

2017-2019 Rules Cycle

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



January 11, 2019

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I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendments to *Rule 1:40-4* – Mediation - General Rules

The Civil Subcommittee of the Supreme Court Committee on Complementary Dispute Resolution proposes amending paragraph (b) of *Rule 1:40-4* to modify the current mediator fee schedule. Presently, the Rule provides that parties may opt out of the mediation process after the mediator has expended two hours of services (one hour of preparation time and one hour of in-person mediation), at no cost to the parties. Under the proposal, the first two hours of mediation services will remain free to all parties that do not wish to continue with the in-person mediation session beyond the first hour. If, however, the parties elect to proceed with the in-person mediation session beyond the first hour, then the mediator will be compensated at one-half of the mediator's market rate for the first hour of preparation time and for the first hour of the in-person session.

By way of illustration, a party who attends a mediation can opt out of the mediation within the first hour of the in-person mediation session at no cost. If the parties want to stay at the mediation table and proceed with the in-person mediation session after the first hour, the parties would share the expense at one-half of the mediator's market rate for the first hour of preparation time and the first hour of the in-person session. Mediators will continue to utilize the Disclosure Concerning Continuation of Mediation and Mediation Preparation Time form provided in Appendix XXVI. In conjunction with the proposed amendments to *Rule 1:40-4(b)*, the Civil Subcommittee proposes amending the written disclosure form and Appendix XXVI.

The Family Subcommittee has considered, and is in favor of the proposal.

Members of the Civil Subcommittee contend that the requirement that roster mediators provide the two free hours of service on every case does not acknowledge the specialized skillset of the professional mediator. Mediation has evolved from the initial Civil Presumptive Mediation Pilot Program to become an expected part of the litigation process. Roster mediators perform a

necessary function for the court, yet they are not receiving commensurate professional recognition for their services. Mediation professionals are held to high standards. They undergo extensive training, which is both costly and time intensive. Mediators are required, among other things, to initially complete 40 hours of mediation skills training and to fulfill a mentoring requirement of at least two cases for a minimum of five hours by a civil roster mentor mediator to qualify for admission to the roster. To remain on the roster, mediators must annually attend four hours of continuing education. In performing their necessary function for the courts, which includes case management and discovery facilitation, professional mediators absorb the parties' litigation costs for the first two hours of services, while other professionals in the mediation room are being fully compensated for their services. The requirement of free hours in every case is not imposed on any other professionals appointed by the Court. The mediators are also required to provide facilities and corollary office services and cannot be reimbursed for travel time.

The proposed amendments to *Rule* 1:40-4(b) still ensure that the public has free access to mediation and do not undermine the Judiciary's Access and Fairness initiative. Moreover, they do not impact the ability of indigent litigants to receive a waiver of the mediation fee pursuant to *Rule* 1:13-2(a).

With a majority of votes, the Committee endorses this recommendation.

The proposed amendments to *Rule* 1:40-4(b), Appendix XXVI and the Disclosure Concerning Continuation of Mediation and Mediation Preparation Time form follow.

1:40-4. Mediation – General Rules

(a) ...no change.

(b) 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 Guideline[s 2 and 15] 7 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. If the parties choose to continue with the mediation process beyond the initial two hours of service, the parties shall equally share the cost of the mediator at the rate of one-half of the mediator's hourly market rate for the initial two hours of service. 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. When a mediator's fee has not been paid, collection shall be in accordance with Guideline [16]15 of Appendix XXVI. Specifically, the remedy for a family mediator to compel payment is either by an application, motion or order to show cause in the Family Part or by a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part). The remedy for a civil mediator to compel payment is a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit

of the Special Civil Part). Any action to compel payment may be brought in the county in which the mediation order originated. The remedy for a party and/or counsel to seek compensation for costs and expenses related to a court-ordered mediation shall be in accordance with Guideline [17]16 of Appendix XXVI.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(1) ...no change.

(2) ...no change.

(3) ...no change.

(f) ...no change.

(g) ...no change.

(h) ...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 July 28, 2017 to be effective September 1, 2017; paragraph (b) amended _____ to be effective _____.

**RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
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. First Two Hours Free: Mediators on the court's Rosters of Civil and Family Mediators shall serve free for two hours in a mediation that is court-ordered. The two free hours shall be divided equally between (a) reasonable preparation time, administrative tasks, the organizational telephonic conference, and (b) an initial mediation session. Travel time may not be included as part of the free first two hours. Unless otherwise provided in these guidelines, no fee, retainer or other payment may be charged or paid prior to the conclusion of the two free hours.

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 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. Substitute Mediators: In the event that the court-appointed mediator has a conflict of interest or is otherwise unable to serve, the court shall appoint a substitute mediator who is

bound by all of the provisions of the court order, including providing the first two hours of service free.

[4.] 3. 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.

[5.] 4. 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.

[6.] 5. 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 [10] 9 below.

[7.] 6. 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.

[8.] 7. 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, and the parties will be charged at one-half of the mediator's market rate for the first two hours of the mediator's services. 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 [10] 9.

[9.] 8. 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.

[10.] 9. 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)*.

[11.] 10. 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 [6] 5 above.

[12.] 11. 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 [10]9 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.

[13.] 12. 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.

[14.] 13. 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.

[15.] 14. 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, i] 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.

[16.] 15. Collection of Unpaid Mediator's Bill/Failure to Mediate in Accordance with Order: If a mediator has not been timely paid or 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 may bring an action to compel payment in the county in which the mediation order originated as follows:

(a) The remedy for a family mediator to compel payment is either by an application, motion or order to show cause in the Family Part or by a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part).

(b) The remedy for a civil mediator to compel payment is by a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part).

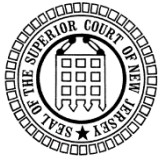
[17.] 16. Collection of Costs and Expenses: A party and/or counsel requesting compensation for costs and expenses related to a court-ordered mediation may bring an action to compel payment in the county in which the mediation order originated as follows:

(a) For family mediations, the remedy for a party and/or counsel to compel payment is by an application, motion or order to show cause in the Family Part or by a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part).

(b) For civil mediations, the remedy for a party and/or counsel to compel payment is by a separate collection action in the Special Civil Part (or in the Civil Part if the amount exceeds the jurisdictional limit of the Special Civil Part).

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 adopted July 28, 2017 to be effective September 1, 2017; paragraph amended to be effective

_____.



Superior Court of New Jersey
Law Division

**Disclosure Concerning Continuation of Mediation
and Mediation Preparation Time**

Directions: This form is to be completed and signed by the parties prior to the start of the one hour free mediation

1. As noted in the Order of Referral to Mediation, I must provide two free hours of mediation services if the parties opt out of mediation at the end of the first hour of the initial in-person mediation. If the parties elect to continue mediating after said first hour, they understand they will be charged at one-half of the Mediator's hourly rate, as published on the Court's Mediation Roster, for the first two hours of the Mediator's services which include up to one hour of preparation time and one hour of mediation time. [These two free hours shall include up to one hour of preparation time and one hour of mediation time.] The one free hour of mediation will end at the time set forth in paragraph 4 below.
2. The parties agree that if they decide to continue with the mediation past today's one free hour of mediation time, then the fees for mediation services will be charged at my market rate as published on the court's Mediator Roster and as set forth in paragraph 4 below.
3. The parties also agree that if they decide to continue with the mediation today past the one free hour, that I may charge them for any additional preparation time spent on this matter that exceeded the one free hour as set forth in paragraph 4 below.
4. Free Mediation will conclude at: ____:____

My Hourly Market Rate is: \$_____

[# of Hours Spent in Preparation Beyond 1 Free Hour ____ x Market Rate = \$_____]
(Two Initial Hours of Service x 1/2 Market Rate) + (# of hours spend beyond Initial Two Hours of Service x Market Rate) = \$_____

If the mediation ends today before the expiration time set forth above, or if you choose to terminate the mediation at the expiration time, there will be no charge for the mediation.

Name of Case: _____

Mediator: _____ Date: _____

Parties

Plaintiff(s):

Defendant(s):

Name: _____
(Please Print)

Name: _____
(Please Print)

Name: _____
(Please Print)

Name: _____
(Please Print)

B. Proposed Amendments to *Rule 1:40-7(a) Complementary Dispute Resolution in the Special Civil Part, Small Claims*

The Supreme Court Committee on Complementary Dispute Resolution (CDR) proposes an amendment to *R. 1:40-7(a)*. This proposal seeks to define the existing Special Civil Part CDR program as a settlement program rather than a mediation program to resolve disputes that are venued in that division.

The current rule requires law clerks, staff, and other trained volunteers to complete a training program that combines settlement and mediation techniques. Successful completion of the current training enables those individuals to serve as both settlors and mediators. However, since these individuals often facilitate settlement conferences rather than conduct mediation sessions, the Committee agreed that it was necessary to acknowledge the differences between the two endeavors and, therefore, provide clarity to the facilitators and litigants as to what the goal of the session is and the methods employed to reach it.

The Committee reviewed and considered the existing program and engaged in preliminary discussions with members from the New Jersey Bar Association, the Conference of Civil Presiding Judges, the Conference of Family Division Judges, the Conference of Civil Division Managers, and the Conference of Family Division Managers, before making this recommendation.

The difference between the two methods is important. Mediators are held to different standards than those who facilitate settlements. Mediators, for instance, are bound by specific confidentiality principles. Conversely, settlors, while still abiding by professional guidelines, may be permitted to share information with the court if a question arises for which preliminary guidance may be provided if a question arises during a session. Further, 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 for the litigants, provided that it is appropriate for the judge to receive this information.

A second, more philosophical, component of the mediation process is the principle of self-determination in which the parties are directed to engage to reach voluntary agreements. (Standards of Conduct for mediators in Court-Connected Programs, as adopted by the Supreme Court in January 2000). Mediation involves considerations of multiple dispute resolution options that might be available to resolve disputes and, similarly, to provide alternatives for consideration by the parties. By definition, this practice is more time consuming than the time that is practically available to resolve cases in the Special Civil Part, and particularly the small claims division. Mediation techniques would not permit an expeditious resolution of special civil part matters. On the other hand, although settlors must remain neutral and must allow the parties to discuss their perspectives regarding the matter, and as importantly, how they would like to resolve the case, settlors may practice a more instructive role than a mediator in helping the litigants reach a resolution.

Finally, the committee acknowledges that the majority of facilitators who conduct small claims matters are law clerks from all divisions. Law clerks assigned to judges in the civil division will develop more familiarity with the substance and procedures that govern special civil part matters than their colleagues in other divisions of the Superior Court. Since all law clerks are trained in settlement techniques regardless of division the small claims settlement program will provide opportunities for uniform statewide training and also access to court staff and judges who can provide guidance if case sensitive issues arise or, without breaching confidentiality, provide

pertinent information from the settlement process to the court for consideration in making a decision.

1:40-7. Complementary Dispute Resolution in the Special Civil Part

(a) Small Claims. Each vicinage shall provide a small claims settlement program in which (1) law clerks from all the divisions who have been trained in complementary dispute resolution settlement negotiation techniques [and as mediators] pursuant to R. 1:40-12-(b)(6), and other employees and volunteers who have been trained in complementary dispute resolution settlement negotiation techniques and as mediators pursuant to R. 1:40-12(b)(1), serve as trained [facilitators] settlers, not mediators, who help litigants settle their cases, and (2) cases that are not settled are tried on the same day, if possible. The training requirements apply to law clerks but not to other attorneys.

(b) ...no change.

(c) ...no change.

Note: Adopted July 14, 1992 as Rule 1:40-6 to be effective September 1, 1992; amended and redesignated as Rule 1:40-7 July 5, 2000 to be effective September 5, 2000; caption and text deleted, new caption and new paragraphs (a), (b), and (c) adopted July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 16, 2009 to be effective September 1, 2009; paragraph (a) amended July 27, 2015 to be effective September 1, 2015; paragraph (a) text amended to be effective _____.

C. Proposed Amendments to Rule 1:40-8(a)(3) Mediation of Minor Disputes in Municipal Court Actions

The Supreme Court Committee on Complementary Dispute Resolution recommends the deletion of *Rule 1:40-8(a)(3)*. The subsection currently prohibits referral to mediation complaints where there is a “clearly demonstrated psychological or emotional disability of a party.” The Committee has concerns this language implies that the court is making a decision on a person’s psychological or emotional disability without experts, documentation, or hearings, and automatically eliminating certain court users from participating in the program. Routinely the municipal courts schedule mediation cases through either an initial complaint review or a judicial determination that mediation should be explored as a means to resolve minor disputes. Eliminating this subsection will have no impact on the municipal court mediation process and would allow availability of the program to all court users. Without defining “psychological or emotional disability”, the municipal court staff and municipal court judges have no clear way of assessing a court user’s ability to participate. Removing this subsection will avoid evaluations on a court user based on current or past interactions.

Mediators are trained to recognize an imbalance of power, and if necessary stop mediation and return the matter to court. *Rule 1:40-4(h)* provides the mediators with the option to end mediation for any reason if they believe it is necessary and further, they do not need to disclose that reason to the participants. The mediator is the individual best to determine if the mediation process can or should move forward. Therefore, the committee recommends the deletion of subsection (a)(3) with no replacement

1:40-8(a)(3). Mediation of Minor Disputes in Municipal Court

(a) Referral. A mediation notice may issue pursuant to R. 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)] (3) incidents involving the same persons who are already parties to a Superior Court action between them, [(5)] (4) matters arising under the Prevention of Domestic Violence Act (*N.J.S.A. 2C:25-17 et seq.*), or [(6)] (5) a violation of the New Jersey Motor Vehicle Code (Title 39), or [(7)] (6) matters involving penalty enforcement actions.

(b) Appointment of Mediators. A municipal court mediator shall be appointed by the Assignment Judge or a designee. The municipal mediator must comply with the requirements of R. 1:40-12. The Assignment Judge or a designee may, either *sua sponte* or on request of the municipal court judge, remove a mediator upon the determination that the individual is unable to perform the mediator's functions.

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; paragraphs (a) and (b) amended July 27, 2015 to be effective September 1, 2015; paragraph (a)(3) deleted, former paragraphs (a)(4), (a)(5), (a)(6), and (a)(7) redesignated as (a)(3), (a)(4), (a)(5), and (a)(6) to be effective _____, _____.

D. Proposed Rule Amendments to Rule 1:40-12(a), Rule 1:40-12(a)(4), Rule 1:40-12(b)(1), and Rule 1:40-12(b)(6). Mediators and Arbitrators in Court-Annexed Programs

The Supreme Court Committee on Complementary Dispute Resolution (Committee) respectfully requests that the Court approve reducing the hours of the mandatory Law Clerk Mediation and Conciliation Training from 12 hours to six hours as well as revising the focus of the training from mediation to a Complementary Dispute Resolution (CDR) settlement negotiation training. Since the 2007-2009 Rules Cycle Report the Committee has assessed the law clerk training curriculum, specifically, whether it is necessary to require the law clerks to attend a two-day mediation and conciliation training when it is feasible to provide a mandatory six-hour CDR settlement negotiation training to all law clerks that once completed, they may conduct CDR events, such as small claims settlements or family consent conferences in lieu of mediation. The Committee also considered discussions with members of the Conferences of Civil and Family Presiding Judges and the Civil and Family Division Managers, respectively, who although they were informed that the Committee was not requesting endorsement for this initiative, collectively, were extremely supportive, as well as members of the Bar Association to implement a six-hour law clerk CDR settlement negotiation training providing the revised curriculum is appropriate for the types of CDR events the law clerks conduct without any detrimental effect on the resolution rates.

The six-hour CDR Law Clerk training will provide an overview of the skills set trainings practiced in small claims settlement negotiations and family consent conferences in lieu of mediation techniques, rules and guidelines. The Committee confirmed that it is not necessary for law clerks to mediate the types of cases that civil and family law clerks typically handle in order to provide a professional CDR alternative to resolution. Further, the requirement of 40- hour

family mediation training for law clerks before they can mediate family custody and parenting plans, will remain unchanged if in fact the number of law clerk training hours is reduced from 12 to six.

With respect to the law clerk survey results, the Committee will continue to review requests to provide law clerks subsequent substantive law training in collaboration with the Administrative Office of the Courts, the Marie L. Garibaldi ADR Inn of Court, and the New Jersey Bar Association, post the initial training, by way of virtual and in person and other continuing education events.

Subsequent to the review of the Committee's recommendations to *Rule* 1:40, the Civil Practice Division, Administrative Office of the Courts, and the Committee respectfully proposes that the language in *Rule* 1:40-12(a)(4) regarding landlord tenant training be revised to require law clerks, attorneys, and staff to complete at least five hours of additional substantive and procedural training in landlord-tenant law, with such training to be approved by the Administrative Office of the Courts. Currently, the curriculum is the same for both the seven-hour and 3.5 hour training and although the current rule states seven hours of training, in reality, the training may be presented within five hours. Also, because the curriculum is the same for the 3.5 hour training, requiring the law clerks and attorneys to attend an additional 1.5 hours of training would enhance their learning experience in this particular and sensitive area of the process.

The recommendations to revise R. 1:40-7(a), R. 1:40-12(a)(4), R. 1:40(b)(1), and R. 1:40-12(b)(6), as they relate to law clerk training follow.

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

(a) Mediator Qualifications.

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) Special Civil Part [Mediators/]Settlors. In addition to mediators on the civil roster, those judicial law clerks who have been trained in complementary dispute resolution (CDR) settlement techniques pursuant to R. 1:40-12(b)(6), court staff[,] and volunteers who have completed [a] the 18-hour course of mediation training approved by the Administrative Office of the Courts may [mediate/] settle Small Claims actions. In the discretion of the Assignment Judge, such persons may also [mediate/] settle landlord-tenant disputes and other Special Civil Part actions, provided that they complete additional substantive and procedural training in landlord-tenant law of at least [three and one-half] five hours [for law clerks, and at least seven hours for all others], with such training to be approved by the Administrative Office of the Courts.

(5) ...no change.

(6) ...no change.

(i) ...no change.

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(ii) ...no change.

(a) ...no change.

(b) ...no change.

(c) ...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 or

former New Jersey Supreme Court justices and Superior Court judges, retired or former Administrative Law 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) Mediation Course Content - Basic Skills. The 18-hour classroom course in basic mediation skills and complementary dispute resolution (CDR) settlement techniques, 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 and other CDR resolution processes.

(4) ...no change.

(5) ...no change.

(6) Training Requirements for Judicial Law Clerks. Judicial law clerks serving as third-party neutral settlors, shall first have completed [either] a [12] six-hour complementary dispute resolution (CDR) settlement techniques 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.]

(7) ...no change.

(8) ...no change.

(c) ...no change.

(1) ...no change.

(2) ...no change.

(3) ...no change.

(4) ...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; (a)(4) text amended, (b)(1) text amended, (b)(3) text amended, (b)(6) text amended _____ to be effective _____.

E. Proposed Amendments to Rule 1:40-12(a)(3) and Rule 1:40-12(b)(1) Mediators and Arbitrators in Court-Annexed Programs: Mediator Qualifications and Mediator Training Requirements

In the July 28, 2017 Omnibus Rule Amendment Order, *Rule 1:40-12(a)(3)* and *Rule 1:40-12(b)(1)* were amended to exempt retired or former New Jersey Supreme Court justices, Superior Court judges, and Administrative Law judges applying for inclusion on the Civil mediation roster from the completed mediations prerequisite of paragraph (a)(3) and mentoring requirements of paragraph (b)(1). During this rules cycle, the Civil Subcommittee was asked to consider whether those exemptions should be extended to retired or former Federal Court judges.

The Civil Subcommittee determined that given retired or former state court judges are exempt, paragraphs (a)(3) and (b)(1) of *Rule 1:40-12* should be amended to include retired or former Federal Court judges. Further, the Civil Subcommittee determined that retired judges from other states who presided over a court of general jurisdiction or appellate court should also be exempted from these requirements.

The full Committee agreed with the subcommittee's proposal to amend (a)(3) and (b)(1) of *Rule 1:40-12*.

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

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 Roster Mediators. Mediator applicants to be on the roster for civil, general equity, and probate actions shall have: (A) at least a bachelor's degree; (B) at least 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 or former New Jersey Supreme Court justices, Superior Court judges, [and] Administrative Law judges, retired or former Federal Court judges, and retired judges from other states who presided over a court of general jurisdiction or appellate court, 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.

(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 or former New Jersey Supreme Court justices and Superior Court judges, retired or former Administrative Law judges, retired or former Federal Court judges, and retired judges from other states who presided over a court of general jurisdiction or appellate court, 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.
- (7) ...no change.
- (8) ...no change.
- (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; 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; subparagraphs (a)(3) text, (a)(5) caption and text, and (b)(1) text and paragraph (c) amended July 28, 2017 to be effective September 1, 2017; paragraphs (a)(3) and (b)(1) amended _____ to be effective _____.

II. MATTERS HELD FOR CONSIDERATION

A. Expansion of the Facilitating Committee

During the 2019-2021 Rules Cycle, the Court will collect data to review in considering the expansion of the Facilitating Committee.

III. LEGISLATION

The Committee does not have any recommendations during this rules cycle.

IV. MISCELLANEOUS MATTERS

A. The Committee recommends that statistics for the judiciary's mediation and other complementary dispute resolution programs be collected and available for the public's purview upon request. These statistical reports are necessary for ongoing review and evaluation of CDR programs.

Respectfully Submitted,

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