.com/articles/krikorian1.cfm last visited 4/2/19)

The proposed amendments suggest that mediation is too time consuming and "would not permit an expeditious resolution of special civil part matters." (Report, page 13). As someone who has mediated in Small Claims, Landlord Tenant, Special Civil, and Municipal Courts as a community volunteer, a law student, and then a law clerk, I am well aware of the overwhelming volume of cases with which the courts contend every day. At the same time, I can speak to my experience and say that I have never conducted a Settlement Conference. For many reasons, including strong and ethical leadership in the Camden vicinage that clearly values quality over speed, I have never felt that I did not have the time to conduct a proper mediation. While some of these mediations are sometimes held in a crowded hallway, in my experience there is always time to reach an agreement as long as the parties are willing to continue to work towards an agreement. In these types of cases, which are most often mediated between two *pro se* clients, there is value in facilitating a conversation between the parties. Often in these types of cases there is a need to maintain a relationship, which will not be advanced by shuttle diplomacy. Even where a continuing relationship is not a goal, parties to a dispute want to feel heard by each other. This is best achieved in a face-to-face mediation conducted by a trained neutral.

Settlement Conferences vs. Mediation – Confidentiality

As noted by the Supreme Court of New Jersey, another key to a successful mediated settlement is confidentiality.

> An integral part of the increasingly prevalent practice of alternative dispute resolution (ADR), mediation is designed to encourage parties to reach compromise and settlement. *See R.* 1:40–3(c) (describing mediation as "a process by which a mediator facilitates communication between parties in an effort to promote settlement"); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation,* 12 *Seton Hall Legis. J.* 1, 12 (1988) (stating that "[t]he trend towards compromise and settlement of disputes, which mediation advances, is clear"). Courts have long-recognized that public policy favors settlement of legal disputes, *see, e.g., Nolan ex rel. Nolan v. Lee Ho,* 120 *N.J.* 465, 472, 577 *A.*2d 143 (1990), and that confidentiality is a "fundamental ingredient of the settlement process," *Brown v. Pica,* 360 *N.J.Super.* 565, 568, 823 *A.*2d 899 (Law Div.2001). The rationale is simple: "If settlement offers were to be treated as admissions of liability, many of them might never be made." Biunno, *Current N.J. Rules of Evidence,* comment 1 on *N.J.R.E.* 408 (2004) (citing 2 *McCormick on Evidence* § 266 (4th ed.1992)); *accord Brown, supra,* 360 *N.J.Super.* at 569, 823 *A.*2d 899 (observing that confidentiality "aids in the free and frank discussion" during settlement negotiations).
> State v. Williams, 184 N.J. 432, 446–47, 877 A.2d 1258, 1266 (2005)

The proposed amendments to R. 1:40-7(a) suggest that "if an agreement is not reached during a small claims settlement, the settlor may disclose information from the session to court management that might be helpful to determine how the matter should be handled going forward or to provide the judge with pertinent information about the case that may be helpful when considering a resolution…" (Report, pp 12-13). In 20 years of volunteering as a mediator, I have never gone to a judge to provide information to her prior to trial if a case did not settle in mediation. I submit that a judge would prefer to collect relevant information herself in order to provide a fair and impartial decision. Further, for parties to truly feel free to express themselves and to collaboratively problem-solve they must know that what is said in the mediation setting will not be used against them later. *Freedman, L. R., & Prigoff, M. L.* Confidentiality in Mediation: The Need for Protection, Ohio St. J. on Disp. Resol., 2, 37 (1986).

Conclusion

I urge the committee not to alter the law clerk mediation program in favor of settlement conferences. The suggestion that this rule change is simply recording what is already happening is not in keeping with my experience as a law clerk in New Jersey's Superior Court. In my experience there is ample time for mediation and absolutely no need to break confidentiality when parties do not come to a resolution. I submit that changing the rules to abandon mediation and its guarantee of confidentiality is not in the best interest

of parties in New Jersey's Small Claims, Special Civil, Landlord-Tenant, or Municipal Courts. Further, a properly trained facilitative mediator makes a better trained advocate for clients in the future, which is a bonus for law clerks who receive mediation training.

Respectfully Submitted,

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