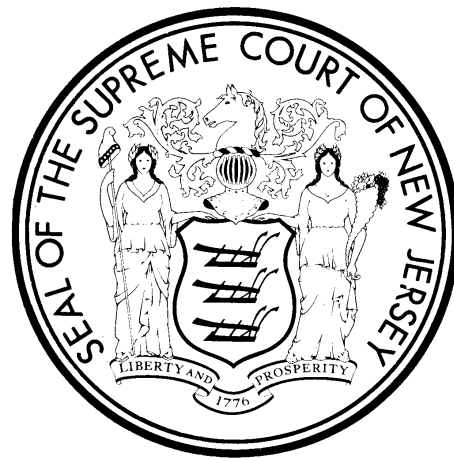


## 2013-2015 Rules Cycle

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



January 15, 2015

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## **I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION**

### **A. Proposed Amendments to *Rule 1:40-2 - Modes and Definitions of Complementary Dispute Resolution***

1. The Committee recommends amending subparagraph (d)(1) of *Rule 1:40-2* to include a hybrid process of arbitration-mediation. The Committee discussed the Appellate Division decision *Minkowitz v. Israeli*, 433 *N.J. Super.* 111 (App. Div. 2013). In that case, the Appellate Division considered what role, if any, the Family Part should play after parties in a matrimonial action agree to submit their disputes to binding arbitration and whether the arbitrator, having first mediated disputes, may thereafter resume the role of arbitrator. The Appellate Division concluded absent the parties' written agreement, once the arbitrator functions as a mediator, he or she may not then conduct arbitration proceedings. The Appellate Division noted that in the family law context, it could envision parties agreeing in writing to allow one person to perform both roles regarding separate issues. The Committee stated that the proposed rule change was to address the issue of confidential information divulged in the mediation being utilized in the arbitration and that information being the basis for the arbitration decision. The Committee agreed that both "mediation – arbitration" and "arbitration – mediation" processes should be in the Rule.

2. The Committee noted that *Rule 1:40-2(d)(2)* defines the term "Mini-trial" as "A process by which the parties present their legal and factual conditions to either a panel of representatives selected by each party or..." The Committee recommends that the word "conditions" be replaced with the word "contentions" which appears to be a better fit for the Rule.

3. The Committee recommends amending paragraph (f) of *Rule 1:40-2* to clarify the difference between a qualified neutral (roster mediator) and a neutral (non-roster mediator), and

that the parties may agree to have either a qualified neutral or neutral mediate their case. The proposed amendments to the paragraph conform to the Appendix XXVI (“Guidelines for the Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs”).

The Advisory Committee on Mediator Standards was asked to investigate a neutral (non-roster mediator), but could not do so because it has no jurisdiction over neutrals participating in the court’s mediation program. To address that issue, the Committee recommends adding language to paragraph (f) to provide that in addition to qualified neutrals, neutrals are subject to the Mediator Standards and their conduct subject to review by the Advisory Committee on Mediator Standards.

A significant number of Committee members suggested that it might be beneficial for the publisher(s) of the Court Rules to include a comment to the Rule that the New Jersey Alternative Procedure for Dispute Resolution Act (*N.J.S.A. 2A:23A-1 et. seq.*) provides for a dispute resolution process outside of the purview of the courts.

The proposed amendments to *Rule 1:40-2* follow:

## 1:40-2. Modes and Definitions of Complementary Dispute Resolution

Complementary Dispute Resolution Programs (CDR) conducted under judicial supervision in accordance with these rules, as well as guidelines and directives of the Supreme Court, and the persons who provide the services to these programs are as follows:

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) “Hybrid Process” means and includes:

(1)(A) Mediation – arbitration: A process by which, after an initial mediation, unresolved issues are then arbitrated.

(B) Arbitration – mediation: A process by which, after initial arbitration proceedings, but before the award is delivered, the parties are jointly given the opportunity to mediate a resolution. If successful, the mediated settlement is executed by the parties and the arbitration award is disregarded. If unsuccessful, the arbitration award is delivered to the parties.

(2) Mini-trial: A process by which the parties present their legal and factual [conditions] contentions to either a panel of representatives selected by each party, or a neutral third party, or both, in an effort to define the issues in dispute and to assist settlement negotiations. A neutral third party may issue an advisory opinion, which shall not, however, be binding, unless the parties have so stipulated in writing in advance.

(e) ...no change.

(f) “Qualified Neutral” or “Neutral”: [A “neutral” is an individual who provides a CDR process.] A “qualified neutral” is an individual included on any roster of neutrals maintained by the Administrative Office of the Courts or an Assignment Judge. A “neutral” is an individual

who provides a CDR process, but is not listed on any roster of neutrals maintained by the Administrative Office of the Courts or an Assignment Judge. Neutral evaluators, neutral fact finders, and settlement program panelists are not required to comply with the training requirements of *Rule* 1:40-12 or to be on any roster of neutrals maintained by the Administrative Office of the Courts or an Assignment Judge. The parties may agree to a qualified neutral or neutral. Qualified neutrals and neutrals are both subject to the Mediator Standards and their conduct is subject to review by the Advisory Committee on Mediator Standards.

Note: Adopted July 14, 1992 to be effective September 1, 1992; caption and text amended, paragraphs (a) through (d) deleted, new paragraphs (a) through (f) adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (a)(3) adopted November 8, 2000 to be effective immediately; new paragraph (d)(1)(B) added, and paragraph (f) amended to be effective .

**B. Proposed Amendments to *Rule 1:40-3* - Organization and Management**

The Committee recommends amending paragraph (a) of *Rule 1:40-3* to clarify that the Administrative Office of the Courts maintains the statewide civil, general equity and probate mediator roster.

The proposed amendments to *Rule 1:40-3* follow:

1:40-3. Organization and Management

(a) Vicinage Organization and Management. Pursuant to these rules and Supreme Court guidelines, the Assignment Judge of each vicinage shall have overall responsibility for CDR programs, including their development and oversight, continuing relations with the Bar to secure the effectiveness of these programs, and mechanisms to educate judges, attorneys, staff, and the public on the benefits of CDR. The Assignment Judge shall appoint a CDR coordinator to assist in the oversight, coordination and management of the vicinage CDR programs. The Assignment Judge shall maintain, pursuant to these rules, all required rosters of neutrals except the roster of statewide civil, general equity, and probate action mediators, which shall be maintained by the Administrative Office of the Courts.

(b) ...no change.

Note: Adopted July 14, 1992 to be effective September 1, 1992; caption amended, text amended and designated as paragraph (a), and new paragraph (b) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a) amended \_\_\_\_\_ to be effective \_\_\_\_\_.



**C. Proposed Amendment to *Rule* 1:40-4 - Mediation – General Rules**

**1. Proposed Amendments to *R.* 1:40-4(b) - Compensation and Payment of Mediators and Appendix XXVI - Guidelines for Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs**

a. The Committee recommends amending paragraph (b) of *Rule* 1:40-4 to conform to the Compensation Guidelines set forth in Appendix XXVI to the Court Rules. The proposed amendments clarify that a non-roster mediator is not required to provide the first two hours of free service and may negotiate his or her fee.

b. A practitioner suggested amending paragraph (b) of *Rule* 1:40-4 to clarify that a mediator's fees should be shared equally by the parties in interest. In a particular employment law case, two defendants were covered by the same carrier. A representative of the carrier was present at the mediation with authority and in her view there were two, not three parties. The mediator was not sure if two-thirds of the mediator's fee should be assessed to the defendants, but agreed that the defense should only pay half of the fee for equitable reasons. The practitioner contends that there is not consistent assessment of fees in these situations. The Committee agrees and recommends that paragraph (b) of the Rule be amended to provide clarification that the fee should be shared equally by the parties in interest. The Committee also recommends removing two sentences that were in conflict with recent changes to the Rules. The first involved fees, permitting them to be determined by the mediator and the parties. In fact, Appendix XXVI, subparagraph 2 conflicts with that sentence and properly indicates that the fees will be as set forth as the mediators' market rate as listed on the roster. The Committee recommends removing the sentence permitting the fees to be set by the mediator. Additionally the final sentence is subsection (b) refers to the court as an avenue for addressing non-payment.

The Committee recommends removing that sentence, as the issue of non-payment is now to be handled in Special Civil Part, as per Appendix XXVI, subparagraph 15:

**2. Proposed Amendments to R. 1:40- 4(e) – Limitations on Service as a Mediator**

The Committee recommends amending subparagraph (e)(4) of *Rule* 1:40-4(e) to provide that in addition to the Assignment Judge, the Administrative Director or his designee may require prior review and approval of the Supreme Court of prospective mediators. The Committee determined that the divisions of the Administrative Office of the Courts (AOC) have more dealings with prospective mediators, so the Rule should be amended to provide the AOC with authority to require prior review and approval of the Supreme Court when necessary.

**3. Proposed Amendments to R. 1:40-4(f) – Mediator Disclosure of Conflict of Interest**

The Committee discussed amending subparagraph (f)(3) of *Rule* 1:40-4 because it currently only applies to Family mediation, and should apply to Civil mediation. The proposed language sets forth the procedure for reassignment based on the matter being a Family or a Civil matter.

**4. Proposed Amendments to R. 1:40-4(g) - Conduct of Mediation Proceedings**

The Committee discussed that in paragraph (g) of *Rule* 1:40-4 the term “non-party witnesses” inaccurately describes individuals who participate in the mediation process but are not parties to the mediation. The individuals are not witnesses but are participants. The Committee concluded that the term “non-party witnesses” should be replaced with the term “non-party participants” as the term “non-party participants” is consistent with the terminology set forth in the Compensation Guidelines. Further, the Committee determined that mediators

should not have sole discretion regarding attendance and participation of non-parties during the mediation sessions, but that there should be consent of the parties and the mediator.

#### **5. Proposed Amendments to R. 1:40-4(h) – Termination of Mediation**

Subparagraph (h)(1) addresses permissive reasons for a mediator or party to end a mediation session whereas subparagraph (h)(2) addresses mandatory reasons for a mediator to end a mediation session. The Committee determined that the reasons for termination currently set forth in the subparagraphs do not necessarily reflect what happens in mediation sessions. The Committee recommends changing in subparagraph (h)(1) the term “participant” to “party” because the mediator and the parties should have the ability to terminate a mediation session, not an individual who is simply participating in the mediation session. Additionally, the Committee determined that the mediator or party should also be able to adjourn a mediation in those cases where an impediment to mediation can be resolved. The new reasons that a mediator or party may terminate a mediation session are (1) there is a failure of communication that seriously impedes effective discussion; and (2) the mediator believes a party is under the influence of drugs or alcohol. These reasons were previously mandatory reasons for a mediator to terminate the session. With respect to subparagraph (h)(2), the Committee determined that mediators are in a better position to make determinations regarding certain reasons for termination. The new reasons that a mediator can terminate the session are (1) there is an imbalance of power between the parties that the mediator cannot overcome; and (2) there is abusive behavior that the mediator cannot control. These reasons were previously permissive reasons to terminate.

#### **6. Proposed Amendments to R. 1:40-4(i) - Final Disposition**

In *Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, L.L.C.*, 215 N.J. 242 (2013), the Supreme Court held in part that a settlement that is reached at mediation but not reduced to a

signed written agreement is not enforceable. While subparagraph (i) of *Rule* 1:40-4 provides that agreements as a result of mediation must be reduced to writing, the Committee determined that the subparagraph should be amended to provide that mediators (both qualified neutrals and non-qualified neutrals) must report the status of the mediation in all cases, not just in cases where formal proceedings have been stayed. The Committee concluded that this could be accomplished by mediators being required to submit a Completion of Mediation form.

The proposed amendments to *Rule* 1:40-4 and Appendix XXVI follow.

1:40-4 Mediation – General Rules

(a) ...no change.

(b) Compensation and Payment of Mediators. The real [P]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 *Rule 1:13-2(a)*. Subject to Paragraph 2 and 14 in Appendix XXVI , if the parties select a mediator on the court's Rosters of Civil and Family Mediators, [A]a party 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. [Fees shall be as determined by the mediator and the parties.] If the parties select a mediator who is not on the court's Rosters, that mediator may negotiate a fee and need not provide the first two hours of service free. [Failure to pay the mediator may result in an order by the court to pay the fees and costs of the mediator including any additional costs and fees incurred due to the non-payment and imposing appropriate sanctions.]

(c) ...no change.

(d) ...no change.

(e) Limitations on Service as a Mediator.

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) The Assignment Judge and the Administrative Office of the Courts shall also have the discretion to require prior review and approval of the Supreme Court of prospective mediators whose employment or position appears to either the Assignment Judge or the Administrative Office of the Courts to require such review and approval.

(f) Mediator Disclosure of Conflict of Interest.

(1) ...no change.

(2) ...no change.

(3) After entry of the order of referral in [an economic] mediation, if the court is advised by the mediator, counsel, or one of the parties that a conflict of interest exists[,]: (A) in a Family action, the court shall reassign the case to a different mediator unless the parties select a replacement mediator, and (B) in a Civil action, the court shall reassign the case to a different mediator if the parties do not, within 14 days, agree upon a substitute mediator. [The parties shall have the opportunity to select a replacement mediator from the roster or the court may appoint one.] An amended order of referral shall then be prepared and provided to the parties. All data shall be entered into the [Family Automated Case Tracking System (FACTS)] appropriate Judiciary case management system.

(g) Conduct of Mediation Proceedings. Mediation proceedings shall commence with an opening statement by the mediator describing the purpose and procedures of the process. Mediators may require the participation of persons with negotiating authority. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded. Non-party [witnesses may be heard in the discretion of the mediator, and other non-parties shall be permitted to attend] participants shall be permitted to attend and participate in the

mediation only with the consent of the parties and the mediator. Multiple sessions may be scheduled.

Attorneys and parties have an obligation to participate in the mediation process in good faith and with a sense of urgency in accordance with program guidelines.

(h) Termination of Mediation.

(1) The mediator or a [participant] party may adjourn or terminate the session if (A) [there is an imbalance of power between the parties that the mediator cannot overcome,] a party challenges the impartiality of the mediator, (B) [a party challenges the impartiality of the mediator,] a party continuously resists the mediation process or the mediator, (C) [there is abusive behavior that the mediator cannot control,] there is a failure of communication that seriously impedes effective discussion, or (D) [a party continuously resists the mediation process or the mediator] the mediator believes a party is under the influence of drugs or alcohol.

(2) The mediator shall terminate the session if (A) [there is a failure of communication that seriously impedes effective discussion,] there is an imbalance of power between the parties that the mediator cannot overcome, (B) [the mediator believes a party is under the influence of drugs or alcohol,] there is abusive behavior that the mediator cannot control, or (C) the mediator believes continued mediation is inappropriate or inadvisable for any reason.

(i) Final Disposition. If the mediation results in the parties' total or partial agreement, it shall be reduced to writing and a copy thereof furnished to each party. The agreement need not be filed with the court, but [if formal proceedings have been stayed pending mediation, the] both qualified and non-qualified mediators shall report the status of the matter to the court by

submission of the Completion of Mediation form [whether agreement has been reached]. If an agreement is not reached, the matter shall be referred back to court for formal disposition.

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; paragraphs (b), (e)(4), (f)(3), (g) (h)(1), (h)(2), and (i) amended \_\_\_\_\_ to be effective \_\_\_\_\_.



**D. Proposed Amendments to *Rule 1:40-8 - Mediation of Minor Disputes in Municipal Court Actions***

Municipal court matters not eligible for mediation are defined in both *Rule 1:40-8* and in *Rule 7:8-1*. Several years ago *Rule 7:8-1* was modified to prohibit penalty enforcement actions from being sent to mediation. The Supreme Court adopted that change, and the Committee is now submitting a corollary change to *Rule 1:40-8* in order to eliminate the inconsistency between the two Rules.

The proposed amendments to *Rule 1:40-8* follow.

1:40-8. Mediation of Minor Disputes in Municipal Court Actions

(a) Referral. A mediation notice may issue pursuant to *Rule* 7:8-1 requiring the parties to appear at a mediation session to determine whether mediation pursuant to these rules is an appropriate method for resolving the minor dispute. No referral to mediation shall be made if the complaint involves (1) serious injury, (2) repeated acts of violence between the parties, (3) clearly demonstrated psychological or emotional disability of a party, (4) incidents involving the same persons who are already parties to a Superior Court action between them, (5) matters arising under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.), [or] (6) a violation of the New Jersey Motor Vehicle Code (Title 39) [.] , or (7) matters involving penalty enforcement actions.

(b) ... no change.

Note: Adopted July 14, 1992 as *Rule* 1:40-7 to be effective September 1, 1992; paragraph (a) amended January 5, 1998 to be effective February 1, 1998; redesignated as *Rule* 1:40-8, paragraph (a) amended, and caption and text of paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended \_\_\_\_\_ to be effective \_\_\_\_\_.

**E. Proposed Amendment to *Rule 1:40-12 - Modes and Definitions of Complementary Dispute Resolution***

**1. R. 1:40-12(a)(3) Mediator Qualifications: Civil, General Equity and Probate Action Mediators**

The Committee recommends amending subparagraph (a)(3) of *Rule 1:40-12* to modify the required qualifications for Civil, General Equity and Probate Action Mediators. The Committee recommends removing the detailed degree requirements and replacing them simply with a bachelor's degree. The Committee feels that experience in any professional field with a bachelor's degree provides an adequate background, as long as the individual is fully trained in mediation skills. The goal is to be inclusive of those with mediation skills and training, and the listing of degrees or professions limits the field of potential mediators whose fields of expertise may fall outside of the listed categories.

The recommended rule change also mandates that the civil mediator training be taken within five years of application to the program. If the training was taken more than five years prior to application, then a six hour supplemental refresher training will be required, further ensuring that the focus is on expertise in mediation skills, rather than a given profession.

Finally, the Committee recommends removal of the provision that allowed for mediation experience to be waived if the training was completed within five years of application to the roster. The Committee strongly feels that hands-on mediation experience (a minimum of two cases) is necessary prior to admission to the roster.

**2. R. 1:40-12(b)(1) Mediator Training Requirements: General Provisions**

The Committee recommends that training for civil, general equity and probate roster mediators be increased from 18 hours to 40 hours. The additional 22 hours of training will ensure that the roster mediators have a strong background in mediation skills, it will make the

minimum training requirement consistent with the family roster mediators' requirement, and it will bring New Jersey in-line with the national norm of the 40-hour minimum. Moreover, it is in line with the highly regarded Pepperdine University School of Law's Straus Institute for Dispute Resolution, the International Institute for Conflict Prevention and Resolution (CPR), and the American Arbitration Association.

The five-hour civil mentoring requirement is being clarified to include only civil roster mentor mediators. As per the Guidelines for the Civil Mediation Mentoring Program, civil roster mentor mediators are approved by the AOC, and they certify that they have completed at least fifteen (15) mediations under R. 1:40-4 or a comparable mediation program.

The Committee recommends that the waiver of the mentoring requirement be removed. The Committee feels strongly that all new mediators to the roster be mentored, and that prior mediation experience or training does not serve as an adequate replacement for being mentored by an experienced Civil roster mediator.

The Committee recommends including a five-hour family mentoring requirement by a family roster mediator to mirror the requirement in the Civil Part. The Committee strongly believes that a prospective mediator must observe a minimum of two mediated cases before beginning to mediate on one's own.

The Committee recognizes that the Civil roster is comprised of over 600 mediators, many of whom have been mediating for the New Jersey Judiciary for ten or more years. It would be logistically very difficult to ascertain who, through the four-hour required continuing education courses, have met the criteria of an additional 22-hours of mediation training. Thus, the Rule is prospective in nature.

The Committee also recommends that Family Roster Mediators who wish to serve on the Civil roster complete the six-hour supplemental civil mediation training as well as the Civil roster mentoring requirement. This mandates a training and mentoring requirement that ensures exposure to Civil issues.

**3. R. 1:40-12(b)(2) Mediator Training Requirements: Continuing Training**

The Committee recommends removing the waiver provision for the four hours of continuing education for mentor mediators. The Committee believes that it is just as important, if not more so, for mentors to complete continuing education. Mentors set an example as experts in this field and must be familiar with the latest mediation techniques (including difficult case types, outcomes, etc.) and case management requirements. The Rule is also being re-worded to emphasize that the continuing education training must include ethics, case management, mediation, and negotiation skills.

**4. R. 1:40-12(b)(4) Mediator Training Requirements: Mediation Course Content – Family Part Actions**

In keeping with the strong feeling of the Committee regarding the need for 40 hours of training, the Committee recommends removing the provision that allows for Family Part Economic Mediators to have completed only 25 hours of training prior to beginning to mediate.

**5. R. 1:40-12(b)(5) (New subparagraph) Mediator Training Requirements: Mediation Course Content – Civil, General Equity and Probate Actions**

This new subparagraph clearly defines what needs to be included in the 40-hour Civil Part training. Training providers and AOC staff who review course content can reference this Rule to ensure that the courses they offer include the listed modules. The Rule also makes it clear that the training include not only theoretical teachings, but also role play and observation.

**6. R. 1:40-12(b)(8) (New subparagraph) Mediator Training Requirements:**

**Supplemental Mediation Training.**

This new subparagraph addresses the additional training required in these new rule recommendations: two six-hour supplemental trainings (one for family and one for civil) for applicants who either received their training from a state other than New Jersey or for applicants who took the 40-hour New Jersey training more than five years before applying to join the roster. The trainings will be distinct for civil and family roster mediators and will include general issues regarding mediation tactics, as well as issues specific to New Jersey.

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

(a) Mediator Qualifications.

(1) ...no change.

(2) ...no change.

(3) Civil, General Equity, and Probate Action Mediators. Mediator applicants for civil, general equity, and probate actions shall have at least: (1) a bachelor's degree; (2) five years of professional experience in the field of their expertise in which they will mediate; (3) have completed the required mediation trainings as defined subparagraph (b)(5) within the last five years; and (4) evidence of completed mediation of a minimum of two 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. [as well as either an advanced degree or an undergraduate degree, coupled in both cases with mediation experience. For purposes of this rule, an advanced degree means a juris doctor or equivalent; an advanced degree in business, finance, or accounting, an advanced degree in the field of expertise in which the applicant will practice mediation, for example, engineering, architecture, or mental health; or state licensure in the field of expertise, for example, certified public accountant, architect, or engineer. For purposes of this rule, mediation experience which, together with an advanced degree, will qualify an applicant means evidence of successful mediation of a minimum of two cases within the last year, provided however that mediation experience is waived if mediation training was completed within the last five years. For purposes of this rule, mediation experience which, together with an undergraduate degree, will qualify an applicant means evidence of successful mediation of a

minimum of ten cases involving subject matter otherwise cognizable in the Superior Court within the last five years.]

(4) ...no change.

(5) ...no change.

(6) ...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 [18] 40 classroom hours of basic mediation skills complying with the requirements of subparagraph [(3)] (b)(5) of this rule and at least two cases in the Civil Part and a minimum of five hours being mentored by [an experienced] a civil roster mentor mediator [on the roster] who has been approved in accordance with [guidelines] the “Guidelines for the Civil Mediation Mentoring Program” promulgated by the Administrative Office of the Courts [in at least two cases in the Superior Court. Individuals may obtain a waiver of the mentoring requirement from the Administrative Office of the Courts on the successful demonstration that they have previously served as a mediator in at least five cases under R. 1:40-4 or comparable mediation program or have satisfactorily completed at least 10 hours in an approved advanced mediation course.] 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. 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. [i; and j] Judicial law clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph [(5)] (b)(6) of this rule.

(2) Continuing Training. Commencing in the year following [the completion of the basic training course or the waiver thereof] admission to one of the court's mediator rosters, all mediators shall annually attend four hours of continuing education and shall file with the Administrative Office of the Courts or the Assignment Judge, as appropriate, an annual certification of compliance. To meet the requirement, this continuing education shall include instruction in (A) ethical issues associated with mediation practice[, program guidelines and/or case management and should cover at least one of the following: (A) reinforcing and enhancing mediation and negotiation concepts and skills, (B) other professional matters related to mediation. Mediators who have been approved to serve as mentors under subsection (b)(1) of

this Rule may apply the time spent mentoring to satisfy this requirement.]; (B) case management skills; and (C) mediation and negotiation concepts and skills.

(3) Mediation Course Content -- Basic Skills. The 18-hour classroom course in basic mediation skills shall, by lectures, demonstrations, exercises and role plays, teach the skills necessary for mediation practice, including but not limited to conflict management, communication and negotiation skills, the mediation process, and addressing problems encountered in mediation.

(4) Mediation Course Content -- Family Part Actions. The 40-hour classroom course for family action mediators shall include basic mediation skills as well as at least 22 hours of specialized family mediation training, which should cover family and child development, family law, dissolution procedures, family finances, and community resources. In special circumstances and at the request of the Assignment Judge, the Administrative Office of the Courts may temporarily approve for a one-year period an applicant who has not yet completed the specialized family mediation training, provided the applicant has at least three years of experience as a mediator or a combination of mediation experience and service in the Family Part, has co-mediated in a CDR program with an experienced family mediator, and certifies to the intention to complete the specialized training within one year following the temporary approval. Economic mediators in family disputes [:(1)]-shall have completed 40 hours of training in family mediation in accordance with this rule[, or (2) shall have completed a minimum of 25 hours of mediation training with a commitment to complete the remaining 15 hours of specialized training within one year following their addition to the roster of mediators consistent with the requirements of this subparagraph].

(5) Mediation Course Content – Civil, General Equity, and Probate Actions. The 40-hour classroom course for civil, general equity and probate action mediators shall include basic and advanced mediation skills as well as specialized civil mediation training. The 40-hour training, the content of which must include not only theoretical teachings but also role play and observation. Training modules should include: (1) The dispute resolution continuum; (2) The stages of mediation; (3) Integrative negotiation; (4) Focusing on "interests" and not issues; (5) How to discover underlying interests; (6) Facilitating integrative bargaining; (7) Facilitating distributive bargaining; (8) Understanding various mediation models, including understanding-based mediation; (9) Controlling the process and mediator styles; (10) Convening and mediator introduction; (11) Active listening; (12) Reframing; (13) Caucusing; (14) Facilitating closing the deal and memorializing an agreement (New Jersey Law) (15) Confidentiality; (16) Emotions; (17) The role of unconscious bias; (18) Ethical standards; (19) Mediator payment; (20) Mediator preparation; (21) Managing document exchange for mediation and for New Jersey case management.

[(5)] (6) Training Requirements for Judicial Law Clerks. Judicial law clerks serving as mediators shall first have completed either a 12-hour training course prescribed by the Administrative Office of the Courts, an approved course conducted by another institution or agency, or other comparable training. Proof of completion of any training other than the prescribed 12-hour course shall be submitted to the Administrative Office of the Courts for a determination of suitability. The Administrative Office of the Courts shall work with other institutions and agencies to encourage their provision of judicial law clerk mediation training and shall either approve or evaluate that training.

(6)] (7) Co-mediation; mentoring; training evaluation. In order to reinforce mediator training, the vicinage CDR coordinator shall, insofar as practical and for a reasonable period following initial training, assign any new mediator who is either an employee or a volunteer to co-mediate with an experienced mediator and shall assign an experienced mediator to mentor a new mediator. Using evaluation forms prescribed by the Administrative Office of the Courts, the vicinage CDR coordinator shall also evaluate the training needs of each new mediator during the first year of the mediator's qualifications and shall periodically assess the training needs of all mediators.

(8) Mediation Course Content – Supplemental Mediation Trainings for Civil and Family mediators. Applicants to the roster who have been trained in a 40-hour out-of-state mediation training or who took the 40-hour New Jersey mediation training more than five years prior to applying to the roster, and who otherwise qualify under this rule, must further attend a six-hour supplemental course approved by the Administrative Office of the Courts. There shall be two distinct supplemental courses, one for family mediators and one for civil mediators. The courses shall include, but are not limited to, training in facilitative methods, case management techniques, procedural requirements for an enforceable mediated settlement, NJ Rules and mediator ethics, Guidelines for Mediator Compensation (see Appendix XXVI to these Rules), the Uniform Mediation Act ( N.J.S.A. 2A:23C-1 to -13), and mediation case law.

(c) ...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; paragraph (a)(3) amended, paragraph (b)(1), (b)(2), (b)(4) amended, new paragraph (b)(5) added, paragraphs (b)(6) and (b)7 renumbered and paragraph (b)(8) added \_\_\_\_\_ to be effective \_\_\_\_\_.

**F. Proposed *Rule* Amendments to Appendix XXVI. Guidelines for the Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs**

The Committee recommends including information in the Appendix clarifying that mediators who are being mentored may not charge for their services. This is in response to feedback from the Family Presiding Judges and Family Division Managers who felt this information should be included in the Rules.

The Committee also recommends that Compensation Guideline 10 (“Allocation of Mediation Fees and Expenses”) be amended to provide that the parties in interest who participate in the mediation beyond the two free hours shall share the costs and fees of the mediator equally. This change is recommended to comport with the recommended change to *Rule* 1:40-4(b).

The proposed amendments to Appendix XXVI follow.

## 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. Time Spent Before Initial Mediation Session: At the beginning of the initial mediation session, the mediator shall disclose to the parties in writing on a form prescribed by the Administrative Director of the courts the amount of preparation time the mediator has spent to that point on the case. If the amount of preparation time by the mediator exceeds one hour and if the mediator intends to charge the parties for that additional preparation time beyond the one free hour in accordance with Guideline [14]15 should they agree to continue with mediation on a paying basis, then the mediator in that written disclosure must so advise the parties prior to commencing the initial mediation session. Any such charged additional preparation time will be billed by the mediator at the mediator's market rate as set forth on the court's Mediation Roster.

3. ...no change.

4. Mediation Involving Mentoring: Mediators who are being mentored may not charge for their time spent involved in the mediation. It is the obligation of the mentor mediator to inform the litigants that the second mediator is not permitted to charge for the mediation.

[4.] 5. Non-Roster Mediators: If the parties select a mediator who is not on the court's rosters, that mediator may negotiate a fee and need not provide the first two hours of service free.

[5.] 6. Cost of Organizational Conference Call: The out-of-pocket cost of the organizational conference call shall be shared equally by the parties, unless expenses have been waived or reallocated in accordance with Guideline [9]10 below.

[6.] 7. Non-Party Participation: If a non-party is invited to participate in the mediation, which participation must be agreed to by the parties and the mediator, the mediator shall obtain the participating non-party's written consent as to confidentiality and any other matters requested by the parties, as facilitated by the mediator.

[7.] 8. Continuing the Mediation: At the beginning of the initial in-person mediation session, the mediator shall disclose to the parties in writing on a form prescribed by the Administrative Director of the Courts the specific time at which the free mediation will conclude. That written disclosure shall advise the parties that any mediation continued beyond that time will be billed by the mediator at the mediator's market rate as set forth on the court's Mediation Roster. At the expiration of the free first two hours as previously defined, including at least a one hour in-person mediation session, any party may elect not to continue with the mediation, which decision must be immediately communicated orally or in writing to the mediator and all parties. In such situation, despite the fact that one or more parties have opted out of mediation, mediation can continue as to those parties desiring to continue to the extent that the mediation can be meaningful without participation by the party or parties that opted out. Only those parties who continue with the mediation beyond the free hours shall be responsible for payment of the mediator's fee and expenses, as set forth in Guideline [9]10.

[8.] 9. Newly Added Parties: The free first two hours are not extended by reason of the addition of a new party to the case. If a new party enters the case after the expiration of the two



free hours, that party may agree to participate in the mediation on the same terms as the rest of the parties on a fee-sharing basis.

[9.] 10. Allocation of Mediation Fees and Expenses: The parties in interest who participate in mediation beyond the "free hours" component shall share the costs and fees of the mediator (a) equally, (b) as determined by the mediator, or (c) as otherwise agreed, subject to an application to the court for an equitable reallocation of the fees. The mediator shall waive the share of the fee allocable to an indigent party as defined in *R. 1:13-2(a)*.

[10.] 11. Mediator's Expenses: Unless the parties otherwise agree in writing in advance following full disclosure, mediators may not charge for travel costs or time, use or rental of facilities, paralegal expenses, food, photocopying, postage, conference calls or other expenses. Note: The parties are responsible for the costs of the organizational conference call as provided in Guideline [5]6 above.

[11.] 12. Failure to Appear or Cancel Timely: Parties who previously agreed to continue in mediation and were duly provided with notice of the mediation session but who failed to appear for the mediation session or who cancel the mediation session less than 24 hours in advance are nonetheless responsible for payment of their share of the mediator fees and expenses as allocated pursuant to Guideline [9]10 above. In the event that a mediation session is canceled because of a party's nonappearance or untimely cancellation, the mediator still may charge a fee; such fee may either be agreed on by the parties in advance or, if not, it shall be the mediator's usual charge for one hour's service and shall be charged to the party who failed to appear or who cancelled untimely.

[12.] 13. Submission of Mediator's Bills: In the absence of other payment arrangements, mediators should bill the parties following each mediation session for which payment is due.

Generally, a mediation session should not begin unless the parties are current in their payments for previous sessions. Counsel have a responsibility to facilitate prompt payment of mediator fees.

[13.] 14. Location of Mediation Sessions: Mediators shall provide space for mediation sessions without charge, unless either the facilities will not accommodate the number of participants or appropriate multiple breakout rooms, or there are other special needs or circumstances. In such event, the parties will be responsible for appropriate facility arrangements for the mediation sessions. Unless the parties agree otherwise, mediation sessions shall be held in neutral facilities and not in the offices of an attorney representing one of the parties. The site of the mediation session shall be in the county of venue or in a contiguous county in reasonable proximity and not more than 40 miles to the parties or to the courthouse of venue, unless all parties consent otherwise.

[14.] 15. Pre-Mediation Submissions and Preparation: Mediators can limit the length of the parties' pre-mediation submissions. If a party exceeds the limitations, the mediator has the discretion not to consider any excess materials unless otherwise agreed between the mediator and parties. The amount of time that the mediator spends in pre-mediation preparation should be reasonable in light of the complexity of the issues and the amount at stake. In a complex case, if the parties agree that it is reasonable that preparation, initial administration and the organizational telephone conference should exceed one hour, they may agree to compensate the mediator for such time in excess of one hour before an in-person mediation session is held.

[15.] 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 or 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 of the county in which the underlying case was filed.

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 4 added, Guidelines 5 through 16 renumbered, Guideline 10 amended \_\_\_\_\_ to be effective \_\_\_\_\_.

## **II. NON- RULE AMENDMENT RECOMMENDED FOR ADOPTION EXPANSION OF THE MEDIATOR FACILITATING COMMITTEE**

Several years ago the Court appointed a Mediator Facilitating Committee to assist Civil roster mediators, counsel and litigants with routine issues regarding the mediation process, case management, billing and collections and other areas where the published guidelines may not cover the issues at hand. The Committee consisted of five members, and its use was limited. The recent changes to the Presumptive Civil Mediation Program, whereby modifications were made to processes in order to minimize the burden on staff, have brought with them a renewed need for resources outside of staff to assist roster mediators. As such, the Committee recommends that the membership of the Facilitating Committee be expanded to include additional mediators with representation from the north, central and southern regions.

It is important to note that the Facilitating Committee is simply a resource for mediators and others who have questions about how to handle issues that arise as part of the mediation process. It is not a policy generating committee, nor should it be in receipt of complaints against mediators. The Supreme Court Advisory Committee on Complementary Dispute Resolution is the body to whom complaints against mediators should be directed. There is a nexus between the two committees in that the Advisory Committee relies on the members of the Facilitating Committee to assist in mentoring and guiding mediators in need of further training or guidance. With the further expansion of the Facilitating Committee, it is recommended that the Advisory Committee assume a general oversight role of the Facilitating Committee, and in that role it shall be provided with statistical reports on the number and types of contacts they receive from mediators, counsel and the public, as well as any evaluative reports, on an annual, or if requested more frequent, basis.

The Committee recommends that the names and resumes of the proposed additional members be submitted to the Administrative Director of the Courts. The Director will determine if further review of the list is needed and if so, how that review should proceed. Ultimately the names will be submitted to the Court for formal review and appointment.

### **III. LEGISLATION**

The Committee has made no recommendations regarding legislation.

Respectfully Submitted,

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