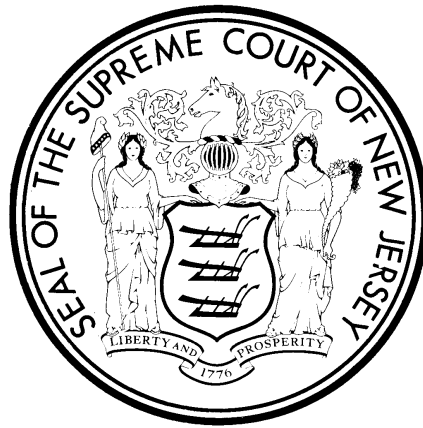


2015-2017 Rules Cycle

Report of the New Jersey Supreme Court Committee on Complementary Dispute Resolution



January 9, 2017

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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In an unpublished *Per Curiam* Opinion, the Appellate Division in *Oberman v. Oberman*, 2015 WL 5313651 considered an appeal relating to a claim for allocation and payment of a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

1:40-4. Mediation – General Rules

(a) ...no change.

(b) Compensation and Payment of Mediators Serving in the Civil and Family Economic Mediation Programs. The real parties in interest in Superior Court, except in the Special Civil Part, assigned to mediation pursuant to this rule shall equally share the fees and expenses of the mediator on an ongoing basis, subject to court review and allocation to create equity. Any fee or expense of the mediator shall be waived in cases, as to those parties exempt, pursuant to *R. 1:13-2(a)*. Subject to the provisions of Guidelines 2 and 15 in Appendix XXVI, Guidelines for the Compensation of Mediators, if the parties select a mediator from the court's rosters of civil and family mediators, the parties may opt out of the mediation process after the mediator has expended two hours of service, which shall be allocated equally between preparation and the first mediation session, and which shall be at no cost to the parties. As provided in Guideline 7 in Appendix XXVI, fees for roster mediators after the first two free hours shall be at the mediator's market rate as set forth on the court's mediation roster. As provided in Guideline 4 in Appendix XXVI, if the parties select a non-roster mediator, that mediator may negotiate a fee and need not provide the first two hours of service free. The remedy for a mediator to compel payment is in the appropriate part of the Law Division of the Superior Court in accordance with paragraph 16 of Appendix XXVI. The remedy for a party and/or counsel to seek compensation for cost and expenses related to a court-ordered mediation with a Civil Roster Mediator or Family Economic Roster Mediator is in accordance with paragraph 17, Appendix XXVI.

(c) ...no change.

(d) ...no change.

- (e) ...no change.
- (1) ...no change.
- (2) ...no change.
- (3) ...no change.
- (f) ...no change.
- (1) ...no change.
- (A) ...no change.
- (B) ...no change.
- (2) ...no change.
- (3) ...no change.
- (g) ...no change.
- (g) ...no change.
- (1) ...no change.
- (2) ...no change.
- (i) ...no change.

Note: Adopted July 14, 1992 to be effective September 1, 1992; paragraph (c)(3) amended and paragraph (c)(4) adopted June 28, 1996 to be effective September 1, 1996; paragraphs (a) and (c)(2) amended and paragraph (c)(3)(v) adopted July 10, 1998 to be effective September 1, 1998; caption amended, paragraph (a) amended and redesignated as paragraphs (a) and (b), paragraphs (b), (c), (d), (e), and (f) amended and redesignated as paragraphs (c), (d), (e), (f), and (g) July 5, 2000 to be effective September 5, 2000; paragraphs (d)(2) and (d)(3) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended July 27, 2006 to be effective September 1, 2006; new paragraph (c) adopted, former paragraph (c) redesignated as paragraph (d) and amended, former paragraph (d) redesignated as paragraph (e), new paragraph (f) adopted, former paragraph (e) redesignated as paragraph (g) and amended, former paragraph (f) redesignated as paragraph (h), and former paragraph (g) redesignated as paragraph (i) June 15, 2007 to be effective September 1, 2007; paragraph (b) amended and new subparagraph (f)(3) adopted July 16, 2009 to be effective September 1, 2009; paragraph (b) amended, subparagraph (e)(1) deleted, subparagraphs (e)(2), (e)(3) and (e)(4) amended and redesignated as subparagraphs (e)(1), (e)(2) and (e)(3), subparagraphs (f)(1) and (f)(3) amended, paragraph (g) amended, subparagraphs (h)(1) and (h)(2) amended, and paragraph (i) amended July 27, 2105 to be effective September 1, 2015; paragraph (b) amended 2017 to be effective September 1, 2017.

**RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
APPENDIX TO THE RULES OF PRACTICE**

APPENDIX XXVI

**GUIDELINES FOR THE COMPENSATION OF MEDIATORS SERVING IN THE
CIVIL AND FAMILY ECONOMIC PROGRAMS**

These guidelines apply to the compensation that may be charged by all mediators serving in the Statewide Mediation Program for Civil, General Equity, and Probate cases, and, where applicable, to mediators serving in the Family Economic Mediation Program.

1. ...no change.
2. ...no change.
3. ...no change.
4. ...no change.
5. ...no change.
6. ...no change.
7. ...no change.
8. ...no change.
9. ...no change.
10. ...no change.
11. ...no change.
12. ...no change.
13. ...no change.
14. ...no change.
15. ...no change.

16. Collection of Unpaid Mediator's Bill/Failure to Mediate in Accordance with Order: If a mediator has not been timely paid or a mediator [and/or a party] has incurred

unnecessary costs and expenses because of the failure of a party and/or counsel to participate in the mediation process in accordance with the Order of Referral to Mediation, the mediator [and/or party] may bring an action to compel payment in the [Special Civil Part] appropriate part of the Law Division of the [county in which the underlying case was filed] Superior Court.

17. The remedy for a party and/or counsel requesting compensation for costs and expenses related to a court-ordered mediation with a Civil Roster Mediator or Family Economic Roster Mediator is by filing an action in the appropriate part of the Law Division of the Superior Court.

Note: Appendix XXVI adopted July 27, 2006 to be effective September 1, 2006; Guideline 15 amended June 15, 2007 to be effective September 1, 2007; caption and introductory text amended, and Guidelines 2, 4, 9, 12, and 15 amended July 16, 2009 to be effective September 1, 2009; Guidelines 1, 2, 4 (including caption), 7, 10, 12, and 15 amended July 21, 2011 to be effective September 1, 2011; Guideline 2 amended, new Guideline 4 caption and text adopted, former Guideline 4 redesignated as Guideline 5, former Guideline 5 amended and redesignated as Guideline 6, former Guideline 6 redesignated as Guideline 7, former Guideline 7 amended and redesignated as Guideline 8, former Guideline 8 redesignated as Guideline 9, former Guideline 9 amended and redesignated as Guideline 10, former Guideline 10 amended and redesignated as Guideline 11, former Guideline 11 amended and redesignated as Guideline 12, former Guideline 12 redesignated as Guideline 13, former Guideline 13 redesignated as Guideline 14, former Guideline 14 redesignated as Guideline 15, and former Guideline 15 redesignated as Guideline 16, July 27, 2015 to be effective September 1, 2015; Guideline 16 was amended and new Guideline 17 was added , 2017 to be effective September 1, 2017.

B. Proposed Amendments to *Rule 1:40-12(a)(3)* and *Rule 1:40-12(b)(1)*, Mediators and Arbitrators in Court-Annexed Programs

Rule 1:40-12(a)(3)(D) states as a prerequisite to admission to the Civil, General Equity and Probate Court roster that the candidate demonstrates:

(D) Evidence of completed mediation of a minimum of two civil, general equity or probate cases within the last year.

It is apparent that for most candidates, who would be novitiate mediators after having taken the forty-hour course, they would have no ability to attract cases to be mediated in an effort to meet this prerequisite in order to be accepted onto the roster. The Committee submits for approval the opportunity for these new mediators to provide evidence in addition of a completed mediation, co-mediation of a minimum of two civil, general equity or probate cases within the last year. Co-mediation implies active participation in mediating the case as opposed to mentoring, which the Committee interpreted as being merely observing an actual mediation. The co-mediation concept is incorporated in *R. 1:40-12(b)(7)* for designation by the CDR coordinator to “assign any new mediator who is either an employee or volunteer to co-mediate with an experienced mediator.”

Additionally, on July 18, 2016, the Supreme Court ordered relaxation of *R. 1:40(a)(3)* and *R. 1:40(b)(1)*. The effect of this order is to remove the requirements that a retired New Jersey Superior Court Judge complete mediation or co-mediation of two civil, general or probate matters before inclusion on the mediator roster pursuant to *R. 1:40* and be mentored, except as required to do so for remedial reasons. The Committee was requested to incorporate these changes into the rules.

The proposed amendments to *R. 1:40-12(a)(3)(D)* and *R. 1:40-12(b)(1)* follow:

1:40-12. Mediator Qualifications

(a) ...no change.

(1) ...no change.

(2) ...no change.

(3) Civil, General Equity, and Probate Action Mediators. Mediator applicants to be on the roster for civil, general equity, and probate actions shall have at least: (A) a bachelor's degree; (B) five years of professional experience in the field of their expertise in which they will mediate; (C) completed the required mediation training as defined in subparagraph (b)(5) within the last five years; and (D) except for retired New Jersey Superior Court judges, evidence of completed mediation or co-mediation of a minimum of two civil, general equity or probate cases within the last year. Applicants who had the required training over five years prior to their application to the roster must complete the six-hour family or civil supplemental mediation course as defined in subparagraph (b)(8) of this rule.

(4) ...no change.

(5) ...no change.

(6) ...no change.

(i) ...no change.

(ii) ...no change.

(iii) ...no change.

(b) Mediator Training Requirements

(1) General Provisions. All persons serving as mediators shall have completed the basic dispute resolution training course as prescribed by these rules and approved by the Administrative Office of the Courts. Volunteer mediators in the Special Civil Part and Municipal

Court mediators shall have completed 18 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(3) of this rule. Mediators on the civil, general equity, and probate roster of the Superior Court shall have completed 40 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(5) of this rule and shall be mentored in at least two cases in the Law Division – Civil Part of Chancery Division – General Equity or Probate Part of the Superior Court for a minimum of five hours by a civil roster mentor mediator who has been approved in accordance with the “Guidelines for the Civil Mediation Mentoring Program” promulgated by the Administrative Office of the Courts. Family Part mediators shall have completed a 40-hour training program complying with the requirements of subparagraph (b)(4) of this rule; and unless otherwise exempted in this rule, at least five hours being mentored by a family roster mentor mediator in at least two cases in the Family Part. In all cases it is the obligation of the mentor mediator to inform the litigants prior to mediation that a second mediator will be in attendance and why. If either party objects to the presence of the second mediator, the second mediator may not attend the mediation. In all cases, the mentor mediator conducts the mediation, while the second mediator observes. Mentored mediators are provided with the same protections as the primary mediator under the Uniform Mediation Act. Retired New Jersey Superior Court judges, child welfare mediators, and staff/law clerk mediators are exempted from the mentoring requirements except as required to do so for remedial reasons. Mediators already serving on the Civil mediator roster prior to September 1, 2015 are exempted from the updated training requirements. Family Roster mediators who wish to serve on the Civil Roster, must complete the six-hour supplemental Civil Mediation training and must comply with the Civil roster mentoring requirement of five hours and two cases in the Civil Part. Judicial law

clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(6) of this rule.

(2) ...no change.

(3) ...no change.

(4) ...no change.

(5) ...no change.

(6) ...no change.

(c) ...no change.

(1) ...no change.

(2) ...no change.

(d) ...no change.

Note: Adopted July 14, 1992 as Rule 1:40-10 to be effective September 1, 1992; caption amended, former text redesignated as paragraphs (a) and (b), paragraphs (a)3.1 and (b)4.1 amended June 28, 1996 to be effective September 1, 1996; redesignated as Rule 1:40-12, caption amended and first sentence deleted, paragraph (a)1.1 amended and redesignated as paragraph (a)(1), paragraph (a)2.1 amended and redesignated as paragraph (a)(2), paragraph (a)2.2 amended and redesignated as paragraph (b)(5), new paragraphs (a)(3) and (a)(4) adopted, paragraph (a)3.1 redesignated as paragraph (a)(5), paragraph (a)3.2 amended and incorporated in paragraph (b)(1), paragraph (a)4.1 amended and redesignated as paragraph (b)(6), paragraph (b)1.1 amended and redesignated as paragraph (b)(1), paragraphs (b)2.1 and (b)3.1 amended and redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)4.1 redesignated as paragraph (b)(4) with caption amended, paragraph (b)5.1 amended and redesignated as paragraph (b)(7) with caption amended, new section (c) adopted, and paragraph (b)5.1(d) amended and redesignated as new section (d) with caption amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3) and (b)(1) amended July 12, 2002 to be effective September 3, 2002; paragraphs (b)(1), (b)(3), and (c) amended July 28, 2004 to be effective September 1, 2004; caption amended and paragraph (a)(4) caption and text amended June 15, 2007 to be effective September 1, 2007; new paragraph (a)(6) caption and text adopted, paragraph (b)(1) amended, paragraph (b)(2) deleted, paragraphs (b)(3) and (b)(4) redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)(5) amended and redesignated as paragraph (b)(4), and paragraphs (b)(6) and (b)(7) redesignated as paragraphs (b)(5) and (b)(6) July 16, 2009 to be effective September 1, 2009; subparagraphs (b)(2) and (b)(4) amended July 21, 2011 to be effective September 1, 2011; subparagraph (a)(3) caption and text amended, subparagraphs (a)(4), (a)(6), (b)(1), (b)(2) and (b)(4) amended, former subparagraph (b)(5) redesignated as subparagraph (b)(6), former subparagraph (b)(6) redesignated as subparagraph (b)(7), new subparagraphs (b)(5) and (b)(8) adopted July 27, 2015 to be effective September 1, 2015; paragraph (a)(3) section (d) amended; paragraph (b)(1) amended, 2017 to be effective September 1, 2017.

C. Proposed Amendments to Rule 1:40-12 (a)(5) Mediators and Arbitrators in Court-Annexed Programs, Municipal Court Volunteer Mediators

The Supreme Court Committee on Complementary Dispute Resolution recommends revising the language in *R. 1:40-12 (a) 5* to clarify the definition of a Municipal Court Mediator. Specifically, the recommendation is to identify the mediator as a volunteer, confirm that the Assignment Judge is the person of authority who approves an applicant or may appoint a designee to fulfill that obligation, and the training required to become a volunteer municipal mediator.

The proposed amendments to *R. 1:40-12(a)(5)* follow:

1:40-12. Mediators and Arbitrators in Court-Annexed Programs

(a) ...no change.

(b) ...no change.

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) Municipal Court Volunteer Mediators. A Municipal Court mediator[s] [shall be] is defined as a person approved [for that position] by the Assignment Judge [for] or designee of the vicinage in which [they] he or she intends to serve, [on recommendation of the Municipal Court judge, stating the applicant's qualifications. In considering the recommendation, the Assignment Judge shall review the applicant's general background, suitability for service as a mediator, and any mediation training the applicant may have completed] to volunteer his or her time, effort and skill for the mediation of minor disputes in municipal court actions and who has met the basic dispute resolution training required by R. 1:40-12 (b) (1) and who has satisfied the continuing training requirements of R. 1:40-12 (b) (2).

Note: Adopted July 14, 1992 as Rule 1:40-10 to be effective September 1, 1992; caption amended, former text redesignated as paragraphs (a) and (b), paragraphs (a)3.1 and (b)4.1 amended June 28, 1996 to be effective September 1, 1996; redesignated as Rule 1:40-12, caption amended and first sentence deleted, paragraph (a)1.1 amended and redesignated as paragraph (a)(1), paragraph (a)2.1 amended and redesignated as paragraph (a)(2), paragraph (a)2.2 amended and redesignated as paragraph (b)(5), new paragraphs (a)(3) and (a)(4) adopted, paragraph (a)3.1 redesignated as paragraph (a)(5), paragraph (a)3.2 amended and incorporated in paragraph (b)(1), paragraph (a)4.1 amended and redesignated as paragraph (b)(6), paragraph (b)1.1 amended and redesignated as paragraph (b)(1), paragraphs (b)2.1 and (b)3.1 amended and redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)4.1 redesignated as paragraph (b)(4) with caption amended, paragraph (b)5.1 amended and redesignated as paragraph (b)(7) with caption amended, new section (c) adopted, and paragraph (b)5.1(d) amended and redesignated as new section (d) with caption amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3) and (b)(1) amended July 12, 2002 to be effective September 3, 2002; paragraphs (b)(1), (b)(3), and (c) amended July 28, 2004 to be effective September 1, 2004; caption amended and paragraph (a)(4) caption and text amended June 15, 2007 to be effective

September 1, 2007; new paragraph (a)(6) caption and text adopted, paragraph (b)(1) amended, paragraph (b)(2) deleted, paragraphs (b)(3) and (b)(4) redesignated as paragraphs (b)(2) and (b)(3), paragraph (b)(5) amended and redesignated as paragraph (b)(4), and paragraphs (b)(6) and (b)(7) redesignated as paragraphs (b)(5) and (b)(6) July 16, 2009 to be effective September 1, 2009; subparagraphs (b)(2) and (b)(4) amended July 21, 2011 to be effective September 1, 2011; subparagraph (a)(3) caption and text amended, subparagraphs (a)(4), (a)(6), (b)(1), (b)(2) and (b)(4) amended, former subparagraph (b)(5) redesignated as subparagraph (b)(6), former subparagraph (b)(6) redesignated as subparagraph (b)(7), new subparagraphs (b)(5) and (b)(8) adopted July 27, 2015 to be effective September 1, 2015; paragraph (a)(5) amended 2017 to be effective September , 2017.

I. NON- RULE AMENDMENTS RECOMMENDED FOR ADOPTION

The Committee has made no recommendations regarding non-rule amendments for adoption.

II. LEGISLATION

The Committee has made no recommendations regarding legislation.

III. MISCELLANEOUS MATTERS

A. 12-Hour Law Clerk Mediation Training Review and Mentorship Pilot Program

At the November 19, 2015, Supreme Court Committee on Complementary Dispute Resolution (Committee) meeting, the members agreed to endorse a request from the Education Subcommittee (Subcommittee) to review the 12-Hour Law Clerk Mediation Training during the Rules Cycle 2015-17 to assess its effectiveness in preparing law clerks to facilitate complementary dispute resolutions (CDR) events. This review is ongoing. The Subcommittee will continue to report to the full Committee, and when necessary, the appropriate Conferences to vet and request approval for any plans to continue forward with the review process and the Mentorship Pilot Program that is currently focused on Civil Division. This Mentorship Pilot Program shall not include Family Division Law Clerks.

The Subcommittee will continue to report to the full Committee, and when necessary, the appropriate Conferences to vet and request approval for any plans to continue forward with the review process and the Mentorship Pilot Program that is currently focused on the Civil Division.

Respectfully Submitted,

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