FAMILY MEDIATION TRAINING COURSE WINTER 2026

2025 Seminar Material

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FAMILY MEDIATION TRAINING COURSE WINTER 2026

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P.L. 2004, c.157
Approved November 22, 2004

SENATE, No. 679

STATE OF NEW JERSEY
211th LEGISLATURE

INTRODUCED JANUARY 26, 2004

Sponsored by:
Senator ROBERT J. MARTIN, District 26 (Morris and Passaic)
Senator DIANE ALLEN, District 7 (Burlington and Camden)
Assemblywoman LINDA R. GREENSTEIN, District 14 (Mercer and Middlesex)
Assemblyman PATRICK DIEGNAN, JR., District 18 (Middlesex)

Co-Sponsored by: Assemblyman McKeon

SYNOPSIS
Enacts the "Uniform Mediation Act."

CURRENT VERSION OF TEXT
As introduced.

AN ACT creating the "Uniform Mediation Act" and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This Act shall be known and may be cited as the "Uniform Mediation Act."

2. Definitions. As used in this act:

"Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

"Mediation communication" means a statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator. A mediation communication shall not be deemed to be a public record under P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented by P.L.2001, c.404 (C.47: 1A-5 et seq.).

"Mediator" means an individual who conducts a mediation.

"Nonparty participant" means a person, other than a party or mediator, who participates in a mediation.

"Mediation party" means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

"Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

"Proceeding" means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or a legislative hearing or similar process.

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"Sign" means to execute or adopt a tangible symbol with the present intent to authenticate a record, or to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

3. Scope.

a. Except as otherwise provided in subsection b. or c., this act shall apply to a mediation in which:

(1) the mediation parties are required to mediate by statute, court rule or administrative agency rule, or are referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself out as a mediator, or the mediation is provided by a person who holds itself out as providing mediation.

b. The act shall not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship or to any mediation conducted by the Public Employment Relations Commission or the State Board of Mediation;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the act applies to a mediation arising out of a dispute that has been filed with a court or an administrative agency other than the Public Employment Relations Commission or the State Board of Mediation;

(3) conducted by a judge who may make a ruling on the case; or

(4) conducted under the auspices of:

(a) a primary or secondary school if all the parties are students; or

(b) a juvenile detention facility or shelter if all the parties are residents of that facility or shelter.

c. If the parties agree in advance in a signed record, or a record of proceeding so reflects, that all or part of a mediation is not privileged, the privileges under sections 4 through 6 of P.L. , c. (C.) (now pending before the Legislature as sections 4 through 6 of this bill) shall not apply to the mediation or part agreed upon. Sections 4 through 6 of P.L. , c. (C.) (now pending before the Legislature as sections 4 through 6 of this bill) shall apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

4. Privilege against Disclosure; Admissibility; Discovery.

a. Except as otherwise provided in section 6 of P.L. , c. (C.) (now pending before the Legislature as section 6 of this bill), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. , c. (C.) (now pending before the Legislature as section 5 of this bill).

b. In a proceeding, the following privileges shall apply:

(1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c. Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

5. Waiver and Preclusion of Privilege.

a. A privilege under section 4 of P.L., c. (C.) (now pending before the Legislature as section 4 of this bill) may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

b. A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L., c. (C.) (now pending before the Legislature as section 4 of this bill), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 4 of P.L., c. (C.) (now pending before the Legislature as section 4 of this bill).

6. Exceptions to Privilege.

a. There is no privilege under section 4 of P.L., c. (C.) (now pending before the Legislature as section 4 of this bill) for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation;

(6) except as otherwise provided in subsection c., sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.

b. There is no privilege under section 4 of P.L., c. (C.) (now pending before the Legislature as section 4 of this bill) if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a crime as defined in the "New Jersey Code of Criminal Justice," N.J.S. 2C:1-1 et seq.; or

(2) except as otherwise provided in subsection c., a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

c. A mediator may not be compelled to provide evidence of a mediation communication referred to in paragraph (6) of subsection a. or paragraph (2) of subsection b.

d. If a mediation communication is not privileged under subsection a. or b., only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection a. or b. does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

7. Prohibited mediator reports.

a. Except as required in subsection b., a mediator may not make a report, assessment, evaluation, recommendation, finding, or other oral or written communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

b. A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; or

(2) a mediation communication as permitted under section 6 of P.L. , c. (C.) (now pending before the Legislature as section 6 of this bill);

c. A communication made in violation of subsection a. may not be considered by a court, administrative agency, or arbitrator.

8. Confidentiality.

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

9. Mediator's Disclosure of Conflicts of Interest; Background.

a. Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practicable before accepting a mediation.

b. If a mediator learns any fact described in paragraph (1) of subsection a. after accepting a mediation, the mediator shall disclose it as soon as is practicable.

c. At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

d. A person who violates subsection a., b., or g. shall be precluded by the violation from asserting a privilege under section 4 of P.L. , c. (C.) (now pending before the Legislature as section 4 of this bill), but only to the extent necessary to prove the violation.

e. Subsections a, b., c., and g. do not apply to a judge of any court of this State acting as a mediator.

f. This act does not require that a mediator have a special qualification by background or profession.

g. A mediator shall be impartial, notwithstanding disclosure of the facts required in subsections a. and b.

10. Participation in Mediation.

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.

11. Relation to Electronic Signatures in Global and National Commerce Act.

This act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this act does not modify, limit, or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

12. Uniformity of application and construction.

In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

13. Severability clause.

If any provision of P.L. , c. (C.) (now pending before the Legislature as this bill) or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

14. This act shall take effect immediately and shall apply to any agreements to mediate made on or after the effective date of this act.

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RULE 1:40. COMPLEMENTARY DISPUTE RESOLUTION PROGRAMS

1:40-1. Purpose, Goals

Complementary Dispute Resolution Programs (CDR) provided for by these rules are available in the Superior Court and Municipal Courts and constitute an integral part of the judicial process, intended to enhance its quality and efficacy. Attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them.

Note: Adopted July 14, 1992 to be effective September 1, 1992; amended July 5, 2000 to be effective September 5, 2000.

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

Complementary Dispute Resolution (CDR) Programs 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) "Adjudicative Processes" means and includes the following:

(1) Arbitration: A process by which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award. The parties may stipulate in advance of the arbitration that the award shall be binding. If not so stipulated, the provisions of Rule 4:21A-6 (Entry of Judgment; Trial De Novo) shall be applicable.

(2) Settlement Proceedings: A process by which the parties appear before a neutral third party or neutral panel, who assists them in attempting to resolve their dispute by voluntary agreement.

(3) Summary Jury Trial: A process by which the parties present summaries of their respective positions to a panel of jurors, which may then issue a non-binding advisory opinion as to liability, damages, or both.

(b) "Evaluative Processes" means and includes the following:

(1) Early Neutral Evaluation (ENE): A pre-discovery process by which the attorneys, in the presence of their respective clients, present their factual and legal contentions to a neutral evaluator, who then provides an assessment of the strengths and weaknesses of each position and, if settlement does not ensue, assists in narrowing the dispute and proposing discovery guidelines.

(2) Neutral Fact Finding: A process by which a neutral third party, agreed upon by the parties, investigates and analyzes a dispute involving complex or technical issues, and who then makes non-binding findings and recommendations.

(c) "Facilitative Process," which includes mediation, is a process by which a neutral third party facilitates communication between parties in an effort to promote settlement without imposition of the facilitator's own judgment regarding the issues in dispute.

(d) "Hybrid Process" means and includes:

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

(1)(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 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) "Other CDR Programs" means and includes any other method or technique of complementary dispute resolution permitted by guideline or directive of the Supreme Court.

(f) "Neutral Third Party:" A "neutral third party" is an individual who provides a CDR process. Neutral third parties serving as mediators must comply with the requirements of R. 1:40-12. Neutral third parties serving as other than mediators, that is, who are conducting Arbitrations, Settlement Proceedings, Summary Jury Trials, Early Neutral Evaluations, or Neutral Fact-Finding processes, are not required to comply with the requirements of R. 1:40-12.

(g) Roster Mediator; Non-Roster Mediator: A roster mediator is an individual included on any roster of mediators maintained by the Administrative Office of the Courts or an Assignment Judge. A non-roster mediator is an individual who provides mediation but is not listed on any roster of mediators maintained by the Administrative Office of the Courts or an Assignment Judge. The parties may agree to use a roster mediator or a non-roster mediator.

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; subparagraphs (a)(2) and (b)(2) amended, paragraph (c) amended, subparagraph (d)(1) redesignated as subparagraph (d)(1)(A), new subparagraph (d)(1)(B) adopted, subparagraph (d)(2) amended, paragraph (f) amended and new paragraph (g) adopted July 27, 2015 to be effective September 1, 2015.

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 neutral third parties except the roster of statewide civil, general equity, and probate action mediators, which shall be maintained by the Administrative Office of the Courts.

(b) Statewide Organization and Management. The Administrative Office of the Courts shall have the responsibility (1) to promote uniformity and quality of CDR programs in all vicinages, (2) to monitor and evaluate vicinage CDR programs and assist CDR Coordinators in implementing them; (3) to serve as a clearinghouse for ideas, issues, and new trends relating to CDR, both in New Jersey and in other jurisdictions; (4) to develop CDR pilot projects to meet new needs; (5) to monitor training and continuing education programs for neutrals; and (6) to institutionalize relationships relating to CDR with the bar, universities, the Marie L. Garibaldi ADR Inn of Court, and private providers of CDR services. The Administrative Office of the Courts shall maintain the statewide roster of civil, general equity, and probate action mediators.

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 July 27, 2015 to be effective September 1, 2015.

1:40-4. Mediation – General Rules

(a) Referral to Mediation. Except as otherwise provided by these rules, a Superior Court or Municipal Court judge may require the parties to attend a mediation session at any time following the filing of a complaint.

(b) Compensation and Payment of Mediators Serving in the Civil and Family Economic Mediation Programs. The real parties in interest in Superior Court, except in the Special Civil Part, assigned to mediation pursuant to this rule shall equally share the fees and expenses of the mediator on an ongoing basis, subject to court review and allocation to create equity. Any fee or expense of the mediator shall be waived in cases,

as to those parties exempt, pursuant to R. 1:13-2(a). Subject to the provisions of Guidelines 2 and 15 in Appendix XXVI, Guidelines for the Compensation of Mediators, if the parties select a mediator from the court's rosters of civil and family mediators, the parties may opt out of the mediation process after the mediator has expended two hours of service, which shall be allocated equally between preparation and the first mediation session, and which shall be at no cost to the parties. As provided in Guideline 7 in Appendix XXVI, fees for roster mediators after the first two free hours shall be at the mediator's market rate as set forth on the court's mediation roster. As provided in Guideline 4 in Appendix XXVI, if the parties select a non-roster mediator, that mediator may negotiate a fee and need not provide the first two hours of service free. When a mediator's fee has not been paid, collection shall be in accordance with Guideline 16 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 of Appendix XXVI.

(c) Evidentiary Privilege. A mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the New Jersey Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence.

(d) Confidentiality. Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone who was not a participant in the mediation. A mediator may disclose a mediation communication to prevent harm to others to the extent such mediation communication would be admissible in a court proceeding. A mediator has the duty to disclose to a proper authority information obtained at a mediation session if required by law or if the mediator has a reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm. No mediator may appear as counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6.

(e) Limitations on Service as a Mediator

(1) No one holding a public office or position or any candidate for a public office or position shall serve as a mediator in a matter directly or indirectly involving the governmental entity in which that individual serves or is seeking to serve.

(2) The approval of the Assignment Judge is required for service as a mediator by any of the following: (A) police or other law enforcement officers employed by the State or by any local unit of government; (B) employees of any court; or (C) government officials or employees whose duties involve regular contact with the court in which they serve.

(3) The Assignment Judge and the Administrative Office of the Courts shall also have the discretion to request 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) Before accepting a mediation, a mediator shall:

(A) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation or an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(B) disclose any such known fact to the mediation parties as soon as is practicable before accepting a mediation.

(2) If a mediator learns any fact described in subparagraph (f)(1)(A) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(3) After entry of the order of referral to mediation, if the court is advised by the mediator, counsel, or one of the parties that a conflict of interest exists, the parties shall have the opportunity to select a replacement mediator 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 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 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 party may adjourn or terminate the session if (A) a party challenges the impartiality of the mediator, (B) a party continuously resists the mediation process or the mediator, (C) there is a failure of communication that seriously impedes effective discussion, or (D) the mediator believes a party is under the influence of drugs or alcohol.

(2) The mediator shall terminate the session if (A) there is an imbalance of power between the parties that the mediator cannot overcome, (B) 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, said agreement must be reduced to writing, signed by each party, and furnished to each party. The agreement need not be filed with the court, but both roster and non-roster mediators shall report the status of the matter to the court by submission of the Completion of Mediation form. 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; 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.

1:40-5. Mediation in Family Part Matters

(a) Mediation of Custody and Parenting Time Actions.

(1) Screening and Referral. All complaints or motions involving a custody or parenting time issue shall be screened to determine whether the issue is genuine and substantial, and if such a determination is made, the matter shall be referred to mediation for resolution in the child's best interests. However, no matter shall be referred to mediation if there is in effect a preliminary or final order of domestic violence entered pursuant to the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.). In matters involving domestic violence in which no order has been entered or in cases involving child abuse or sexual abuse, the custody or parenting time issues shall be

referred to mediation provided that the issues of domestic violence, child abuse or sexual abuse shall not be mediated in the custody mediation process. The mediator or either party may petition the court for removal of the case from mediation based upon a determination of good cause.

(2) Conduct of Mediation. In addition to the general requirements of Rule 1:40-4, the parties shall be required to attend a mediation orientation program and may be required to attend an initial mediation session. Mediation sessions shall be closed to the public. The mediator and the parties should consider whether it is appropriate to involve the child in the mediation process. The mediator or either party may terminate a mediation session in accordance with the provisions of R. 1:40-4(h).

(3) Mediator Not to Act as Evaluator. The mediator may not subsequently act as an evaluator for any court-ordered report nor make any recommendation to the court respecting custody and parenting time.

(b) Mediation of Economic Aspects of Dissolution Actions.

(1) Referral to ESP. The CDR program of each vicinage shall include a post-Early Settlement Panel (ESP) program for the mediation of the economic aspects of dissolution actions or for the conduct of a post-ESP alternate Complementary Dispute Resolution (CDR) event consistent with the provisions of this rule and R. 5:5-6. However, no matter shall be referred to mediation if a temporary or final restraining order is in effect in the matter pursuant to the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.).

(2) Designation of Mediator of Economic Aspects of Family Law Matters. A credentials committee comprised of representatives from the Supreme Court Committee on Complementary Dispute Resolution shall be responsible for reviewing and approving all mediator applications. Applicants must complete an application form posted on the Judiciary's Internet web site (www.judiciary.state.nj.us or www.njcourtsonline.com). Mediators who meet the training requirements set forth in this rule, and any other approved criteria developed by the Family Court Programs Subcommittee of the Committee on Complementary Dispute Resolution shall be added to the Roster of Approved Mediators. The roster shall be maintained by the Administrative Office of the Courts and shall be posted on the Judiciary's Internet web site.

(3) Exchange of Information. In mediation of economic aspects of Family actions, parties are required to provide accurate and complete information to the mediator and to each other, including but not limited to tax returns, Case Information Statements, and appraisal reports. The court may, in the Mediation Referral Order, stay discovery and set specific times for completion of mediation.

(4) Timing of Referral. Parties shall be referred to economic mediation or other alternate CDR event following the unsuccessful attempt to resolve their issues through ESP. At the condusion of the ESP process, parties shall be directed to confer

with appropriate court staff to expedite the referral to economic mediation in accordance with the following procedures:

A. Parties may conference with the judge or the judge's designee.

B. Court staff shall explain the program to the parties and/or their attorneys.

C. Parties shall be provided with the roster of approved mediators for selection.

D. after a mediator has been selected, court staff shall attempt immediate contact to secure the mediator's acceptance and the date of initial appointment. If court staff is unable to contact the mediator for confirmation, the order of referral shall state that the mediator and the date of initial appointment remain tentative until confirmation is secured. Staff will attempt to confirm within 24 hours and send an amended order to the parties and/or their attorneys.

E. If a mediator notifies the court that he or she cannot take on any additional cases, court staff will so advise the parties at the time of selection so that an alternate mediator can be selected.

F. The court shall enter an Economic Mediation Referral Order stating the name of the mediator, listing the financial documents to be shared between the parties and with the mediator, indicating the allocation of compensation by each party if mediation extends beyond the initial two hours, stating the court's expectation that the parties will mediate in good faith, defining the mediation time frame, and identifying the next court event and the date of that event.

G. The referral order, signed by the judge, shall be provided to the parties before they leave the courthouse. Amended orders with confirmed appointments shall be faxed to the parties and/or their attorneys the next day, replacing the tentative orders.

H. If the parties are unable to agree upon and select a mediator, the judge will appoint one. Staff shall then follow the above procedures as applicable.

I. Referral to economic mediation shall be recorded in the Family Automated Case Tracking System (FACTS).

(5) Adjournments. Adjournment of events in the mediation process shall be determined by the mediator after conferring with the parties and/or attorneys, provided that any such adjournment will not result in the case exceeding the return date to the court. If an adjournment would cause delay of the return date to the court, a written adjournment request must be made to the judge who has responsibility for the case or the judge's designee.

Note: Adopted July 14, 1992 to be effective September 1, 1992; new paragraph (c) adopted January 21, 1999 to be effective April 5, 1999; caption and paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; caption amended, former paragraphs (a), (b), and (c) redesignated as paragraphs (a)(1), (a)(2), and (a)(3), new paragraph (a) caption adopted, and new paragraph (b) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a)(2) amended July 31, 2007 to be effective September 1, 2007; paragraph (b) amended and redesignated as paragraph (b)(1), caption for paragraph (b)(1) added, and new paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) adopted July 16, 2009 to be effective September 1, 2009; paragraph (b) caption amended, subparagraph (b)(1) caption and text amended, and subparagraph (b)(4) amended July 21, 2011 to be effective September 1, 2011.

1:40-6. Mediation of Civil, Probate, and General Equity Matters

The CDR program of each vicinage shall include mediation of civil, probate, and general equity matters, pursuant to rules and guidelines approved by the Supreme Court.

(a) Referral to Mediation. The court may, sua sponte and by written order, refer any civil, general equity, or probate action to mediation for an initial two hours, which shall include an organizational telephone conference, preparation by the mediator, and the first mediation session. In addition, the parties to an action may request an order of referral to mediation and may either select the mediator or request the court to designate a mediator from the court-approved roster.

(b) Designation of Mediator. Within 14 days after entry of the mediation referral order, the parties may select a mediator, who may, but need not, be listed on the court's Roster of Civil Mediators. Lead plaintiff's counsel must in writing provide the CDR Point Person in the county, as well as the individual designated by the court in the mediation referral order, with the name of the selected mediator. If the parties do not timely select a mediator, the individual designated by the court in the mediation referral order shall serve. All roster and non-roster mediators, whether party-selected or court-designated, shall comply with the terms and conditions set forth in the mediation referral order.

(c) Stay of Proceedings. The court may, in the mediation referral order, stay discovery for a specific or an indeterminate period.

(d) Withdrawal and Removal from Mediation. A motion for removal from mediation shall be filed and served upon all parties within 10 days after the entry of the mediation referral order and shall be granted only for good cause. Any party may withdraw from mediation after the initial two hours provided for by paragraph (a) of this rule. The mediation may, however, continue with the consent of the mediator and the remaining parties if they determine that it may be productive even without participation by the withdrawing party.

(e) Mediation Statement. The mediator shall fix a date following the telephonic conference for the exchange by the parties and service upon the mediator of a brief statement of facts and proposals for settlement not exceeding ten pages. At the discretion

of the mediator, each party's statement of facts may be prepared and submitted to the mediator for review without service of the statement of facts on the other party. All documents prepared for mediation shall be confidential and subject to Rule 1:40-4(c) and (d).

(f) Procedure Following Mediation. Promptly upon termination of the mediation process, the mediator shall report to the court in writing as to whether or not the action or any severable claim therein has been settled.

(g) Compensation of Mediators. Mediators shall be compensated as provided by Rule 1:40-4(b) and Appendix XXVI ("Guidelines for the Compensation of Mediators Serving in the Civil Mediation Program").

Note: Adopted July 5, 2000 to be effective September 5, 2000 (and former Rule 1:40-6 redesignated as Rule 1:40-7); paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraphs (e) and (g) amended July 27, 2006 to be effective September 1, 2006; paragraph (a) amended September 11, 2006 to be effective immediately; paragraph (e) amended July 31, 2007 to be effective September 1, 2007; paragraph (d) amended July 9, 2008 to be effective September 1, 2008; paragraph (e) amended July 16, 2009 to be effective September 1, 2009; paragraph (b) amended July 21, 2011 to be effective September 1, 2011; paragraph (b) amended July 27, 2015 to be effective September 1, 2011.

1:40-7. Complementary Dispute Resolution Programs 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 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 settlors, 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) Tenancy Actions. If complementary dispute resolution programs are used for tenancy actions, cases that are not settled shall be tried on the same day, if possible.

(c) Other Actions for Damages. For other Special Civil Part actions for damages each vicinage shall establish a settlement program that does not include arbitration in which there is one settlement event scheduled to occur on the trial date.

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 July 29, 2019 to be effective September 1, 2019.

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

(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) incidents involving the same persons who are already parties to a Superior Court action between them, (4) matters arising under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.), (5) a violation of the New Jersey Motor Vehicle Code (Title 39), or (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; subparagraph (a)(3) deleted and subparagraphs (a)(4) through (a)(7) resdesignated as subparagraphs (a)(3) through (a)(6) July 29, 2019 to be effective September 1, 2019.

1:40-9. Civil Arbitration

The CDR program of each vicinage shall include arbitration of civil actions in accordance with Rule 4:21A.

Note: Adopted July 5, 2000 to be effective September 5, 2000 (and former Rule 1:40-9 redesignated as Rule 1:40-11).

1:40-10. Relaxation of Court Rules and Program Guidelines

These rules, and any program guidelines may be relaxed or modified by the court in its discretion if it determines that injustice or inequity would otherwise result. Factors to be considered in making that determination include but are not limited to (1) the incapacity of one or more parties to participate in the process, (2) the unwillingness of one or more parties to participate in good faith, (3) the previous participation by the parties in a CDR program involving the same issue, and (4) any factor warranting termination of the program pursuant to Rule 1:40-4(h).

Note: Adopted July 14, 1992 as Rule 1:40-8 to be effective September 1, 1992; caption and text amended and redesignated as Rule 1:40-10 July 5, 2000 to be effective September 5, 2000; amended July 31, 2007 to be effective September 1, 2007.

1:40-11. Non-Court Dispute Resolution

With the approval of the Assignment Judge or the Assignment Judge's designee, the court, while retaining jurisdiction, may refer a matter to a non-court administered dispute resolution process on the condition that any such mediation process will be subject to the privilege and confidentiality provisions of Rule 1:40-4(c) and (d). The Assignment Judge or designee may approve such referral upon the finding that it will not prejudice the interests of the parties.

Note: Adopted July 14, 1992 as Rule 1:40-9 to be effective September 1, 1992; redesignated as Rule 1:40-11 July 5, 2000 to be effective September 5, 2000; amended July 12, 2002 to be effective September 3, 2002; amended July 31, 2007 to be effective September 1, 2007.

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

(a) Mediator Qualifications.

(1) Generally. Unless otherwise specified by these rules, no special occupational status or educational degree is required for mediator service and mediation training. An applicant for listing on a roster of mediators maintained by either the Administrative Office of the Courts or the Assignment Judge shall, however, certify to good professional standing. An applicant whose professional license has been revoked shall not be placed on the roster, or if already on the roster shall be removed therefrom.

(2) Custody and Parenting Time Mediators. The Assignment Judge, upon recommendation of the Presiding Judge of the Family Part, may approve persons or agencies to provide mediation services in custody and parenting time disputes if the mediator meets the following minimum qualifications: (A) a graduate degree or certification of advanced training in a behavioral or social science; (B) training in mediation techniques and practice as prescribed by these rules; and (C) supervised clinical experience in mediation, preferably with families. In the discretion of the Assignment Judge relevant experience may be substituted for either a graduate degree or certification, or clinical experience, or both.

(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, retired Superior Court judges, retired 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) Special Civil Part 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 the 18-hour course of mediation training approved by the Administrative Office of the Courts may settle Small Claims actions. In the discretion of the Assignment Judge, such persons may also 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 five hours, with such training to be approved by the Administrative Office of the Courts.

(5) Municipal Court Volunteer Mediators. Individuals may serve as volunteer mediators in municipal court mediation programs. To serve as municipal court mediators and volunteer their time, effort and skill to mediate minor disputes in municipal court actions, such individuals (A) must be approved by the Assignment Judge or designee in the vicinage in which they intend to serve, (B) must meet the basic dispute resolution training required by R. 1:40-12(b)(1), and (C) must have satisfied any continuing training requirements under R. 1:40-12(b)(2).

(6) Family Part Economic Mediators. To be listed on the approved roster, mediators of economic issues in family disputes shall meet the applicable requirements set forth below for attorneys and non-attorneys and shall complete the required training set forth in paragraph (b) of this Rule:

(i) Attorneys

a. Juris Doctor (or equivalent law degree)

b. Admission to the bar for at least seven years

c. Licensed to practice law in the state of New Jersey

d. Practice substantially devoted to matrimonial law

(ii) Non-Attorneys

a. Advanced degree in psychology, psychiatry, social work, business, finance, or accounting, or a CPA or other relevant advanced degree deemed appropriate by the credentials committee,

b. At least seven years of experience in the field of expertise, and

c. Licensed in New Jersey if required in the field of expertise

(iii) Any retired Superior Court judge with experience in handling dissolution matters.

(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.

(2) Continuing Training. Commencing in the year following 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 ethical issues associated with mediation practice, program guidelines and/or case management and should cover at least one of the following: (A) case management skills; and (B) mediation and negotiation concepts and skills.

(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) 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 shall have completed 40 hours of training in family mediation in accordance with this rule.

(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 as approved by the Administrative Director of the Courts.

(6) Training Requirements for Judicial Law Clerks. Judicial law clerks serving as third-party neutral settlors, shall first have completed a six-hour complementary dispute resolution (CDR) settlement techniques training course prescribed by the Administrative Office of the Courts.

(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 Training 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) Arbitrator Qualification and Training. Arbitrators serving in judicial arbitration programs shall have the minimum qualifications prescribed by Rule 4:21A-2. All arbitrators shall attend initial training of at least three classroom hours and continuing training of at least two hours in courses approved by the Administrative Office of the Courts.

(1) New Arbitrators. After attending the initial training, a new arbitrator shall attend continuing training after two years. Thereafter, an arbitrator shall attend continuing training every four years.

(2) Roster Arbitrators. Arbitrators who have already attended the initial training and at least one continuing training shall attend continuing training every four years.

(3) Arbitration Course Content – Initial Training. The three-hour classroom course shall teach the skills necessary for arbitration, including applicable statutes, court rules and administrative directives and policies, the standards of conduct, applicable uniform procedures as reflected in the approved procedures manual and other relevant information.

(4) Arbitration Course Content – Continuing Training. The two-hour continuing training course should cover at least one of the following: (a) reinforcing and enhancing relevant arbitration skills and procedures, (b) ethical issues associated with arbitration, or (c) other matters related to court-annexed arbitration as recommended by the Arbitration Advisory Committee.

(d) Training Program Evaluation. The Administrative Office of the Courts shall conduct periodic assessments and evaluations of the CDR training programs to ensure their continued effectiveness and to identify any needed improvements.

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; paragraph (a)(3) amended, paragraph (a)(4) caption and text amended, and paragraphs (b)(1), (b)(3), and (b)(6) amended July 29, 2019 to be effective September 1, 2019; paragraph (c) amended July 31, 2020 to be effective September 1, 2020.

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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 Mediation 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. 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. 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. 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 below.

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.

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 10.

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.

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).

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 6 above.

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 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.

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.

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.

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.

16. 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. 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).

Notes: 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 amended and new Guideline 17 adopted July 28, 2017 to be effective September 1, 2017.

Rule 519. Mediator Privilege

(a) *N.J.S. 2A:23C-4* provides:

a. Except as otherwise provided in section 6 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-6*), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-5*).

b. In a proceeding, the following privileges shall apply:

(1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c. Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

(b) *N.J.S. 2A:23C-5* provides:

a. A privilege under section 4 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-4*) may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

b. A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-4*), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-4*).

(c) *N.J.S. 2A:23C-6* provides:

a. There is no privilege under section 4 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-4*) for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation;

(6) except as otherwise provided in subsection c., sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.

b. There is no privilege under section 4 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-4*) if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a crime as defined in the 'New Jersey Code of Criminal Justice," *N.J.S. 2C: 1-1* et seq.; or

(2) except as otherwise provided in subsection c., a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

c. A mediator may not be compelled to provide evidence of a mediation communication referred to in paragraph (6) of subsection a. or paragraph (2) of subsection b.

d. If a mediation communication is not privileged under subsection a. or b., only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection a. or b. does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(d) *N.J.S. 2A:23C-7* provides:

a. Except as required in subsection b., a mediator may not make a report, assessment, evaluation, recommendation, finding, or other oral or written communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

b. A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; or

(2) a mediation communication as permitted under section 6 of P.L. 2004, c. 157 (*N.J.S. 2A:23C-6*).

c. A communication made in violation of subsection a. may not be considered by a court, administrative agency, or arbitrator.

(e) *N.J.S. 2A:23C-8* provides:

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Note**:** Adopted September 17, 2007 to be effective July 1, 2008.

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PROGRAM GUIDELINES FOR STATEWIDE PROGRAM FOR MEDIATION OF ECONOMIC ASPECTS OF FAMILY MATTERS

**[Approved by the Supreme Court;
Promulgated By Directive #1-07]**

Introduction

Mediation is a dispute resolution process that utilizes an impartial third party to facilitate dialogue among parties to help them reach a mutually acceptable settlement of their pending issues. The mediator does not make decisions regarding the outcome of a case, but rather provides parties the opportunity to (1) express feelings and diffuse anger, (2) clear up misconceptions (3) determine underlying interests or concerns, (4) find areas of agreement, and, ultimately, (5) incorporate a mutually agreed upon solution into a written agreement.

The New Jersey Supreme Court Committee on Complementary Dispute Resolution (CDR) developed the Economic Mediation Pilot Program, which began on a pilot basis in 1999. The pilot eventually was in place in seven counties: Atlantic, Bergen, Burlington, Morris, Ocean, Somerset, and Union. After assessing the positive outcomes of the pilot, the Supreme Court in June 2006 approved the program for statewide implementation. The Court thereafter approved these Program Guidelines, to be effective immediately, in January 2007.

Program Overview

The economic mediation program provides a vehicle for applying complementary dispute resolution techniques to help resolve economic aspects of dissolution (divorce) actions. Additionally, non-dissolution cases also may be referred at the discretion of the Family Presiding Judge. All such cases referred to economic mediation must first be referred to the Matrimonial Early Settlement Panel (MESP) program. To expedite settlement, parties may voluntarily request mediation during any phase of their case. No case shall be referred to mediation if there is a temporary or final restraining order in effect pursuant to the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.). Unless good cause is shown why a particular matter should not be referred to the Economic Mediation Program, litigants will be ordered to attend this program or another post-MESP Complementary Dispute Resolution ("CDR") event. Parties are required to participate in post-MESP mediation for not more than two hours, usually consisting of one hour of preparation time by the mediator and one hour of time for mediation. The parties will not be charged a fee for the mandatory first two hours of mediation. Participation after the first two hours shall be voluntary. If parties consent to continue the

mediation process, the Order of Referral to Economic Mediation will determine the distribution of costs for each party for the additional hours. If the parties choose to participate in an alternate post-MESP CDR event, the fee shall be set by the individual conducting the session. The parties shall share the cost equally unless otherwise determined by the court. The parties are required to participate in at least one session of such alternate post MESP CDR event.

Designation of Mediator

A joint credentials committee comprised of representatives from the Supreme Court Committee on Complementary Dispute Resolution and the Supreme Court Family Practice Committee will be responsible for reviewing and approving all mediator applications. Applicants must complete an application form posted on the Judiciary's Internet website (www.judiciary.state.nj.us or www.njcourtsonline.com). Mediators who meet the training requirements set forth in Court Rule 1:40-12, and any other approved criteria developed by the Family Court Programs Subcommittee on the Committee on Complementary Dispute Resolution will be added to the Roster of Approved Mediators. The roster will be maintained by the Administrative Office of the Courts and is accessible on the Judiciary's Internet web site.

Mediator Qualifications and Training

Qualified mediators of economic issues in family disputes must meet one of the following sets of experiential requirements and must also have completed the required training set forth below:

Experience

(1) Attorneys
   a. Juris Doctor (or equivalent law degree)
   b. Admission to the bar for at least seven years
   c. Licensed to practice law in the state of New Jersey
   d. Practice substantially devoted to matrimonial law

(2) Non-Attorneys
   a. Advanced degree in psychology, psychiatry, social work or allied mental health field, business, finance, or accounting, or a CPA
   b. At least seven years experience in the field of expertise; and
   c. Licensed in New Jersey if required in the field of expertise.

(3) Any retired Superior Court judge with experience in handling dissolution matters.

Training

Qualified mediators (1) shall have completed 40 hours of training in family mediation approved by the Administrative Office of the Courts, or (2) shall have completed a minimum of 25 hours of mediation training with the commitment to complete the remaining 15 hours of specialized training within one year following addition to the roster if mediators.

Program Operations

Pursuant to Rule 5:5-7, when a case is referred to mediation, the order of referral shall provide that the litigants may select a mediator from the statewide-approved list of mediators or select an individual to conduct a post-MESP CDR event. Litigants shall be permitted to select another individual who will conduct a post-MESP mediation or other alternate CDR event, provided that such selection is made within seven days.

Rules 1:40-4 and 1:40-5 govern the mediation process. These rules provide that mediation must begin with an opening statement by the mediator describing the purpose of mediation and the procedures used in the process. Counsel for the parties are encouraged to attend the first mediation session and may attend any subsequent session on notice to the other party or counsel and the mediator. In mediation of economic aspects of Family actions, parties are required to provide accurate and complete information to the mediator and to each other, including but not limited to tax returns, Case Information Statements, and appraisal reports. The court may, in the Mediation Referral Order, stay discovery and set specific times for completion of mediation. The rules further provide that attorneys and parties have the obligation to participate in the mediation process in good faith and in accordance with program guidelines.

Timing of Referral

Parties are referred to economic mediation or other alternate CDR event following the unsuccessful attempt to resolve their issues through MESP. At the conclusion of the MESP process, parties are directed to confer with appropriate court staff to expedite the referral to economic mediation. The following procedures should be followed:

1. Parties may conference with the judge or the judge's designee.
2. Court staff will explain the program to the parties and/or their attorneys.
3. Parties will be provided with the roster of approved mediators for selection.
4. Once a mediator has been selected, contact is immediately attempted by phone to secure acceptance by the mediator and the date of initial appointment. If court staff cannot contact the mediator for confirmation, the order of referral will reflect that the mediator and the date of initial appointment are tentative

until confirmation is secured. Staff will attempt to confirm within 24 hours and send an amended order to the parties and/or their attorneys.

5. If a mediator notifies the court that he or she cannot take on any additional cases, court staff will convey that to the parties at the time of selection so that an alternate mediator can be selected.
6. The Economic Mediation Referral Order shall be prepared reflecting the name of the mediator, listing the financial documents to be shared between the parties and with the mediator, indicating the allocation of compensation by each party if mediation extends past the initial two hours, stating the court's expectation that the parties will mediate in good faith, defining the mediation time frame, and the identifying the next court event and corresponding date of that next court event.
7. The referral order is to be signed by the judge and provided to the parties before they leave the court house. Tentative orders are replaced by amended orders with confirmed appointments and faxed to the parties and/or their attorneys the next day, if necessary.
8. If the parties are unable to agree upon and select a mediator, the judge will appoint one. Staff should follow the above procedures as applicable.
9. Referral to economic mediation is recorded in the Family Automated Case Tracking System (FACTS).

Mediator Conflict of Interest

If after entry of the Order of Referral the court is advised by the mediator, counsel, or one of the parties that a conflict of interest exists, the court will reassign the case to a different mediator. In such situations, the parties will be provided the opportunity to select a replacement mediator from the roster or the court may appoint one to the case. An Amended Order of Referral will be prepared and provided to the new mediator and to the parties. The appropriate referral procedures should be completed. All data should be entered in FACTS.

Adjournments

Adjournments specific to the mediation process are handled between the mediator, the parties, and/or attorneys, so long as the adjournment does not cause the case to exceed the return date to the court. If an adjournment would cause the case to exceed the return date to the court, a written request to the court is required. The request should be forwarded for consideration to the judge who has responsibility for the case or the judge's designee.

Termination of Mediation

Pursuant to Rule 1:40-4(f), the mediator or a participant may terminate the session if (1) there is an imbalance of power between the parties that the mediator cannot overcome, (2) a party challenges the impartiality of the mediator, (3) there is abusive behavior that the mediator cannot control, or (4) a party continuously resists the mediation process or the mediator.

The mediator shall terminate the session if (1) there is a failure of communication that seriously impedes effective discussion, (2) the mediator believes a party is under the influence of drugs or alcohol, or (3) the mediator believes continued mediation is inappropriate or inadvisable for any reason.

Completion of Mediation

Mediators must promptly complete and submit to the court a Completion of Mediation form. A copy of the Completion of Mediation form must accompany the referral form given to the mediator during initial contact, with instructions on how to fill out the Completion of Mediation form.

Tracking of Mediation

All referrals and data pertaining to the results of mediation must be entered in FACTS. Staff must follow the FACTS Differentiated Case Management program data entry guidelines. Follow-up with mediators may be required to obtain the Mediation Completion Form.

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STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS

[As Adopted by the Supreme Court January 4, 2000]

Preamble, Scope and Purpose

These standards of conduct are intended to instill and promote public confidence in the mediation process and to be a guide to mediators in discharging their professional responsibilities. Public understanding and confidence are vital to a strong mediation program. Persons serving as mediators are responsible for conducting themselves in a manner that will merit the confidence of parties, members of the bar, and judges. These standards apply to all mediators when acting in state court-connected programs.

Definition of Mediation

Mediation is a process in which an impartial third party neutral (mediator) facilitates communication between disputing parties for the purpose of assisting them in reaching a mutually acceptable agreement. Mediators promote understanding, focus the parties on their interests, and assist the parties in developing options to make informed decisions that will promote settlement of the dispute. Mediators do not have authority to make decisions for the parties, or to impose a settlement.

I. Principle Of Self-Determination

A mediator shall proceed with the understanding that mediation is based on the fundamental principle of self-determination by the parties. Self-determination requires that the mediation process rely upon the ability of the parties to reach a voluntary agreement without coercion.

A. A mediator shall inform the parties that mediation is consensual in nature, that the mediator is an impartial facilitator, that any party may withdraw from mediation at any time as specified in R.1:40-4(a) through (e), and that the mediator may not impose or force any settlement on the parties.

B. The primary role of a mediator is to facilitate a voluntary resolution of the dispute, allowing the parties the opportunity to consider all options for settlement.

C. Because a mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, a mediator should make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. Impartiality

A mediator shall always conduct mediation sessions in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall only mediate a dispute in which there is reason to believe that impartiality can be maintained. When a mediator is unable to conduct the mediation in an impartial manner, the mediator must withdraw from the process.

A. When disputing parties have confidence in the impartiality of the mediator, the quality of the mediation process is enhanced. A mediator shall therefore avoid any conduct that gives the appearance of either favoring or disfavoring any party.

B. A mediator shall guard against prejudice or lack of impartiality because of any party's personal characteristics, background, or behavior during the mediation. A mediator shall advise all parties of any circumstances bearing on possible bias, prejudice, or lack of impartiality.

III. Conflicts Of Interest

A mediator must disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator may proceed with the mediation only if all parties consent to mediate. Nonetheless, if the mediator believes that the conflict of interest casts doubt on the integrity of the mediation process, the mediator shall decline to proceed.

A. A mediator shall always avoid conflicts of interest when recommending the services of other professionals. If requested, a mediator may provide parties with information on professional referral services or associations that maintain rosters of qualified professionals.

B. (1) Related Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office, shall not subsequently represent or provide professional services for any party to the mediation proceeding in the same matter or in any related matter.
(2) Unrelated Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office, shall not subsequently represent or provide professional services for any party to the mediation proceeding in any unrelated matter for a period of six months, unless all parties consent after full disclosure.

IV. Competence

A mediator shall only mediate when the mediator possesses the necessary and required qualifications to satisfy the reasonable expectations of the parties.

A. A mediator appointed by the court shall have training and education in the mediation process, and shall have familiarity with the general principles of the subject matter involved in the case being mediated.

B. A mediator shall have information available for the parties regarding the mediator's relevant training, education, and experience.

C. A mediator has an obligation to continuously strive to improve upon his or her professional skills, abilities, and knowledge of the mediation process.

V. Confidentiality

To protect the integrity of the mediation, a mediator shall not disclose any information obtained during the mediation unless the parties expressly consent to such disclosure, or unless disclosure is required by applicable rules or law. A mediator shall not otherwise communicate any information to the court about the mediation, except: (1) whether the case has been resolved in whole or in part; or (2) whether the parties or attorneys appeared at a scheduled mediation.

Consistent with Rule 1:40-4, a mediator shall:

A. Preserve and maintain the confidentiality of all mediation proceedings and advise the parties of the Rule's provisions;

B. Prior to the commencement of mediation, reach agreement with the parties concerning the limits and bounds of confidentiality and non-disclosure;

C. Conduct the mediation so as to provide the parties with the greatest protection of confidentiality afforded by court rule and mutually agreed to by the parties;

D. Maintain confidentiality in the storage and disposal of all records and remove all identifying information when such information is used for research, training, or statistical compilations, except minimum identifiers necessary to link research documents; and

E. Not use confidential information obtained in a mediation outside the mediation process.

VI. Quality Of The Process

A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. To further these goals, a mediator shall:

A. Work to ensure a quality process and to encourage mutual respect among the parties, including a commitment by the mediator to diligence and to procedural fairness;

B. Assess the case and determine that it is appropriate and suitable for continuing the mediation;

C. Provide adequate opportunity for each party in the mediation to participate fully in the discussions, and allow the parties to decide when and under what conditions they will reach an agreement or terminate the mediation;

D. Not unnecessarily or inappropriately prolong a mediation session if it becomes apparent to the mediator that the case is unsuitable for mediation, or if one or more parties is unwilling or unable to participate in the mediation process in a meaningful manner;

E. Only accept cases when the mediator can satisfy the reasonable expectations of the parties concerning the timetable for the process, and not allow a mediation to be unduly delayed by the parties or their representatives; and

F. Where appropriate, recommend that parties seek outside professional advice or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes.

VII. Fees For Service

A mediator shall fully disclose and explain any applicable fees and charges to the parties. Payment for mediation services shall be in accordance with Rule 1:40-4 of the Rules of Court.

A. Fees charged by the mediator shall be reasonable, taking into account, among other things, the subject area and the complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community.

B. A mediator shall provide parties with sufficient information about fees in writing at the outset of a mediation.

C. A mediator shall not enter into a fee agreement in which the amount of the fee is contingent upon the result of the mediation or the financial amount of the settlement.

Source: Standards adopted by Supreme Court January 4, 2000.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(ADOPTED AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

i. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

ii. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

iii. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be

seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

iv. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

v. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

vi. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a

scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these

Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

The New Jersey Association of Professional Mediators
Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators, the source document for these Standards, was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

The Model Standards of Conduct for Mediators as revised herein was adopted by the Board of Directors of the New Jersey Association of Professional Mediators on January 31, 2007.

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

The ethical practice of mediation is a hallmark of the New Jersey Association of Professional Mediators. If you have a question about our Standards, or if you feel one of our members has acted in an unethical manner, you can contact the NJAPM Ethics Review Board by e-mail to ethics@njapm.org or by mail to The NJAPM Ethics Review Board c/o our Association Office. All ethics matters are handled in confidence. In addition to the New Jersey Association of Professional Mediators Standards of Conduct for Mediators below, the NJAPM has policy statements and the address of our Association office available on our website at www.njapm.org.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the Parties to the dispute.

Mediation serves various purposes, including providing the opportunity for Parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements.

Note on Construction

The Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

Definitions.

"Party" means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

"Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for strong reasons and in light of the careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific time frames when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of mediation, including some matters covered by these Standards, may also be affected by applicable law, such as New Jersey's Uniform Mediation Act, N.J.S.A. 2A:23-1, et seq., court rules, regulations, other applicable professional rules, mediation rules to which the Parties have agreed and other agreements of the Parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, these Standards have been adopted by the respective sponsoring entities, and by The New Jersey Association of Professional Mediators. Mediators should be aware that the Standards may be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A Mediator shall conduct a mediation based on the principle of Party self-determination. Self-determination is the act of coming to a voluntary decision in which each Party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

B. Although Party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these standards, and the recognition that in some cases, such as court-referred matters, neither the Parties nor the mediator can make certain choices concerning the process or range of outcomes.

C. A mediator cannot personally ensure that each Party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the Parties aware of the importance of consulting other professionals to help them make informed choices.

D. A mediator shall not undermine Party self-determination by any Party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and should try to avoid conduct that gives the appearance of partiality.

1. A mediator shall guard against partiality or prejudice based on a participant's personal characteristics, background, values and belief, or performance at a mediation.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that would be likely to raise a question as to the mediator's actual or perceived impartiality.

C. If at any time, a mediator realizes that s/he is unable to conduct a mediation in an impartial manner, and that no reasonable effort is likely to ameliorate the problem, then the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest and should avoid the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any Party or other Persons, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation except as provided for in Paragraph III E below.

D. If a mediator learns of any fact after accepting a mediation that raises a question with respect to that mediator's service, creating a potential or actual conflict of interest, then the mediator shall disclose it as quickly as practicable. After disclosure, if all Parties agree, the mediator may proceed with the mediation except as provided for in Paragraph III E below.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation, regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the Parties or other Persons in any matter that would reasonably raise questions about the integrity of the mediation. When, following a mediation, a mediator develops personal or professional relationships with Parties, other individuals or organizations involved in the mediation, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and the subsequent services offered when determining whether the relationships might reasonably create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator reasonably believes s/he has the necessary competence to satisfy the reasonable expectations of the Parties.

1. Any person may be selected as a mediator, provided that the Parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understanding, and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively. At the request of any Party, a mediator shall disclose his or her qualifications to mediate the dispute.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the Parties written information on the mediation process, and should have available for the Parties information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the Parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation unless otherwise agreed to by the Parties or required by applicable law.

1. If the Parties agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator shall not communicate to any non-participant information about how the Parties acted in the mediation. A mediator may report, if required, whether Parties appeared at a scheduled mediation and whether or not the Parties reached a resolution.

3. If a mediator participates in the teaching, research or evaluation of mediation, the mediator shall protect the anonymity of the Parties and abide by their reasonable expectations regarding confidentiality.

B. Unless required to do so by law, a mediator who meets with any Party in private session during a mediation shall not convey directly or indirectly to any other Person, including any other Party, information that was obtained during that private session without the consent of the disclosing Person.

C. A mediator shall promote understanding among the Parties of the extent to which they will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstances of a mediation, the Parties may have varying expectations regarding confidentiality that a mediator should address. The Parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, Party participation, procedural fairness, Party competency and mutual respect among all participants.

1. A mediator shall agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator shall accept cases only when the mediator can satisfy the reasonable expectation of the Parties concerning the timing of a mediation.

3. Except as may be required by law, the presence or absence of persons at a mediation depends on the agreement of the Parties and the mediator.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The practice of mediation is a discipline separate and distinct from other professions; however, mediation may also be offered as a service by other professionals. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7 A mediator may recommend, when appropriate, that Parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other process.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the Parties. Before providing such service, a mediator shall inform the Parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a Party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty in participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the Party's capacity to comprehend, participate and exercise self-determination.

11. The mediator or a Party may terminate the session if there is an imbalance of power between the Parties that the mediator cannot overcome; a Party challenges the impartiality of the mediator; there is abusive behavior that the mediator cannot control, or a Party continuously resists the mediation process or the mediator.

12. The mediator shall terminate the session if there is a failure of communication that seriously impedes effective discussion; the mediator believes a Party is under the influence of drugs or alcohol; or the mediator believes continued mediation is inappropriate or inadvisable for any reason.

B. If a mediator is made aware of domestic abuse or violence among the Parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation, and reporting such conduct as may be required by law.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITING

A. A mediator shall be truthful and not misleading at all times, including when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator shall not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator shall only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a Party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of Parties or Persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each Party or each Party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with mediation.

1. If a mediator charges a fee, the mediator should develop the fee in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediator services.

2. A mediator's fee arrangement shall be in writing unless the Parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator shall not enter into a fee arrangement that is contingent upon the result of the mediation or amount of settlement.

2. While a mediator may accept unequal fee payments from the Parties, a mediator shall not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in a impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Helping newer mediators through training, mentoring and networking.

6. Participating in mediation membership organizations and supporting organizations that promote legitimate use of mediation and other forms of appropriate dispute resolution.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

State of New Jersey **MEDIATION CASE INFORMATION FORM** **For Mediation of Economic Aspects of Family Law Cases**	For Office Use Only Date Received: Date Entered:

Directions: This form is to be completed by the mediator when mediation is concluded or the case is returned to court.

CASE DOCKET NUMBER	CASE NAME	NAME OF MEDIATOR

OUTCOME

- ☐ mediation held / full agreement on all issues
- ☐ mediation held / some issues still pending
- ☐ mediation held / no agreement
- ☐ no mediation held / parties settled case before mediation session
- ☐ no mediation held / party failed to attend

DATE CASE ASSIGNED TO MEDIATOR	DATE OF INITIAL MEDIATION SESSION	DATE OF FINAL MEDIATION SESSION
NUMBER OF MEDIATION SESSIONS	**NUMBER OF HOURS FOR PREPARATION**	**NUMBER OF MEDIATION HOURS**
DID THE ATTORNEYS/PARTIES SUBMIT PROPER CASE SUMMARIES? ☐ yes ☐ no	**WERE THE ATTORNEYS/PARTIES PREPARED FOR THE MEDIATION SESSIONS?** ☐ yes ☐ no	**DID THE PARTIES PARTICIPATE IN THE MEDIATION SESSIONS?** ☐ yes ☐ no

PLEASE RETURN TO: FAMILY DIVISION **OR FAX TO:**

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PREPARED BY COURT:

	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	**CHANCERY DIVISION-FAMILY PART**
	_____ COUNTY
vs.	**DOCKET NO. F__- _____**
	Civil Action
Defendant.	**ORDER OF REFERRAL TO POST-MESP MEDIATION PROGRAM**

This matter having been opened to the court by Case Management Conference; _____, appearing for plaintiff, and _____, appearing for defendant; and good cause having been shown;

IT IS on this _____ day of _____ 20____ ,

ORDERED AS FOLLOWS:

1. This Order is entered pursuant to R.1:40-5(b).

2. The above-captioned matter is hereby referred to the Post-MESP Mediation Program pursuant to R.5:5-6.

3. Post-mediation next event:

_____; Date:_____

4. _____ is designated as the mediator. The mediator was selected from the statewide approved list or is a person chosen by the parties to conduct the mediation at the parties' discretion. The mediator shall serve on a *pro bono* basis for the initial two hours of service, which includes reasonable preparation time (one hour), and the first mediation session (one hour). After the first two hours, the mediator shall be compensated at the mediator's hourly rate, together with reasonable expenses. The mediator's fee shall be paid by the parties as follows: plaintiff _____ % and defendant _____ %. Payment shall be made as billed, unless other arrangements are made with the mediator. Any outstanding bills shall be paid within ____ days of receipt. Either party may opt out of the mediation process after the first two hours.

5. After the first session ordered herein, the date(s), time(s), and place(s) of subsequent mediation session(s) shall be set by the mediator selected or appointed in this matter.

6. The appearance of attorneys at mediation shall be as agreed to by the parties in consultation with the mediator. The court expects and requires all litigants and their attorneys (if applicable) to participate in the mediation sessions in good faith. The parties shall cooperate in providing accurate and complete information to the mediator including, but not limited to, tax returns, Case Information Statements and appraisal reports.

7. Termination of mediation generally shall be governed by R. 1:40-4(f).

8. Upon termination of the mediation process, the mediator shall promptly report to the court in writing as to whether or not the case is settled. If the case is not fully settled, the mediator shall within fourteen days provide the court and the parties notice of which issues are settled and which issues remain open.

9. Unless otherwise agreed by the parties, and subject to R.1:40-4(c), all mediation proceedings shall be confidential and non- evidential. No verbatim record shall be made thereof.

_____

Judge, Superior Court of New Jersey

FIRST MEDIATION SESSION: * _____

(Date & Time)

* Please provide mediator with parties' Case Information Statements and ESP Statements prior to the first mediation session.

MEDIATOR NAME, ADDRESS AND TELEPHONE NUMBER:

_____

_____

_____

_____

Telephone Number:_____

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Criteria for Admission to the Roster of Mediators for Economic Aspects of Family Law Cases

A Joint Credentials Committee of the Supreme Court Committee on Complementary Dispute Resolution and the Supreme Court Family Practice Committee will review all applications. All criteria must be met for approval.

Mediation Training
Successful completion of 40 hours of divorce mediation training approved by the Joint Credentials Committee. A copy of the certificate of completion must be included with the application.

Education/Professional Experience

1. **Attorneys**
   a. Juris Doctor (or equivalent law degree);
   b. Admission to the Bar at seven years;
   c. Licensed to practice law in New Jersey; and
   d. Practice substantially dedicated to matrimonial law.

or

2. **Non-Attorneys**
   a. Advanced Degree in Psychology, Psychiatry, Social Work or Allied Mental Health field, Business, Finance, or Accounting or a CPA;
   b. At least seven years of experience in the field of expertise; and
   c. Licensed in New Jersey, if required, in the field of expertise.

Mediation Mentorship
After receiving a conditional approval, applicants must complete a mentorship. **The mentorship must be completed with an approved Family Part qualified mentor mediator**. The mentorship must be a minimum of 5 hours in at least two cases. The mentorship should not be completed until a conditional approval has been issued.

Annual Continuing Education
Following final approval for admission to the roster, attendance at a minimum of four (4) hours of annual continuing education is required as set forth under *Rule* 1:40-12(b)(2).

New Jersey Judiciary

Application for Admission to Roster of Mediators for Economic Aspects of Family Law Cases

Last Name	First Name	Middle Name

Firm/Business Name

Firm/Business Address	Email

City	State	Zip Code	Telephone Number	Fax Number

Degrees Attained (Post High School)	Year	Area of Concentration

Name of Institution	Professional License(s)	Admission Date	License Number

Have You Ever Been Disciplined In Your Profession? (If Yes, Attach Explanation) ☐ Yes ☐ No	Year of Admission to Professional Practice	Number of Years of Experience	Bar Admission Year New Jersey: _____ Other States: _____

For Attorneys: Percent of Practice Devoted to Matrimonial Law	Certified Matrimonial Attorney ☐ Yes ☐ No	Primary Counties of Practice

For Non-Attorneys: Percent of Time Devoted to Family Matters	Primary Counties of Practice

Mediation Training (attach additional sheet if necessary)

Provider(s)	Course Title	Date(s)	Hours

Number of Years Doing Mediation	Number of Mediations in Past 5 Years	Hourly Fee $	Do You Have Malpractice Insurance? ☐ Yes ☐ No

I certify that the foregoing statements made by me are true and that I am in good standing in my profession.

Date _____ Signature _____

Please attach the following:

1. Resume or Curriculum Vitae
2. Description of mediation training courses and **copy of official training certificate**
3. Descriptive paragraph (please provide a maximum of 50 words about your mediation and other relevant professional experience that will be transferred directly to the roster if you are accepted)
4. Subject area(s) of mediation experience
5. List of professional organizations in which you are an active member

Return the above five items and this form to:

Joanne M. Dietrich
Family Division
Administrative Office of the Courts PO Box 983
Trenton, NJ 08625

New Jersey Judiciary
Family Practice Division

Economic Mediation Roster Change/Update Form

Name: _____ Telephone: _____

Date: _____ Attorney ID: _____

Counties Where Currently Listed: _____

_____

☐ **Please Check to be Removed From Roster**

Please provide changes/updates below. Do not include the information unless you are making changes.

Address: _____

_____

_____

Telephone: _____ Fax: _____

Email address: _____

Website: _____

Additional Counties to be Listed: _____

_____

Hourly Fee: _____

Email your completed form to **AOCFamily.Mailbox@njcourts.gov**.

You may also fax your completed form to
Economic Mediation Program Coordinator at 609.376.3021.

Revised: 11/2017, CN: 11734

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NOTICE TO THE BAR

Family - Guidelines and Certification for the Mentoring Requirement of the Family Economic Mediation Program

Rule 1:40-12(b) requires all Family Part economic mediators who want to be included on the Judiciary's roster of economic mediators, unless otherwise exempted by the rule, to complete at least five hours of being mentored by a Family roster mediator in at least two cases in the Family Part. This mentoring component is in addition to the 40-hour training program component of the court rule and must be fulfilled after the completion of the training requirement and the application approval process.

Attached are the Guidelines for the Mentoring Requirement of the Family Economic Mediation Program (Guidelines) and a Certification of Completion of Mentoring Requirement (Certification) (CN 12055), as approved by the Supreme Court.

Following completion of the required mentoring sessions, the economic mediator applicant must certify her/his compliance with that requirement by completing and submitting the attached Certification to: Administrative Office of the Courts, Family Practice Division, Richard J. Hughes Justice Complex, 7th Floor North, P.O. Box 983, Trenton, NJ 08625-0983, or via fax to: 609-984-0067. This Certification form is available on the Judiciary's website at: http://www.judiciary.state.nj.us.

Questions regarding this Notice or the Family Economic Mediation Program may be directed to the AOC Family Practice Division by at 609-984-4228.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: December 22, 2016

Certification of Completion of Mentoring Requirement
(Rule 1:40-12)

Name _____

Address: _____

_____

City/Town: _____ State_____ Zip Code _____

Telephone: _____

Email Address: _____

I, _____, of full age, hereby certify that I have completed the mentoring requirements pursuant to R. 1:40-12. Specifically, I have completed:

- ☐ At least five hours being mentored by a Family roster mentor mediator in at least two cases in the Family Part;
- ☐ I was not (and will not) receive monetary compensation during the mentoring process; and
- ☐ I have met with the approved Family Part roster mentor mediator before and after the mentoring sessions I observed.

1. Name of Case Observed: _____ Venue of Case Observed: _____

   Number of hours mentored:_____

   Name of Mentor: _____

   Address: _____

   _____

   City/Town: _____ State_____ Zip Code _____

   Telephone: _____

   Email Address: _____

Certification of Completion of Mentoring Requirement

2. Name of Case Observed: _____ Venue of Case Observed: _____

   Number of hours mentored:_____

   Name of Mentor: _____

   Address: _____

   _____

   City/Town: _____ State_____ Zip Code _____

   Telephone: _____

   Email Address: _____

3. Name of Case Observed: _____ Venue of Case Observed: _____

   Number of hours mentored:_____

   Name of Mentor: _____

   Address: _____

   _____

   City/Town:_____ State_____ Zip Code _____

   Telephone:_____

   Email Address: _____

I certify that the statements made above are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment by the Court.

_____ _____

Signature Date

Guidelines for the Mentoring Requirement of the Family Economic Mediation Program (Guidelines Promulgated December 22, 2016)

1. The following requirements must be met for a mediator to be included on the Judiciary's Family Part Economic Mediator roster. Economic Mediator applicants (applicants) shall complete the process in the following sequence:

    1. Complete a 40-hour training program complying with the requirements of the court rules.
    2. Complete the application process for admission to the Judiciary roster of mediators.
    3. Upon application approval, applicants must be mentored by an approved Family Part roster mentor mediator (mentor) for a minimum of five hours in at least two cases in the Family Part. The Family Part Economic Mediation roster includes those mediators who have been approved as mentors. The applicants must select a mediator from the roster who has been designated as a mentor.

2. In the mentored cases, it is the obligation of the mentor to inform the litigants prior to the mediation that a second mediator (the applicant) will be in attendance and why. If either party objects to the presence of the second mediator, the applicant may not attend the mediation. In all mentored cases, the mentor conducts the mediation, while the applicant observes.

3. Applicants are provided with the same protections as the mentor mediator under the Uniform Mediation Act.

4. Prior to the observation by the applicant, the mentor shall meet with the applicant to discuss the Family mediation process. The mentor shall provide the applicant with submissions by the parties. As part of the mentoring, the mentor shall again meet with the applicant after the session(s) to discuss the mediation as well as any other questions regarding the process. These meetings are in addition to the five hours of observation.

5. The applicant **shall not** be monetarily compensated for participating in this mentoring process.

6. Following completion of the required mentoring sessions, the applicant shall certify her/his compliance with that requirement by completing the Certification of Completion of Mentoring Requirement form (Certification) (CN 12055). This Certification shall be submitted to the Administrative Office of the Courts, Family Practice Division, Richard J. Hughes Justice Complex, 7th Floor North, PO Box 983, Trenton, NJ 08625-0983, or via fax to: 609-984-0067.

7. The applicant will not be added to the Judiciary's Family Economic Mediation roster unless and until all of the requirements set forth above have been completed.

MEDIATOR COMPLAINT REVIEW PROCESS

I. SUBMISSION OF COMPLAINTS

All complaints regarding mediators must be submitted in writing to the Advisory Committee on Mediator Standards (Committee) specifying the conduct about which the person is complaining. Complaints concerning fee disputes will not be reviewed by the Committee. Complaints should be sent to:

Manager, CDR Programs
Administrative Office of the Courts
Programs and Procedures Division
Hughes Justice Complex
P.O. Box 988
Trenton, NJ 08625

II. REGISTRY OF COMPLAINTS

The Manager of Complementary Dispute Resolution (CDR) Programs for the Administrative Office of the Courts (Manager), as staff to the Committee, shall maintain a registry of all complaints filed against a mediator.

III. INFORMAL RESOLUTION

The Manager shall acknowledge receipt of the complaint in writing to the complaining party, provide notice of the complaint to the mediator and provide a copy of the complaint to the Chair and members of the Committee. After review by the Committee, the Manager or a member of the Committee will seek to resolve the complaint informally unless the Committee determines otherwise.

IV. COMMITTEE REVIEW

If the Manager or Committee member is unable to resolve the complaint informally, the Committee shall determine the appropriate course of action to be taken, which may include the following:

A. That the complaint does not warrant further action.

B. That the mediator be provided with a copy of the complaint with a request for a written response and advised that a copy of the response will be provided to the complaining party.

C. That upon review of the mediator's response, the Committee may request additional information from the complainant, the mediator or other party(ies).

D. That upon review of the papers, no further action shall be taken or that action should be taken against the mediator.

V. REMEDIAL ACTIONS

Upon completion of its investigation, the Committee may require, as a condition of remaining on the roster, that the mediator take such action as it deems appropriate, including but not limited to the following:

- Attending additional training; observing other mediators; or being mentored by other mediators currently on the roster.
- The Committee may determine that the mediator should not conduct any mediation until the completion of the required remedial actions.
- The Committee may determine that the mediator should be removed from the roster or terminated from providing mediation services for the courts.

VI. APPEAL

The mediator may appeal a Committee decision to be removed from the roster, or be prohibited from providing mediation services for the courts to the Assignment Judge in the Vicinage where the grievance originated within thirty (30) days of receiving notice of such a decision. A copy of the appeal shall be provided to the Manager. The Assignment Judge, or designee, shall appoint an ad hoc panel of two mediators currently on the roster, at least one of which shall be an attorney who shall serve as the Committee's Chair to hear the appeal. The determination of the panel shall be final, with notice of its decision being provided to the Assignment Judge and a copy being provided to the Manager.

Getting to Yes
Negotiating Agreement Without Giving In

Richard H. Steen, Esq.
ricksteen@adrlawfirm.com

The Elements of Principled Negotiations

- Focus on the Parties Interests, not their Positions
- Invent Options for Mutual Gain
- Use Objective Criteria and Independent Standards
- Separate the People from the Problem
- Know your Alternatives

Focus on Interests

- Problem is not conflicting positions - but conflicting needs, desires, concerns and fears
  - You decide on your position
  - You do so based on your interests
  - Determine interests first – proposals later
  - Figure out their interests as well as yours
  - Identify shared and multiple interests

Inventing Options for Mutual Gain

- Brainstorming – Create options first
  - Determine broad array of possible solutions that meet the interests of all parties
  - Work together if possible
  - Options are not criticized or evaluated
  - Exploring options does not involve a commitment to any of them
  - Dovetail differing interests for mutual gain

Objective Criteria and Independent Standards

- Use independent standards to resolve conflicting interests
- Research standards as part of preparation
- Discuss the most relevant and appropriate standards and criteria
- Standards can persuade parties of the fairness (or unfairness) of an option

Separate the People from the Problem

- Use people techniques
  - Acknowledge emotions (yours and theirs)
  - Distinguish perceptions from facts
  - Consider how the other side sees things
  - Communication
    - Speak for yourself
    - Avoid attribution
    - Listen actively and acknowledge their communication

Know your Alternatives

- Prepare for the negotiation being unsuccessful
  - BATNA – Best Alternative to a Negotiated Agreement
  - Explore and understand alternatives
  - Improve your BATNA
  - Evaluate their BATNA
    - Is it as good as they think
    - Can you change it

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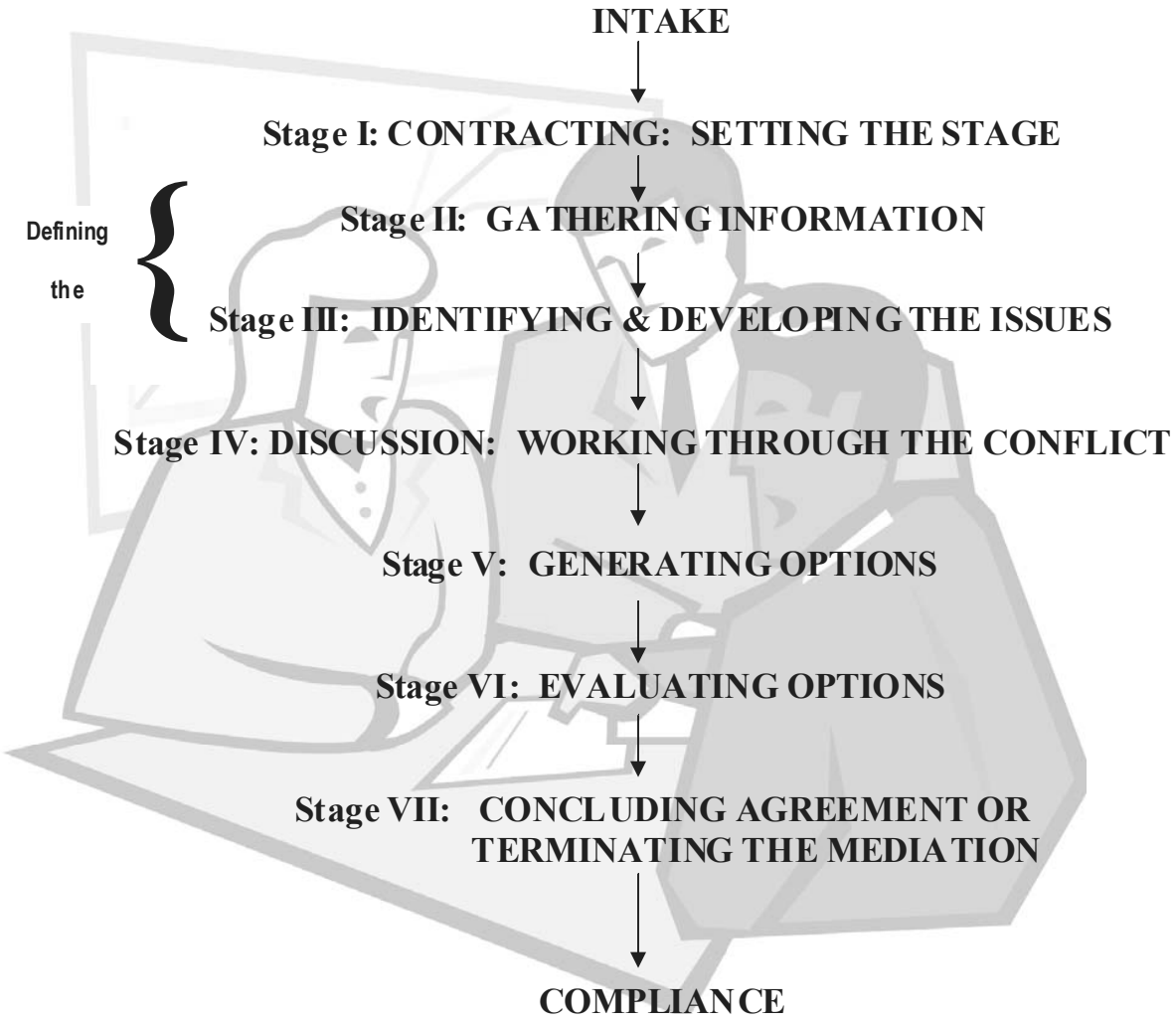
THE MEDIATION PROCESS



STAGES OF THE MEDIATION PROCESS

Pre-Mediation

- Referral, Intake, and Scheduling
- Prepare room, papers, co-mediation plan (where applicable), etc.

Stage I: CONTRACTING: SETTING THE STAGE

Opening Statement

- Welcoming and Introducing
- Explaining process of mediation and role of mediator
- Exploring motivation and goals of parties
- Discussing guidelines and/or expectations of the process

Stage II: GATHERING INFORMATION

- Each party is given an opportunity to present his or her perspective of the situation
- The mediator(s) summarizes each party's view and restates the content into specific impartial language confirming understanding
- The mediator(s) acknowledges the parties feelings
- Legal Context (particularly when Lawyers are present)

Stage III: IDENTIFYING AND DEVELOPING THE ISSUES

- Identify areas of agreement and disagreement
- Organize issues to be resolved (which becomes the Agenda)
- The mediator(s) helps the parties to define or 'frame" issues that need to be resolved in neutral language

Stage IV: DISCUSSION: WORKING THROUGH THE CONFLICT

- Mediator(s) seeks to understand differing views
- The mediator(s) helps the parties to clarify needs & interests.
- Understanding the Law
- Mediator(s) helps parties to understand each other

Stage V: GENERATING OPTIONS

- The mediator(s) helps the parties to think of all the possible ways the problem might be resolved
- The mediator(s) seeks to help create value ("expanding the pie")
- Brainstorming & Developing Options

Stage VI: EVALUATING OPTIONS

- The mediator(s) helps the parties to find a solution that is well informed, efficient, and stable, and that each party can accept
- The mediator(s) helps the parties to evaluate options in light of their interests & the reality they face.

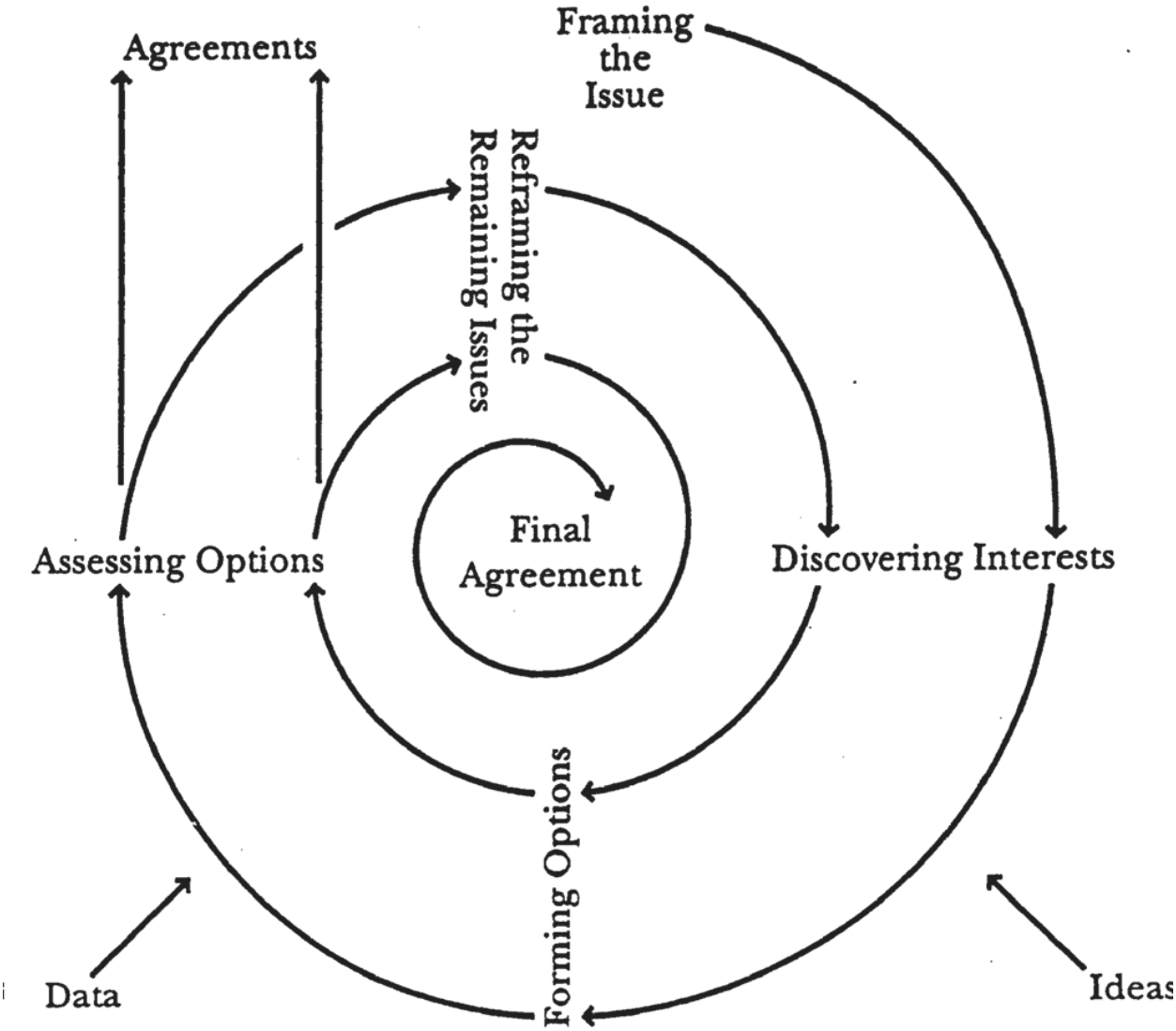
Stage VII: CONCLUDING AGREEMENT OR TERMINATING THE MEDIATION

- The mediator(s) helps the parties craft an agreement that they can understand and that represents the parties' solution
- Review by Lawyers
- Execution & Implementation

Or

- The mediator(s) thanks the parties for trying, and discusses with the parties alternatives for resolving the conflict

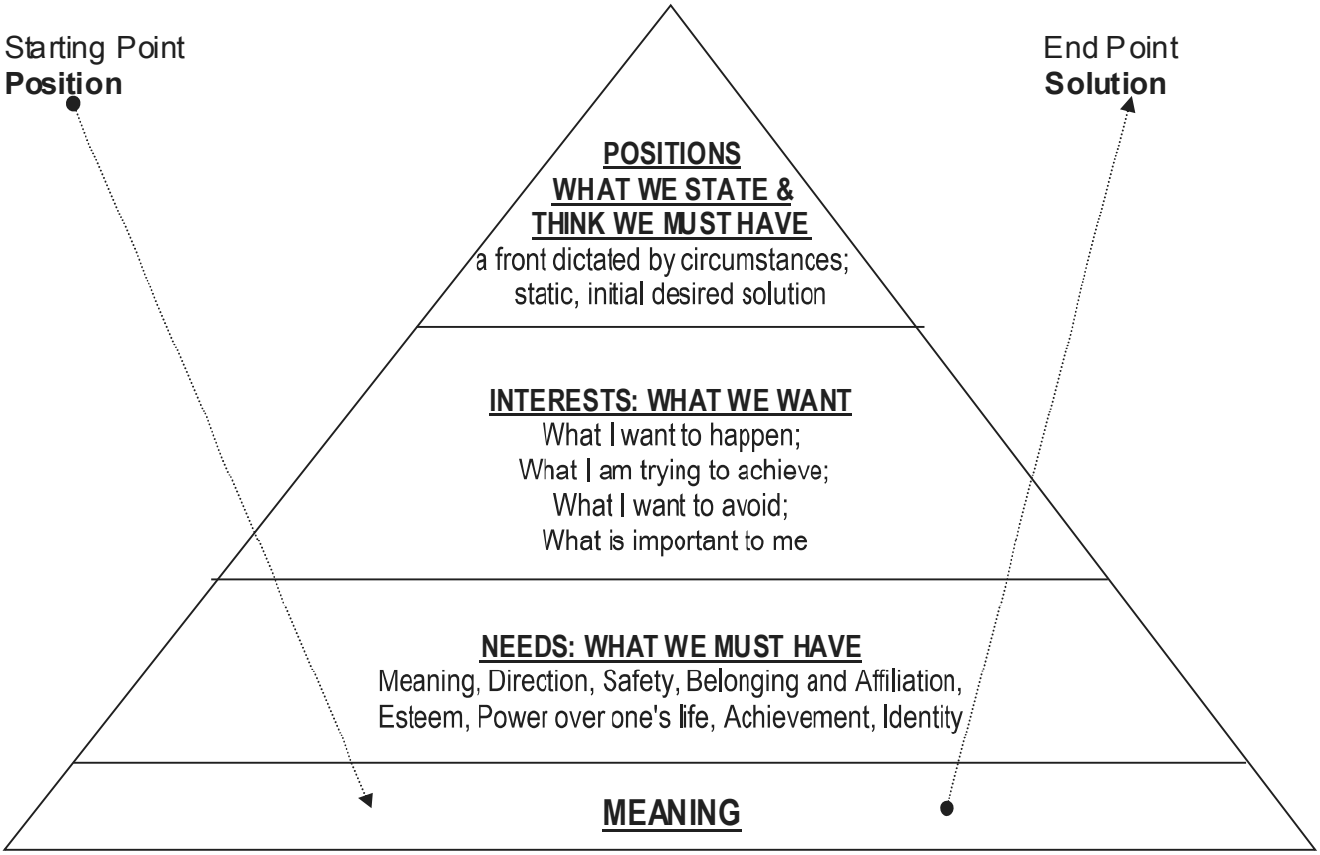
Cyclical Nature of the Mediation Stages[1]



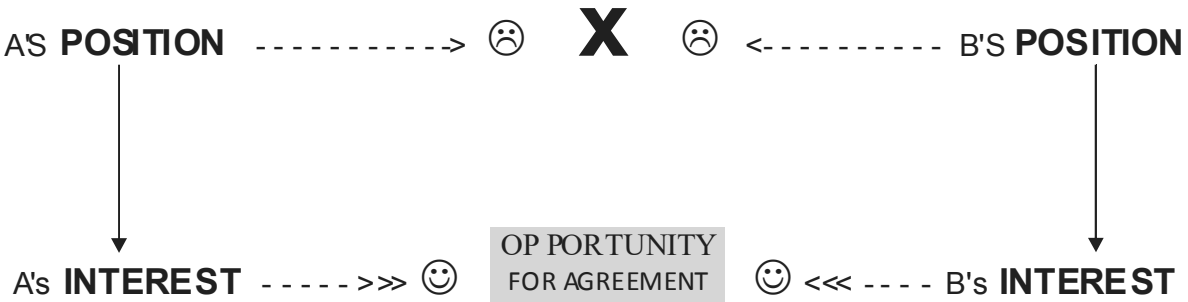
[1] Diagrams used with permission from this section are from Mayer, Bernard, The Dynamics of Conflict Resolution: A Practitioner's Guide (2000)
Pages from Divorce Mediation Training Manual by Adam J. Berner, Esq.

POSITIONS VS. INTERESTS & NEEDS

The challenge of the mediator is not to take a party's initial position at face value. Underlying those positions are interests and even deeper needs that the party seeks to satisfy.



A mediator can help the parties shift from their initial positions by dipping (or digging) down this pyramid, seeking to uncover a better understanding of these underlying interests and needs causing the conflict. Where positions may be mutually exclusive, very often parties can find common ground by satisfying each others' interests (which are less likely to be mutually exclusive).



Pages from Divorce Mediation Training Manual by Adam J. Berner, Esq.

HOW TO UNCOVER UNDERLYING INTERESTS & NEEDS

After both sides gave their stories, issues were listed and developed, an agenda set. NOW WHAT? Where do you go from here?

#1 **The First Step** is to make sure you really understand where both sides are coming from, what each perspective is. (Do this by active listening, reflecting back your understanding of their statements.) This is not only to assist you, but it is to assist the parties, too. If they do not feel comfortable and question whether you are really listening and understanding them, any attempt you make to dig down and explore their underlying interests may likely be met with resistance.

#2 **The Second Step** is to explore and inquire, with their permission, of course.

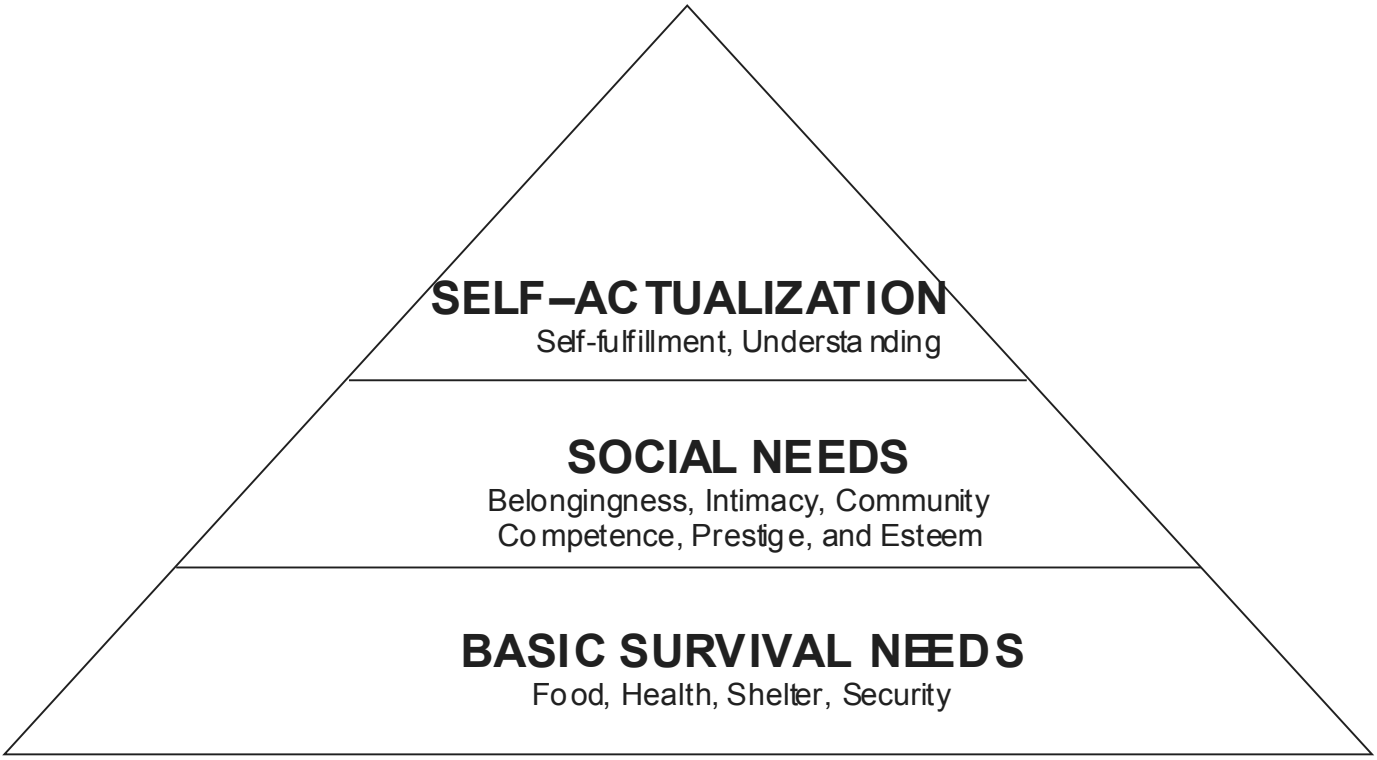
CONSIDER WHAT KIND OF QUESTIONS CAN HELP UNCOVER UNDERLYING INTERESTS:

- **HOW** CAN YOU SATISFY THE PRIORITIES UNDERLYING BOTH OF YOUR CONCERNS AND INTERESTS?
- **WHAT** DO YOU WANT, WHAT DO YOU REALLY WANT?
- **WHY IS THAT IMPORTANT TO YOU**?
- **WHAT** VALUES OR GOALS ARE IN YOUR REQUEST?
- **WHAT** IS UNDERLYING YOUR REQUEST?
- **IT SEEMS TO ME** THAT YOU ARE REALLY CONCERNED ABOUT…IS THAT CORRECT?
- **HOW** WOULD THAT ACCOMPLISH YOUR NEEDS?
- **HOW** WILL YOUR POSITION ACCOMMODATE YOUR NEEDS?
- **H**ELP ME UNDERSTAND. . .
- . . .

INTERESTS & NEEDS

PLEASURE (FUN)	POWER (CONTROL)	LOVE (BELONGING)	FREEDOM (CHOICE)
Enjoyment	Importance	Friendship	Autonomy
Learning	Recognition	Caring	Liberty
Laughter	Competence	Involvement	Independence
Comfort	Respect	Trust	Safety
Relaxation	Self-esteem	Approval	Security

MASLOW'S HIERARCHY OF NEEDS



The Continuum of Human Needs

Survival Needs	*Interests*	*Identity-Based Needs*
* Food	* Substantive	* Meaning
* Shelter	* Procedural	* Community
* Health	* Psychological	* Intimacy
* Security		* Autonomy

DEALING WITH IMPASSE[23]

Although reaching agreement may not be the goal of the mediator or the mediation process, if it can happen, the parties and we are pleased. More important, agreement represents that the parties have had the opportunity to relate to each other differently and to better understand themselves, each other, and the reality they face. What happens when this "shift" does not happen, when the parties are "stuck" in disagreement, when one or both parties seem close-minded and inflexible? What happens when we reach impasse?

Impasse is not necessarily destructive. It is a necessary and often a useful part of the conflict resolution process. "Being stuck" is a misleading metaphor for impasse. Often parties in conflict are at an impasse for very good reasons. **The key for the mediator's handling an impasse situation is to understand what the impasse is accomplishing for the parties**. Consider two types of impasse:

TACTICAL IMPASSE: Occurs when parties refuse to proceed towards resolution in an attempt to increase their negotiating power, such as creating pressure on the other party to make concessions. This strategy, of using impasse to further a party's goals, is usually based on a short-term calculation of costs and benefits and usually does not last very long.

GENUINE IMPASSE: Occurs when people feel unable to move forward towards resolution without sacrificing something important to them, such as certain needs and interests. Here the mediator needs to consider to what needs are blocking the party from movement. Are they concrete needs or behaviors that have not been addressed yet? Are there perceptions that are not allowing the parties to shift in how they view the conflict? Are there emotions preventing such shift?

Reasons for Impasse may include:

- Lack or failure of communication
- Not enough information available to make informed decisions
- Emotions
- Ineffective negotiation skills
- Differing styles of negotiating
- Disagreement about the likely outcome of the dispute in another forum
- The needs of at least one party are not being met
- Not comfortable in mediation

For each of these reasons for impasse, consider what technique the mediator can use to help the parties break the impasse.

In order to understand impasse and address it, we need to accept that from some perspective it makes sense. It is generally premature when the mediator or the other party jumps to the conclusion that the "stuck" party is immoral, evil, or irrational. Such assumptions do little to help, explain nothing, and lead to inappropriate or rigid responses.

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[23] Adopted from, with permission to use fron, Mayer, Bernard, The Dynamics of Conflict Resolution: A Practitioner's Guide, Jossey-Bass (2000)
Pages from Divorce Mediation Training Manual by Adam J. Berner, Esq.

The KEY for moving through Impasse is more a matter of ***ATTITUDE & UNDERSTANDING*** **than about a strategic technique or tool.**

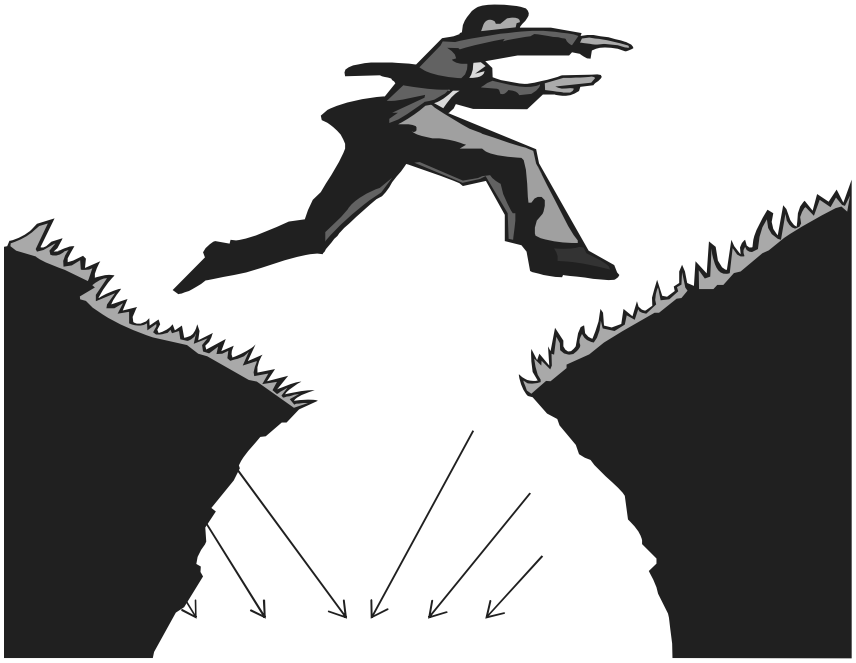
ATTITUDES

CONSTRUCTIVE ATTITUDES ABOUT IMPASSE

- **IMPASSE IS OK**
- **IMPASSE IS A NATURAL & OFTEN HELPFUL PART OF THE CONFLICT PROCESS**
- **PEOPLE HAVE GOOD REASONS FOR BEING AT IMPASSE**
- **DISPUTANTS HAVE TO FIND THEIR OWN WAY THROUGH IMPASSE**
  When mediators take too much responsibility for overcoming impasse, they make things worse by allowing the parties to avoid responsibility for looking at their own situations clearly and courageously
- **ANXIETY AND FEAR ARE NOT HELPFUL**
  But breed rigidity and shut down communication and creativity
- **AN IMPASSE MAY NOT HAVE AN IMMEDIATE SOLUTION, BUT PEOPLE CAN USUALLY FIND A CONSTRUCTIVE NEXT STEP**
- **THE VALUE OF SILENCE**
  "The relationship between creativity and the pause is as close as it is startling.... Not only does one get one's original ideas in the pause... The pause is an active, nimble, often intense state..."
  (Rollo May)

  "We make a vessel from a lump of clay,
  But it is empty space within it that makes it useful.
  We make doors and windows in the room;
  But it is the empty spaces that make the room livable.
  Thus, while existence has advantages,
  It is the emptiness that makes it useful. (Lao Tzu)

Stages in Building an Effective Agreement



REFRAMING THE ISSUES

GENERATE "POSSIBLE" OPTIONS

EVALUATE, SELECT &
PRIORITIZE SOLUTIONS

TEST EACH OFFERED
SOLUTION

FORMALIZE
IN WRITING

GENERATING OPTIONS

One of the most effective tools a mediator can impart to parties stuck in conflict is BRAINSTORMING of any and all options towards resolution. The purpose of this task is to open up the parties to creative thinking, to produce as many ideas for solution as possible. It is helpful to put **all** suggested options on newsprint / flipchart, for all parties to see.

GUIDELINES FOR BRAINSTORMING[24]

1. NO EVALUATION

All ideas are acceptable, no matter how "far off" they seem.
The idea here is that in order to get the creative juices flowing it is important that parties have the opportunity to think without the fear of negative feedback on their ideas which will only serve to quash creativity.

2. NO ATTRIBUTION

If parties feel that they will be committed to the ideas they propose, they will be more hesitant to engage in free thinking brainstorming. It is best, therefore, not to worry about which party said which option.

3. ALL OPTIONS ENCOURAGED

Discourage any evaluation.
Encourage one party to build on suggestions of other.
Encourage creativity and "out-of-the-box" thinking.
Seek opportunities to create value, to "expand the pie."

4. MEDIATOR OPTIONS CAN BE INCLUDED

Only after parties have exhausted their list of options.
To retain neutrality and avoid coming in as the expert:

- Provide more than one option.
- Let them know that your suggestion is not any better than their own alternatives and that you are just partaking in the brainstorming exercise.

OTHER STRATEGIES FOR GENERATING OPTIONS[25]

- **Dovetail Interests**: Each party gives up a little on an issue that is low priority to them, but a high priority to the other, and visa versa.
- **Agree in Principle**: Find broad general levels of agreement.
- **Fractionalization**: Big, complex issues can be too overwhelming for parties to consider options for resolution. Break down the problem into smaller pieces.
- Discuss the parties' **Ideal Visions**: Sometimes good solutions are missed because the parties are afraid to think big.
- Use **Hypotheticals**: Where mediator sees potential agreement.

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[24] Adapted from the Center for Mediation in Law
[25] Adopted from YPIS Mediation Training Manual designed by Frank Woods

EVALUATING & SELECTING OPTIONS

Before evaluating possible solutions, it is often helpful to have the parties create a list of objective criteria for evaluating the options. These criteria typically will reflect satisfaction of the parties' underlying interests and needs.

1. PRIORITIZE

Trade-offs, if necessary, according to party priority
Can have parties rank their alternatives, crossing out the ones that are mutually not acceptable.

2. CATEGORIZE

To help select options review the brainstormed list, grouping multiple options into relevant categories.

3. ASSESS OPTIONS IN LIGHT OF NEEDS & INTERESTS

4. REFINE ALTERNATIVES

5. ASSESS VIABILITY

Can parties realistically carry out their agreements?
Test ("Check in") agreement and its consequences.

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NJAPM Ad Hoc Committee Final Report on the Legal Limits of New Jersey Divorce Mediation Practice

Dated: February 15, 2013

Preliminary Statement:

The Ad Hoc Committee ("Committee") of the New Jersey Association of Professional Mediators ("NJAPM") investigated the legal and ethical limits of New Jersey divorce mediation practice, including a comprehensive review of other states' regulatory practices. The Committee reached consensus on most of the regulatory issues affecting mediators under current New Jersey law, including ethical boundaries.

The Committee believes that, as current New Jersey law stands, a distinction must be made between mediators who are licensed to practice law in New Jersey and those who are not. The Committee recognizes there are various schools of thought about whether:

A. Mediation is a profession apart from any other practice, so that no distinctions are relevant or desirable;

B. Mediation for NJAPM members is a full-time enterprise to the exclusion of all else, or an adjunctive activity secondary to one's primary professional engagement; or

C. Legal definitions, non-mediation based ethics issues, or other public policy questions should fairly be aimed at what we do.

The Committee took a pragmatic approach: whether or not NJAPM or its members like the idea, our members are subject to state regulation of various types when they mediate. All mediators who also possess licensure in any profession remain subject to decisions of "other" regulatory bodies. In particular, every NJAPM member is regulated by the NJ Supreme Court and its relevant Committees, even if those members are not lawyers. The Supreme Court regulates legal practice, but it also regulates the unauthorized practice of law by non-attorneys. Whether it wanted to or not, the Committee felt it had to identify and examine the distinctions between attorney mediators and non-attorney mediators, for regulatory clarity. It is an unfortunate but necessary distinction, and we adopted it here.

Our definition of "attorney mediator" is someone who, in addition to NJAPM membership and training, is presently licensed and in good standing as an attorney with the Supreme Court of New Jersey. Our definition of "non-attorney mediator" is, not surprisingly, everyone not covered by the first definition. This includes mediators who are or were licensed to practice law in other jurisdictions, but who are not presently law licensed in New Jersey. This also includes mediators who were licensed to practice law in New Jersey, but who have voluntarily retired.

Part I: Introduction

History:

In 2011, a number of New Jersey mediators sought guidance from the Board of NJAPM for a determination on rules governing mediators in New Jersey. This question was

further developed during interactions with mediators from other states, between those who routinely write settlement agreements and those who reject that practice.

In response to questions generated from members, NJAPM's Board of Directors, through Carl Cangelosi, President, appointed the Committee to do the following:

(1) Investigate the state of the role of and legal limits on mediators in New Jersey.

(2) Investigate the state of the role of and legal limits on mediators in other states.

(3) Recommend to the board what the role of and legal limits on mediators should be.

(4) Recommend to the board what actions, if any, NJAPM should take to make the legal limits consistent with (3).

Committee members included both experienced and new mediators; New Jersey licensed attorneys, retired attorneys, a professor, and a social worker; both civil and matrimonial mediators, and mediators and attorneys who practice in both New York and New Jersey. Committee discussion eventually focused on one key issue, namely the lawful and ethical ability of mediators to draft and finalize settlement agreements for the mediating parties.

Discussion

Typically, divorce mediation in New Jersey concludes with the mediator drawing up a Memorandum of Understanding (MOU) for the parties, who then provide the MOU to their respective lawyers. The lawyers then create a settlement agreement that will be legally binding when it is signed. Increasingly, New Jersey attorney mediators draw up a final settlement agreement for the parties to sign, but other mediators believe the practice is or should be prohibited.

Whether New Jersey divorce mediators should be allowed to draft final agreements brings into simultaneous question the right of party self-determination and the need to protect the public. Party self-determination is a fundamental tenet of mediation[1]. As defined in both the Model Standards of Conduct for Mediators (promulgated by the American Arbitration Association, American Bar Association, and Association for Conflict Resolution) and the NJAPM Standards of Conduct for Mediators, self-determination gives parties the power not just to control the outcome of the mediation, but to control the process.[2] Much like every other choice made during mediation, and if permissible on the mediator's part, the parties could decide to have the mediator draft a final agreement, rather than taking the MOU to an attorney to be formalized.

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[1] Party self-determination is the first standard set out in the under The American Arbitration Association, American Bar Association, and Association for Conflict Resolution's joint Model Standards of Conduct for Mediators. Self-determination is still the first standard under NJAPM's Standards of Conduct for Mediators in 2007.

[2] "Self-determination is the act of coming to a voluntary decision in which each Party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes." NJAPM STANDARDS OF CONDUCT FOR MEDIATORS § IA(2007) [hereinafter *NJAPM Standards*]; *see also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IA (2005)[hereinafter *Model Standards*].

Ensuring that people who draft legally binding agreements are able to do so without causing harm to the parties or to themselves is an important public interest. Generally, the state attempts to limit potential legal harms by regulating the practice of law.[3] The conclusions reached by the Committee regarding the law as it stands now, as well as suggestions for future changes, embrace the tension between self-determination and the public welfare, and attempt to bring them into balance. Another aspect of the public's interest is in making the mediation process efficient and reducing unnecessary or duplicative costs. These various concerns also framed the Committee's investigation into the legal limits on New Jersey mediators.

Part II: Findings

The Practice of Law

The unauthorized practice of law is a criminal offense in many states. In New Jersey, "[a] person is guilty of a disorderly persons offense if the person knowingly engages in the unauthorized practice of law."[4] The offense is elevated if the non-attorney receives a benefit from the unauthorized practice, gives the impression he or she is admitted, or causes injury to another.[5] Only non-attorney mediators need to be concerned about unauthorized practice issues. The Committee considered attorney and non-attorney mediators distinctly and determined that the legal limits on mediators in New Jersey depend whether the mediator is also an attorney who is licensed to practice law in New Jersey. If the mediator is not an attorney licensed in New Jersey, then he or she is bound by the prohibition against the unauthorized practice of law. When a New Jersey attorney is engaged in mediation, he or she does not have the same concern. The Committee carefully considered this distinction and all of its implications, which will be set out below.

Non-Attorney Mediators

Non-attorneys in New Jersey are expressly permitted to provide mediation services, so long as they do not engage in the unauthorized practice of law. A Joint Opinion of the Supreme Court's Advisory Committee on Professional Ethics and Committee on Attorney Advertising determined in 1994 that "non-lawyers may provide ADR/CDR services as long as they do not hold themselves out as lawyers and do not engage in any activities, such as the rendering of legal advice, which might constitute the unauthorized practice of law."[6]

Therefore, to determine the legal limits on non-attorney mediators in New Jersey, one must determine what constitutes the unauthorized practice of law. The Supreme Court of New Jersey has never specifically defined the practice of law, and stated in 1948 that

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[3] In New Jersey Bar admission is governed by the Supreme Court. N.J. CONST. art. 6, § 3. "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

[4] *See* N.J.S.A. § 2C:21-22(a)

[5] Id. (b)-(c) "A person is guilty of a crime of the fourth degree if the person knowingly engages in the unauthorized practice of law and: (1) Creates or reinforces a false impression that the person is licensed to engage in the practice of law; or (2) Derives a benefit; or (3) In fact causes injury to another. (c) For the purposes of this section, the phrase "in fact" indicates strict liability."

[6] NJ Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 676 and NJ Sup. Ct. Comm. on Att'y Adver. Op. 18 (1994).

"[w]hat constitutes the practice of law does not lend itself to precise and all inclusive definition. There is no definitive formula that automatically classifies every case."[7] What constitutes the unauthorized practice of law in New Jersey is determined by the Supreme Court and the Supreme Court's Unauthorized Practice of Law Committee ("UPLC") on a case-by-case basis.

Underlying all unauthorized practice of law questions are the competing goals of serving and protecting the public. In *Auerbacher*, The Court noted that in drawing the line between that which is and is not permitted, "guidance is to be found in the consideration that the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law."[8]

The unauthorized practice criminal statute[9] supports the important public interest in prohibiting the unauthorized practice of law. "The importance of our public policy assuring the lay public that only those properly approved for bar admission in New Jersey may render legal services here is underscored by the Legislature's designation of the unauthorized practice of law as a disorderly person's offense or a crime of the fourth degree." [10]

Where consumer protections may be established, the Supreme Court has been more willing to carve out specific exceptions to what might otherwise be unauthorized practice in the name of public service. The New Jersey Supreme Court focused on benefits to the public when considering residential real estate transactions and ultimately held that "attendance and participation at the closing or settlement where neither party has been represented by counsel, or where one has not been so represented, does not constitute the unauthorized practice of law", but only if the broker conforms to the specific conditions set out in the opinion. [11]

"[T]he conclusion in these cases that parties need not retain counsel to perform limited activities that constitute the practice of law and that others may perform them does not imply that the public interest is thereby advanced, but rather that the public interest does not require that those parties be deprived of their right to proceed without counsel."[12]

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[7] Auerbacher v. Wood, 142 N.J. Eq. 484, 485 (NJ 1948)(holding that performing the usual functions of a labor relations consultant is not the unauthorized practice of law, but the issue could not be determined by reference to any satisfactory definition.).
[8] Auerbacher, 142 N.J. Eq. at 484.
[9] *See* N.J.S.A. § 2C:21-22(a)-(c)("(a) A person is guilty of a disorderly persons offense if the person knowingly engages in the unauthorized practice of law. (b) A person is guilty of a crime of the fourth degree if the person knowingly engages in the unauthorized practice of law and: (1) Creates or reinforces a false impression that the person is licensed to engage in the practice of law; or (2) Derives a benefit; or (3) In fact causes injury to another. (c) For the purposes of this section, the phrase "in fact" indicates strict liability.").
[10] In re Jackman, 165 NJ 580, 588 (2000)(holding that a person admitted in Massachusetts had engaged in unauthorized practice by working at a NJ law firm for eight years without seeking admission to the NJ Bar); *see also* State v. Rogers 308 NJ Super. 59 (App. Div.), certif. den. 156 NJ 385 (1998))(upholding the unauthorized law criminal statute against constitutional attack on vagueness grounds).
[11] In re Opinion No. 26 Of The Committee On The Unauthorized Practice Of Law 139 N.J. 323 (1995)(requiring "both buyer and seller be made aware of the conflicting interests of brokers and title companies in these matters and of the general risks involved in not being represented by counsel").
[12] *Id.*

The public benefit consideration is especially salient when considering what a non-attorney mediator can do without engaging in the unauthorized practice of law.

While the New Jersey courts have focused on situations that may constitute the unauthorized practice of law, which will be discussed in detail below, many other states have taken a more direct route by defining the practice of law and prohibiting non attorneys from engaging in actions that fit into that definition. Some states define the practice of law statutorily,[13] while others define it through the court[14]. Of the states examined by the Committee, not a single one follows New Jersey in defining situations that constitute the unauthorized practice of law, as each has been willing to at least minimally define the practice of law.[15] Every state, including New Jersey, considers providing legal advice the practice of law. Additionally, the majority of states the Committee considered, except for Florida and Delaware, included drafting documents in its definition of the practice of law. Interestingly, North Carolina specifically exempts MOU's from the definition of UPL definition[16], and Virginia provides guidance for mediators to avoid the unauthorized practice of law by distinguishing between drafting a legal instrument and serving as a scrivener. The Virginia guidance pointed out that adding boiler plate-type language to a mediated agreement could, although it did not automatically, take the mediator from scrivener to one engaged in the unauthorized practice of law.[17]

In 1999, the UPLC looked to the dichotomy between advancing the public interest and protecting the public:

> [W]e [have] described that standard in simple and pragmatic terms: Practically all of the cases in this area are relatively recent. They consistently reflect the conclusion that the determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking whether the public interest is disserved by permitting such conduct. The resolution of the question is determined by practical, not theoretical, considerations; the public interest is weighed by analyzing the competing policies

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[13] Arizona, Colorado, Maryland, North Carolina, and Virginia each define the practice of law by statue. *See*, RULES OF ARIZONA SUPREME COURT, RULE 31(a)(2); Colorado Court Rules, Rule 201.3(2); GA. CODE ANN. § 5-19-15; MD. CODE ANN., < BUS. OCC. & PROF. > § 10-101h; VA. CODE ANN PART 6 §1 (2).

[14] Courts in California, Connecticut, Delaware, Florida, Massachusetts, Oregon, and Pennsylvania have each set out a definition for the practice of law. See, *People v. Merchants Protective Corp.*, 209 P.363, 365 (Cal.1922); *State Bar Association of Connecticut v. Connecticut Bank & Trust Co.*, 140 A.2d 863, 870 (Conn. 1958); *Marshall-Steele v. Nanticoke Memorial Hosp., Inc.*, 1999 WL 458724 (Del.Super. 1999); *State ex rel. The Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962); *Massachusetts Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc.*, 2001 WL 669280 (Mass.Super. 2001); *Oregon State Bar v. Security Escrows, Inc.*, 377 P.2d 334 (Or. 1962); *Gmerek v. State Ethics Com'n*, 751 A.2d 1241 (Pa.Cmwlth. 2000).

[15] The Florida Court, like New Jersey, is hesitant to define the practice of law generally and so limits its analysis to the situation before them stating, "But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court." *State ex rel. The Florida Bar v. Sperry*, 140 So.2d 587, 591 (1962).

[16] NCGS § 84-2.1. "The phrase "practice law" does not encompass the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers."

[17] *See*, VIRGINIA MEDIATORS AND UPL (1999)("In drafting settlement agreements for the parties, mediators should avoid the use of legal "boilerplate" and legal terms of art. These terms have legal consequences resulting from judicial interpretation and may favor one party over the other. The use of such terms may affect the parties in unintended ways and should be avoided."); VA. CODE ANN PART 6 §1 (2) ("One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.")

> and interests that may be involved in the case; the conduct, if permitted, is often conditioned by requirements designed to assure that the public interest is indeed not disserved.[18]

It is unlikely that the NJ Supreme Court will soon change its vague stance on defining the practice of law. The UPLC could consider our specific issues and make a determination about the actions of non-attorney mediators. Looking at experience in other states, it seems unlikely that non-attorney mediators will be challenged for drafting MOUs. But it seems just as likely that the UPLC would look unfavorably upon non-attorneys drafting full- scale settlement agreements for parties. Whereas the Supreme Court liberally construed unauthorized practice rules as they related to real estate brokers who prepared residential real estate contracts for party signatures – with public protection caveats -- it is not clear that the Supreme Court would see non-attorney mediator contract preparation in the same way.

Our Committee recommends taking no action on the question of a non-attorney mediator drafting a Settlement Agreement, whether addressed to the UPLC or elsewhere. In the Committee's view, there does not seem to be a groundswell for non-attorney mediators to be able to perform this service in New Jersey, and the gains to the non-attorney mediators and the public simply do not seem worth the risks.

The Committee repeatedly returned to concerns about non-attorney mediators providing legal advice to parties. This has explicitly been defined as the unauthorized practice of law. The Committee believes that until these concerns are alleviated, non-attorney mediators should simply avoid drafting final agreements. The Committee is aware of a practice by some non-attorney mediators of assisting pro se parties by referring them to a court-based self-help center or the clerk of court and in which the MOU is incorporated into the final judgment of divorce. The Committee supports this practice, provided that non-attorney mediators do not state or imply that the MOU requires no attorney review or that the parties should use it as their final settlement agreement.

The Committee also recommends more stringent training for mediators, more frequent use of third party neutral attorneys as consultants and drafters, and a heightened educational effort to make non-attorney mediators more clearly aware of the line between providing legal information, which is permissible, and legal advice, which is not.[19]

The Committee recognizes that NJAPM could turn to the Supreme Court's UPLC, along with the CDR Committee, on the issue of non-attorney mediators' provision of legal advice. NJAPM also could consider statutory reform, to create a safe harbor for non-attorney mediators. Virginia defines "dispute resolution services" as including the "screening and intake of disputants, conducting dispute resolution proceedings, drafting

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[18] In re Opinion 33 of Committee on Unauthorized Practice of Law, 733 A.2d 478 (N.J. 1999)

[19] The Committee spent a great deal of time debating this line. While these seemed to be agreement that applying the mediation parties specific facts to the law and making a statement about how the situation would play out constituted legal advice, there was no real consensus on whether something less than that could constitute legal advice. The Committee agreed NJAPM may want to consider another ad hoc committee to further address this issue. The use of third party neutral attorneys is outlined in RPC 2.4, "Lawyer Serving as Third Party Neutral", in which the attorney serves "in such ... capacity as will enable the lawyer to assist the parties to resolve the matter", but clarifying that the attorney's role is strictly non-representational.

agreements and providing information or referral services." Legislation of this type would provide clearer guidance for mediators. Having considered each of these options, the Committee, as stated above, recommends taking no action at this time. These strategies and tactics could be revisited if the public demands non-attorney mediators' provision of services that are presently likely to be deemed the unauthorized practice of law.

Attorney Mediators

All attorneys licensed in New Jersey are governed by the New Jersey Rules of Professional Conduct. An attorney found to be in violation of the Rules will be subject to disciplinary action taken by the Office of Attorney Ethics. When the application of a rule is unclear or a practice is questionable, a ruling can be sought from the Advisory Committee on Professional Ethics, or through the State Court System. The Committee was careful to examine all the potential sources of guidance before reaching a conclusion as to where the law currently stands.

Since 2004, the Rules of Professional Conduct have addressed attorneys serving as third-party neutrals. Rule 2.4(a) states that "[a] lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter." [20] The Rule also places an affirmative duty on third-party neutrals to "inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."[21]

The Supreme Court's Advisory Committee on Professional Ethics ("ACPE") and Committee on Attorney Advertising issued a Joint Opinion in 1997 specifically addressing the situation where an attorney mediator is practicing mediation out of his or her law office, stating that "[w]hen a lawyer ... serves as a third party neutral, he or she is acting as a lawyer." [22] The ACPE issued a 2007 opinion addressing the attorney's limited scope of representation in a mediation context, under RPC 1.2(c).[23] By requiring an attorney mediator to inform a party that the attorney will not provide "representation adverse to the other party to the dispute"[24], the ACPE, in the Committee's judgment, has concluded that a New Jersey attorney mediator may not, consistent with the Rules of Professional Conduct, become an attorney for one of the parties. The Committee believes the issue of an attorney-mediator or a neutral attorney finalizing a divorce for one or both of the parties may be ripe for review and consideration in the future. For

[20] NEW JERSEY RULES OF PROF'L CONDUCT R. 2.4(a)
[21] *Id.* § (b).
[22] NJ Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 676 and NJ Sup. Ct. Comm. on Att'y Adver. Op. 18 (1995).
[23] NJ Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 711 (2007) ("For an attorney to limit representation to neutral mediation services in a way that is proper under *RPC* 1.2(c), the attorney must fully disclose that the attorney cannot and will not at any time act as the client's individual lawyer, nor provide legal advice or representation adverse to the other party to the dispute, and that it may be in the client's best interest to engage a separate attorney who represents only that client.")
[24] *Id.*

example, under RPC 2.4, an attorney who serves a neutral and non-representational role could be construed as continuing to perform neutral services on behalf of one or both of the parties in finalizing the parties' divorce. There could be financial benefits to the parties who may in fact have no conflicts between them. However, at the present time the Committee recommends taking no action.

The Committee could find no decided cases addressing the applicability of the conflict of interest rules to attorney mediators.[25] New Jersey lawyers are prohibited from representing a client if the representation involves a concurrent conflict of interest, in which representation of one client is directly adverse to another, or there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client.[26] However, under RPC 2.4(a), an attorney is expressly permitted to serve as a third party neutral. That RPC does not prohibit offering legal services, like drafting a final agreement, for both parties neutrally, so long as the parties give informed consent and understand that the lawyer is not representing them, per RPC 2.4 (b).

In January of 2001, the New York State Bar Association's Committee on Professional Ethics issued Opinion 736 on "Mediation, matrimonial matters". The New York Committee reach conclusions very similar to those reached by this Committee. The Committee modified its previous view that "[it] would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties." The Committee's 2001 view was that a lawyer in appropriate circumstances may "objectively conclude[] that . . . the parties are firmly committed to the terms arrived at mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents." In those limited circumstances, the Committee found that its prior Opinion "should be relaxed to permit spouses to avoid the expense incident to separate representation and permit them to consummate a truly consensual parting provided both spouses consent to the representation after full disclosure of the implication of the simultaneous representation and the advantages and risks involved."

Under the New Jersey Rules of Professional Conduct, and with informed consent, clients may authorize attorney drafting of a settlement agreement, even if it involves a concurrent conflict of interest. The consultation must include an explanation of the advantages and risks involved. Moreover, the lawyer working with parties in such a setting must reasonably believe that the lawyer will be able to provide competent and diligent services to each affected client. [27] The New Jersey Supreme Court has held that, even with clients' informed consent, attorneys may not ignore developing conflicts

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[25] *But see* NJ Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 521 (1983)(providing guidance to attorney who was asked to advise both parties to a mediation and draft property settlement agreement, "[t]he Committee recognizes that a lawyer's participation in a private matrimonial mediation service can be valuable in resolving disputes prior to litigation in a non-adversarial setting. But it must be emphasized that in so doing the lawyer is eliminated from any future representation of either party in the divorce proceeding.").

[26] NEW JERSEY RULES OF PROF'L CONDUCT R. 1.7(a).

[27] *Id.* § (b); see also NEW JERSEY RULES OF PROF'L CONDUCT R. 1.10(a)(when lawyers are associated in a firm, none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7).

of interest, and are ethically liable for failure to recognize the dangers involved in dual representation. [28] The fact that such misunderstandings are likely to occur leads to the conclusion that only in the clearest cases should counsel agree to work with interests that are or may become adverse, even after disclosing dual representation.[29]

In the context of a lawyer as third party neutral, which was not part of the Rules when *Lanza* was decided, the issue of dual representation really does not arise, because (as discussed below) the lawyer is not representing either party, but rather offering to draft a settlement agreement. The New Jersey attorney mediator who wants to provide services in the safest way, i.e., satisfying the legal concerns raised in New York Ethics Opinion 736 will implement disclosure practices and withdraw if an actual conflict arises between the parties.

The Committee considered these distinctions carefully. Following extensive discussions, the Committee determined that while attorney mediators are permitted to draft final Settlement Agreements for parties, they should always protect the parties from foreseeable risks of harm.

The Committee believes attorney mediators should distinguish between facilitative services that help parties reach an agreement and legal services that result in a drafted final agreement.[30] In their Agreements to Mediate, attorney mediators should describe the scope of services to be performed, including facilitative services and, if the parties so desire, legal services (such as drafting a final settlement agreement). It should be noted that during or after the drafting stage, the attorney mediator is not limited to a scrivener's function. Rather, there could well be a role for continued mediation services, as the attorney mediator helps the parties work their way through the drafting process. Such follow-up mediation work could include facilitating difficult language issues, with the advice of the parties' independent legal counsel -- if they have such counsel.

In the Committee's view, and until the law is clarified or changed, the attorney mediator should never prepare, file, and/or serve legal documents in a dissolution or related action, and should not represent one of the parties in court -- even with the consent of the other party.

The Committee further believes that attorney mediators should inform the parties, in writing, that the services to be provided are neutral attorney services, per RPC 2.4, and that the attorney is not representing either party. The Committee recommends that the

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[28] In re Guy J. Lanza, Attorney at Law, 65 NJ 347 (1974).
[29] *Id.*

[30] The Committee is aware of published letters from two District Fee Arbitration Committees that state no fee arbitration jurisdiction exists when a lawyer serves as a court appointed mediator, because "[the mediator] did not and could not provide any legal services to any party." This Committee believes that providing clients with a final settlement agreement may subject an attorney to fee arbitration for challenged fees, since the attorney mediator would be providing a legal service.

Board solicit sample language from NJAPM attorney members who already do this work, for dissemination to all NJAPM members.

The Committee also believes that attorney mediators should encourage parties and remind them in writing that they have the right to retain separate and independent attorneys to represent their respective interests in the agreement finalization process.

The attorney mediator should only include boilerplate provisions in the settlement agreement upon the parties' request and with their explicit permission. All substantive terms, including boilerplate, should be discussed with the parties during the mediation process.

Before the attorney mediator consents to assist the parties directly in agreement finalization, s/he must assure that each party fully understands the proposed terms of agreement, there are no points of contention between them as to the terms of settlement, the parties appear to have the mental capacity to enter into the agreement, and each party appears to be entering into it voluntarily. The attorney mediator might consider memorializing these facts in a signed writing.

The Committee believes that, under existing New Jersey law, and with the above protections in place, an attorney mediator may properly draft final settlement agreements. The Committee further believes that New Jersey attorney mediators may finalize the parties' settlement agreement by taking their sworn signatures, if the parties so request.

Part III: Conclusions

The Committee believes that non-attorney divorce mediators should refrain from drafting final settlement agreements. Ultimately, a governing body would need to directly address the question before any non-attorney mediator should engage in this practice. The Committee recommends no Board action at this time. However, the Committee has offered the Board some avenues to consider, as set forth above, should the public demand non-attorney mediator services that raise UPL issues.

New Jersey public policy distinguishes between attorney and non-attorney mediators regarding the legal ability to draft final agreements for parties. Attorney mediators may draft and finalize party settlement agreements. The Committee believes that attorney mediators should follow a number of safeguards to ensure party protection.

Finally, the Committee recommends increased mediator training requirements. A recurring theme in the Committee's discussions involved the line between a mediator providing legal information and legal advice. Clearly, all mediators may provide legal information. While some mediators may question whether any mediator, law licensed or not, should provide legal advice, the issue is more critical for mediators who are not

licensed attorneys. Where that line falls is not easily defined, hence the Committee recommends additional training to assure mediator awareness and good practice.

AHC Member Carl Viniar has submitted a Minority/Dissenting Report, which is attached for the Board's consideration. Most of Carl's comments have been directly addressed in the Final Report, but not necessarily modified in the ways that Carl wanted.

Respectfully submitted,

Ad Hoc Committee Co-Chairs
Allison Cardinal and Hanan Isaacs

Committee Members
Larry Abrams
Adam Berner
Carl Cangelosi
Kim Corbett
Frank Grather
Bruce Hector
Katherine Newcomer
John Tomaine
Carl Viniar

MINORITY/DISSENTING REPORT

I disagree with the use of the terms attorney mediator and non-attorney mediator. I am a mediator who happens to have a law degree. There may be others who have other licenses. The way we use language creates context and therefore reality. We should not be creating classes of mediators based on their other professions. The Academy of Family Mediators decided that these terms should not be used 25 years ago. As an organization that is supposed to be promoting professional mediators, and the profession of mediation, the NJAPM should certainly not be using these terms.

I have concerns about some of the conclusions reached in the report. The practice of divorce mediation is distinct and is not the practice of law. We should be carefully training new mediators and managing all of our members, to make sure they are not giving legal advice, holding themselves out as lawyers, or practicing law in any manner, no matter what their license is, and no matter where they are in the process.

The preparation of a draft of a settlement agreement is part of many mediation services and practices. We should be training people to prepare agreements if they wish, and to prepare them well. As an organization, if we are concerned about the definition of the unauthorized practice of law, we should be standing for mediation agreements to be uniformly excluded from such a definition. Settlement agreements in divorce mediation should be no different from settlement agreements in other matters. The court trains students, clerks, and volunteers to mediate in small claims, municipal, and landlord tenant courts. The court trains and requires the mediators to prepare settlement agreements when the process is successfully completed. The court does not think this is the practice of law, unauthorized or not. We should be arguing to provide the same services to parties who have exercised their right of self determination in using the mediation process from start to finish in divorce matters.

The conclusion that a mediator who is a licensed attorney may draft an agreement is clearly one I can agree with. But to conclude that this is a service being rendered as a neutral legal service, and not as part of the facilitative mediation defeats the very essence of promoting and taking a stand for the rendering of professional mediation services. I think to so conclude would actually lend credence to the argument that drafting these agreements is the practice of law, and I just can't agree with that conclusion. (This would, I think, leave formerly licensed lawyers, and lawyers licensed in other states, in the same category as mediators who were formerly trained in non-legal fields).

I know that for some in the NJAPM, this will appear a valid compromise and even a big leap from the absolute position of no agreements should be drafted by mediators. After all, the bottom line of the report appears to be no position on mediators without law licenses, and permission to draft agreements for mediators with the license. As the report finds that there is no real clear law on the subject in New Jersey, it is hard to take issue with this bottom line. It is the reasoning and the terminology that leave me troubled and unable to agree with the report.

Respectfully,

Carl Viniar

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A 12 Step Approach to Enhancing Your Alternate Dispute Resolution Practice
by Anju D. Jessani (November 2001)
(www.mediate.com/articles/jessani.cfm)

Thinking of ways to enhance your ADR practice? Join the club. The 40-hour divorce mediation training classes are packed to capacity. At ADR Day in New Jersey, it was standing room only for the workshop entitled "Making a Living in Mediation". During a recent presentation I gave to the Hudson County Bar, at least 50% of the attendees indicated they were thinking about expanding their law practices to include mediation services.

It is easy to establish an ADR practice. In most states including New Jersey, there are no licensing requirements. However, as most ADR practitioners who hang out their shingle find out, "build it, and they will come," does not usually apply to ADR. It takes planning, hard work, stubbornness, and more than an ounce of good luck to develop a successful practice.

I learn something new every day from practitioners in the field and from my clients. I have taken their collective wisdom and tried to document these ideas. So, with thanks to all those who have assisted me, I share with you A 12 Step Approach to Enhancing Your ADR Practice.

STEP 1: DON'T QUIT YOUR DAY JOB without understanding the cost!

I was a management consultant with Price Waterhouse, and a Vice President with JP Morgan. I left JP Morgan with a nice package at the end of 1996 to establish my mediation practice.

In my first year of practice with startup costs, my volunteering efforts that provided experience but no income, and my fixed office expenses, I lost money, as I had planned.
- In my second year of practice, I broke even, but didn't pay myself a penny.
- In my third year of practice, I did show a modest profit.
- In my fourth year of practice, the practice began to generate sufficient income to justify staying in business.
- In this, my fifth year of practice, I believe my practice is finally, fully operational; I thought I would be fully operational by year three, and was lucky to have the financial resources to stay in the game.

Almost all ADR practitioners were working for themselves before entering the field of mediation; they added ADR services to their existing practice - typically, accounting, family and marriage counseling, financial planning or law. In a prior survey, I found that ADR typically accounted for 40% of their practices. Your primary area of specialty may enhance your reputation in ADR, and your association with ADR may enhance your primary area of practice. Even if it is financially feasible, it may not make sense to quit your day job.

STEP 2: PREPARE A BUSINESS PLAN and track your progress relative to the plan.

When I started my practice; I enrolled in a program with the Small Business Administration that helped me develop a plan, and also assigned a retired executive to mentor me. You will have to invest money in marketing expenses, and may also forgo income from your day job as you work to build your ADR practice. A business plan is a necessity.

Essential components of a business plan include:

Identification of facilities, furniture and equipment that you feel are necessary to offer ADR services; I feel much more comfortable mediating at a round table where everyone is an equal. I also need my white board to summarize for clients the day's agenda, at the beginning of each meeting. For me, these are minimum requirements.
- An advertising budget that may include Yellow Page advertising, web site development and web site links, print advertising, and use of a public relations firm.
- A budget and plan for memberships to professional organizations, as well as civic/networking organization such as the Rotary Club.
- Revenue and expense projections for your ADR practice: don't forget to put a value on the hours you invest in building your business.

Track your progress relative to the plan. Learning experiences are necessary, but losses should be managed. I learned the hard way that prints advertising was not very effective for me. After my first year in practice, I dropped almost all my print advertising. I also learned that web site links increased the number of hits to may web site, and devoted more of my budget to this area in my second year.

STEP 3: FOCUS ON BUILDING A BETTER MOUSETRAP not on reinventing the wheel.

I am still using the standard forms such as the Client Information Form, Issues to be Decided, and Budget forms from my divorce mediation training class. However, if something can be done better, I try and make that improvement; many of these are relatively minor.

How do I identify ways of building a better mousetrap?

Having gotten divorced through mediation, I have first hand experience on what worked and what could have been done better. As an example, I provide two copies of the Memorandum of Understanding to each of my divorce clients so that they don't have to go to the trouble of making extra copies to forward to their attorneys.
- I examine what I like from other organizations that provide good customer service such as American Express. As an example, if I quote a client a fee, I try and hold to that fee, even if my billing rates have increased.
- After each case is completed, I send a survey asking for feedback. About 30% of clients return the survey. As an example, one of my clients had indicated they hated searching for parking in urban Hoboken. I now provide free parking at the municipal parking lots at a nominal cost to my practice. The survey also allows me to identify whether there are any loose ends on a case.

STEP 4: DEVELOP YOUR UNIQUE SELLING PROPOSITION to describe what makes you and your ADR practice unique.

Write one paragraph on what makes you and your practice unique. Why? You need to summarize for yourself why people should use your services. You can use components of it in your brochures, letters to potential clients, phone inquiries and so on. You don't need to include every accolade. Need an example of a USP? Here's mine: "Divorce with Dignity offers a fair, sensitive and cost-effective approach to family, business and civil, alternate dispute resolution. Anju D. Jessani has an MBA from the Wharton School, and spent nearly 20 year in financial services. She is an Accredited Professional Mediator by the New Jersey Association of Professional Mediators, and is a Practitioner Member of the Academy of Family Mediators, reflecting the highest level of training and experience. She is on mediation and arbitration referral lists including the New Jersey Administrative Office of the Courts, and the National Association of Securities Dealers."

In my first year in practice, I tried not to mention the MBA. I felt I should be emphasizing my ADR training and experience. This was a mistake. Clients and peers want this information: it is part of what makes you unique. With so many referrals coming from practitioners with primary expertise in another field, the challenge is to present your credentials without disparaging the other professions.

STEP 5: TAKE ADVANTAGE OF TRAINING and credentialing opportunities.

I mentioned that there are few barriers to entry for ADR, and that most states including New Jersey, have no ADR licensing requirements. Nevertheless clients are getting savvy. They are asking for information regarding background and training, and are noticing difference between practitioners. However, the reason to focus on training is because the knowledge provided should allow you to service client better, in turn, resulting in more satisfied clients and more referrals.

In tandem with the issue of training is the issue of credentialing. Credentialing provides a way for clients to differentiate the dilettante from the professional who has made a commitment to ADR. The requirements for the New Jersey Association of Professional Mediators are similar to those of many other states.

NJAPM mediators holding Practitioner Member status with the Academy of Family Mediators are deemed to be qualified as Accredited Professional Mediators, upon completion of at least 16 hours of training in New Jersey family and divorce law. Otherwise, the requirements for APM status are as follows:

An advanced degree in mental health, business, or finance, an accounting license, or a Juris Doctor of equivalent law degree. The educational requirement may be waived, if appropriate.
- A minimum of four years of professional practice in a discipline in which the educational requirement was satisfied.
- For mediators seeking family and divorce accreditation, completion of an approved Divorce and Family Mediation training course (minimum 40 hours or 18 hours in addition to an approved 40-hour training in another mediation field); training must include at least two hours of training on identification of domestic violence issues.
- For mediators seeking business/commercial accreditation, completion of an approved business and commercial Mediation training course (minimum 18 hours).
- Completion of at least 15 cases and 100 hours mediation, with at least 80% of the cases having been mediated face-to-face with the parties.

- Up to 48 hours of participation in an approved practicum or internship or in co-mediation with an accredited divorce/fa mediator may be counted towards the required hours for mediation experience.
Most credentialing programs have continuing education requirements, further assuring that clients will be serviced by practitioners who are current on issues that could impact their cases; another good reason why clients should be looking at credentials when evaluating practitioners.

STEP 6: JOIN ADR ORGANIZATIONS and network with fellow ADR practitioners.

I mentioned that I learned the hard way that print advertising didn't work for me. In networking with other ADR professionals, I found that this was a fairly common, although not universal, consensus. If I hadn't networked, I may have invested in a second-year of expensive print advertising trying different copy and different publications.

ADR organizations also provide great marketing opportunities. 20% of my clients come from other ADR practitioners who can't take the case because of conflicts of interest and/or geography issues. I also have to refer at least 50% the inquiries I receive, either because they are not appropriate for mediation, or because of conflict of interest and/or geography issues; I give referrals to people I know and have also have a comfort level.

Active participation in an ADR organization will allow you to build a useful Rolodex of referral sources. I frequently have to refer clients to appraisers, financial planners, insurance experts, therapists, and college-aid counselors. Almost all my contacts have also come through networking. Additionally, for each dollar I generate in revenue, the lawyers who do the legal work after me generally make two dollars. While, my clients are free to use any attorney or specialist they choose, most prefer to use a referral. Most ADR practitioners maintain similar lists.

I belong to my state mediation association, the New Jersey Association of Professional Mediators. Please visit their web site www.njapm.org; or phone them at 800-981-4800, for more information. NJAPM benefits include statewide marketing efforts, networking opportunities, legislative updates, educational seminars, and a mediation referral program for accredited mediators. Most states have similar organizations.

I also belong to a national organization, the Association for Conflict Resolution. ACR is the merged organization of the Academy of Family Mediators, the Society for Professionals in Dispute Resolution, and the Conflict Resolution Education Network. They maintain a referral program for Practitioner Members of the AFM, and also offer access to various liability insurance programs. The ACR web site located at www.acresolution.org, includes a list of state mediation organizations; you can also call their office in Washington DC at 202-667-9700, for more information.

Anytime you go to a conference, read the resumes of the speakers to see which ADR organizations they have joined. Do a search on the web and see which organizations prominent ADR practitioners hold membership.

STEP 7: GET ON APPLICABLE REFERRAL LISTS for your area of specialty.

I call this getting your name on the map. In terms of psychic energy, this is easier to do when you are starting a practice. However, even for the seasoned ADR professional, it pays to review which lists you are on annually, and to compare your lists with your competitors.

Some lists such as the NJAPM and ACR/AFM, have their own credentialing prerequisites, while others have an application process. On the Internet, there are lists open to all interested parties for a nominal fee. The only free and open list I am aware of on the Internet is at www.split-up.com, a referral list for family and divorce mediators.

I am on the following lists that have an application process, but no fee requirements:
- National Association of Securities Dealers, Mediation and Arbitration programs.
- New York Stock Exchange, Mediation and Arbitration programs.
- New Jersey Administrative Office of the Courts, Family Economic Mediation Pilot Program
- New Jersey Administrative Office of the Courts, Civil/Commercial Mediation Pilot Program.

I pay an annual fee from $100 to $250 to be included at various Internet web sites. If you are curious to see where I am listed, do a search on my name. While it is almost impossible to tell which Internet sites are leading clients to me, in addition to - - - -
- www.divorcesource.com, the host of my web site, I believe the following sites have been most effective:
- www.divorcenet.com - a state-by state resource on divorce.
- www.adr.martindale.com - Martindale-Hubbell's online directory of ADR practitioners.
- www.mediate.com - the web site for the Mediation Information Resource Center.

STEP 8: SEEK WRITING AND SPEAKING ENGAGEMENTS and set practice goals accordingly. Advertising is expensive and usually has a brief shelf life. In addition, it is often hard to assess whether your advertising has been effective. I am not suggesting that you don't advertise. Rather, that you invest some time in promoting yourself through writing and speaking engagements. They work!

I set a goal of writing two articles every year. My white papers are among my best marketing tools. Clients are hungry for relevant articles about ADR, and these articles also establish my credibility as an ADR service provider. You don't need a publisher anymore. You can implement a web site at almost no cost, and post articles at your site. Most of the articles I have written for print publications have been by invitation from an editor who had read one of my summary articles posted at my web site.

When I first started my practice, my goal was participating in one speaking engagement a month. I gave presentations to support groups, library groups, chambers of commerce, attorneys - basically anyone who would listen. My current goal is at least two speaking engagements a year. I now aim for forums where I can expand my referral network rather than targeting clients directly.

STEP 9: GET AN E-MAIL ADDRESS AND A WEB SITE; these are essential to doing business in the 21st century.

In his new book Business @ the Speed of Thought, Bill Gates states that business will change more in the next ten years than it has in the last fifty. Businesses that seize the opportunity and use digital tools to move information inside their enterprise, as well as to reach out to customers in new ways, will lead in this era. "Any activity you're going to engage in, whether it's buying or simply planning something, you'll be able to take advantage of the Web and you'll even take it for granted."

I would imagine that I am probably preaching to the converted when I sing the praises of e-mail. However, if there is even one reader who has avoided getting connected, I encourage that person to try using e-mail. With e-mail, I can instantaneously send a Memorandum of Understanding to both clients, and they can e-mail be back their changes, all at no cost. There are not missed phone calls, no messy faxes, and no express mail charges. Of course there is a caveat - e-mail can also be very dangerous. As an example, it's easy to hit the "reply to all" button when you just intend to reply to the sender.

In speaking with ADR practitioners, every person who has a web site has stated to me that they are pleasantly surprised that is does reach potential clients, and that these clients are much more suitable ADR candidates that those that come through the Yellow Pages. Even if your ADR practice is overbooked, the web can still be useful for reducing your marketing, printing and mailing costs. You reduce the need for mailing out brochures by referring potential clients to your web site when they ask for information about your approach to ADR.

STEP 10: PLAN FOR CHANGE; nothing stays the same.

I see two different forces impacting ADR - one is the increasing acceptability of ADR, and the second is the impact of technology. There are futurists who specialize in predicting change; my views are strictly as an amateur. Here are five ways I believe ADR will change in the near future:

- No matter what happens to the legality of multi-disciplinary practice (MDPs), there will be greater collaboration between various professionals. If servicing the client well is the primary objective, then bringing the best available resource to the table is in the best interests of the client. ADR professionals are becoming more comfortable and appreciative of each other's talents. There will be a more standardized approach to servicing clients and pricing services. Service approach and pricing will be based less on the person's primary area of specialty, and more on a standard approach for ADR services, no matter what the practitioners background.
- While there will be greater demand for services, there will also be more ADR practitioners, and the field will get more competitive. Clients will be shopping around more for services.
- As evidenced by the success of SquareTrade, a company that provides online dispute resolution for web auctioneer eBay, there will be greater acceptance and use of online dispute resolution, especially for low dollar disputes. If you are interested in more information online dispute resolution, read Online Dispute Resolution - Resolving Conflicts in Cyberspace by Ethan Katch and Judith Rifkin, published by Wiley Company.
- ADR will become the standard tool for resolving disputes such as divorce, rather than the exception. It will become the default so to speak. If people cannot resolve their issues in ADR, they will then utilize the legal system.

STEP 11: STAY OUT OF TROUBLE by observing generally accepted guidelines for the practice ADR.

Most ADR organizations have a code of ethics for members. With respect to mediation, a group of commissioners of the National Conference of Commissioners on Uniform State Laws (NCCUSL) has been drafting a Uniform Mediation Act (UMA) in collaboration with the American Bar Association's Section on Dispute Resolution, which incorporates many of the principles these organizations, and will apply to most areas of mediation, if enacted. It is important that ADR practitioners make themselves aware of acceptable practice guidelines for their state and ADR organizations, and practice within these parameters to protect their professional reputations.

The UMA draft is available on the web at www.pon.harvard.edu/guests/umaDRAFT. Some of the highlights of the draft act include:
- Decision-making authority in the mediation process rests with the parties.
- Before accepting an assignment, the mediator should disclose whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a party or foreseeable participant in the mediation.
- There is no privilege for communication sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child.
- An attorney or other individual designated by a party may accompany the party to and participate in mediation. A waiver of participation given before the mediation may be rescinded.
- A mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding mediation to a court, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation, but a mediator may disclose whether the mediation occurred or has terminated, whether a settlement was reached, and attendance.

STEP 12: BE GRACIOUS.

I am always in awe when genuine graciousness is shown to me. Everyone is busy; we have good intentions but get sidetracked along the way. I believe the trick is to put these activities at the top of your day's "to do" list. In meditation, my best clients continue to come through referrals. It just makes good business sense to be gracious.
- Take the time to thank the people who refer to you. Develop a routine, whether is be dropping a note, sending e-mail, or picking up the phone. Always ask potential clients who referred them to you.
- If you receive a call outside your area of specialty, refer them to someone who does perform that type of service. You will be doing them a favor as well as the service provider.
- When you see an article that you know will help a colleague, send them a copy with and handwritten note with a copy of the article.

* * * * *

Cesare Pavese stated, "Lessons are not given, they are taken." Not everything that has worked for me will work for you, and some things that didn't work for me, might very well work for you. However, I hope that they're at least a handful of helpful tips you can take and implement from this article. And, I hope that they do help enhance your practice. Have any secrets to your success you would like to share? I welcome your ideas and your feedback.

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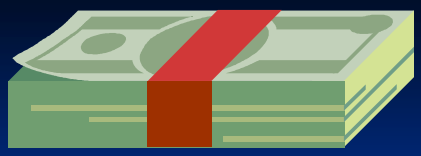
NJ ICLE 40-Hour Divorce Mediation

Practice Management/Marketing

Anju D. Jessani, MBA, APM®
Accredited Professional Mediator
Divorce with Dignity Mediation Services
223 Bloomfield Street, Suite 104, Hoboken, NJ 07030
(201) 217-1090
ajessani@dwdmediation.org
www.dwdmediation.org

Updated 2/13/23

The Importance of Marketing



"Even the perfect product needs careful marketing, and mediation is no exception to this rule. A competent mediator needs to generate a cash flow…" John M. Haynes, PhD

"Build it and they will come - does not apply to mediation services…" Anju D. Jessani, MBA, APM"

2

Presentation Agenda

A. Faculty practices
B. Your attitude towards marketing
C. What is marketing?
D. Marketing 101 – 5Ps
E. Your marketing plan, including promotion
F. Websites
G. Blogs
H. Social Networking
I. Your Unique Selling Proposition
I. Naming your practice
J. Basics as you establish your mediation practice
K. 1:40 Economic Mediation
L. Billing Options
M. Review Attorneys
N. ADR Organizations
O. NJAPM Accreditation
P. 12-Step program for ADR
Q. Questions/Comments

3

A. My Practice

- Corporate background
- Divorced thru mediation in 1994
- Hoboken office established in 1997
- Clinton office established in 2005
- Focus on private divorce mediation
- Practice 100% dedicated to mediation
- Differentiators – MBA/financial experience, own divorce thru mediation, write extensively, President of NJAPM 05-07, assisted 1,200 couples divorce since 1997

4

B. Exploring Attitudes Towards Marketing

- When I think of marketing, I feel it is:
  1. Scary?
  2. Fun
  3. A necessity?
- In terms of marketing, I prefer to
  1. Network with other professionals?
  2. Write articles and/or blog?
  3. Make presentations?
  4. Design and maintain a website?
  5. Spend money on advertising?
- What will happen if you don't do any marketing?

5

C. What is Marketing?

Everything is ... Marketing ... is Everything

- Can't be placed in a neat box
- The way your phone is answered
- How you reply to e-mail messages
- How your office is decorated
- The quality of your MOU's
- The way you deal with an unhappy client

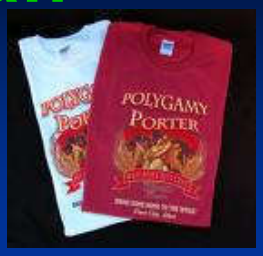
6

D. Traditional 5 P's of Marketing; What is Your Brand?

1. **Product**: What product(s) are you selling and to whom? Bundled? Unbundled? Session at a time or a package?
2. **Place** (& Time): Where are you selling your product/services?
3. **Price**: How much does your product cost and how do customers pay for it?
4. **Promotion**: How will people know about your product? **(To be discussed Further)**
5. **People**: Who is involved in the delivery of your service – from initial inquiry forward?

7

E1. You Need a Marketing Plan

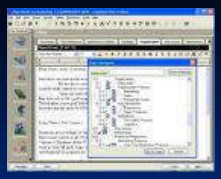


What is not a marketing plan…

- Wearing a t-shirt with your logo
- Printing a business card
- Throwing a lavish party
- Developing a website
- Running a yellow-page listing
- Assuming what works in your primary profession will work for mediation
- Making it up as you go

8

E2. You Need a Marketing Plan



Your Marketing Plan Should Include

- Your mission
- Market analysis/Competition
- SWOT analysis – Strengths, Weaknesses, Opportunities, Threats
- What makes you unique?
- 5 P's – Product, Price, Place, Promotion, Place
- Cost to enter market, ongoing costs
- Realistic income/expense projections

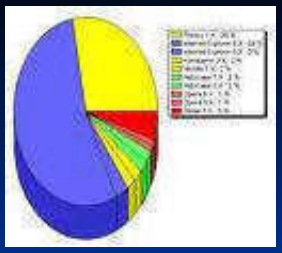
See Page 13 for marketing plan resources

E3. Component of Plan – Market Analysis/Competition

- NJAPM has @ 200+ members
- @ 2/3 do family & divorce mediation
- Most NJ divorce mediators are NJAPM members
- Handful of full-time divorce mediators in New Jersey
- @ 65% attorneys, 25% mental health, 10% financial and other
- Most practicing in their primary field; 1/3 of practice is mediation
- No one dominates the market
- You are in a “me too” business

10

E4. Component of Plan - Market Size & Share?



- 50% marriages end in divorce
- Most of these can be mediated
- Scope for private family mediation is huge
- Business is there for the taking
- Much room for new mediators in New Jersey
- Mediators are competing against litigation
- Family Economic Program for experience
- Gay marriages, civil unions and domestic partnerships are a growing segment of the market

11

E5. Promotion Strategies For Mediation

Worked Better

- Websites
- Social Media
- Writing articles
- Speeches to Professionals
- Networking
- Cross-Referrals
- Professional organization memberships
- Longevity
- **New in 2021, Videos**

Not as Well

- Library talks
- Talks to advocacy groups
- Print advertising
- Yellow Page Listings (but you may still need them)
- Radio ads
- Promotional give-a-ways
- Inconsistency between primary profession and mediation

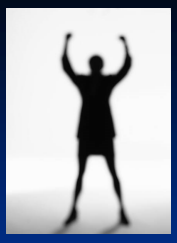
12

E6. Marketing Plan Resources

- www.sba.gov: U.S. Small Business Administration for marketing plan templates and guidance
- www.score.org: Service Corps of Retired Executives; online + 13,000+ volunteers offering business counseling services at no charge
- www.mediate.com: Everything mediation
- http://lenski.com: Website for Tammy Lenski, Author of *Making Mediation Your Day Job*
- www.mostenmediation.com: Website for Woody Mosten, Author of *The Mediation Career Guide*

13

F. Your Website - Working 24/7



- A necessity for divorce mediation
- Google Search: divorce mediation new jersey 2,130,000 results on 2/13/23
- Add APM, 247,000
- Top five, excluding three paid ads and NJAPM:
  1. www.sannsmediation (Marv S)
  2. https://divorcelawandmediation.com (Steve M)
  3. www.kvellamediation.com/case-closed (Kath V)
  4. https://www.dwdmediation.org/ (Anju J)
  5. www.newjerseymediation.com/ (Virginia R)

... Demonstration of various mediation websites

14

G. Blogs

- A blog - a blend of the terms web and log
- Commentary or online diary
- Blog is a type of website or part of a website
- Meant to be updated with new content
- Easy to setup and update
- Search engines like frequent content
- Good for client loyalty
- Twitter is a “microblog” – 140 Characters

15

H. Social Networking

- Web based media for networking
- Social networking accounts for 1 of every 6 minutes spent online (http://blog.comscore.com)
- Connect people w/common interests across borders
- ***Facebook*** used for both personal and business; friends chat, businesses have followers; 1 in every 9 people on Earth is on Facebook .
- ***Linkedin*** used for professional networking where uses can employment history, recommendations…
- ***Twitter*** allows you to follow your friends, experts, favorite celebrities, and breaking news.

16

I. Class Exercise – Your Unique Selling Proposition (if time permits)

- Interview your neighbor. Write down 5 things a divorcing couple would find appealing about your him/her as their mediator (e.g. John has been a divorce mediator for 20 years and has a good understanding of family law)

1. _____
2. _____
3. _____
4. _____
5. _____

- **Classroom Debrief**:

_____

_____

17

J. Naming Your Business

- New Jersey's latest change to RPC 7.5 in 2020 eliminated the requirement that a law firm name include the name of a lawyer.
- For attorneys, trade name must not be "misleading, comparative, or suggestive of the ability to retain results" is preserved.
- If using trade name, advertisements and letterhead must include the name of one licensed NJ attorney
- Lawyers licensed in other states should check their RPC's
- Other professionals should check their own rules
- Make sure you are not infringing on existing trade or service marks

18

K. Some Basics As you Establish Your Practice

- **Business Plan –** Use existing templates (see page 13)
- **Immediately** – Use your NJAPM profile https://njapm.org/find-a-mediator/genesis-liu/
- **Website – don't obsess; e.g.** www.mediate.com - $50/month https://www.mediate.com/articles/infodoc.cfm
- Alternatively, develop website/blog via www.wordpress.org - free
- **Business Cards** – Avoid "Certified Mediator" (NJ Courts & NJAPM do not certify mediators) – use Mediator, NJAPM General Member, Qualified 1:40 AOC Mediator, etc., APM only if Accredited by NJAPM
- **Network/Lunch** – Best source of leads – people who trust you; develop relationships w/mental health professionals, attorneys; focus on WIIFT (what's in it for them)
- **NJAPM Peer Groups Lunches** – Meet Peers, Discuss Cases, Learn, Share, see www.njapm.org site for schedule
- **Focus on Building the Practice First** – Don't obsess about profitability initially; get experience, have enough capital

19

L. 1:40 Economic Mediation

- **Application**: https://njcourts.gov/forms/10488_em_appl.pdf?c=RyB
- **Free Component**: 1 hour planning time & 1 hour session time
- **Admissions Requirements**: Completion of Approved 40-Hour Divorce Mediation Training Class **Plus**

  - JD, Admission to NJ Bar for 7 Years, License to practice in NJ, practice substantially in family law, **or**

  - Advanced degree or CPA License, At least 7 years experience in Field of Expertise, Licensed if Necessary
- **When**: Post Early-Settlement Panel
- **Appointment**: Mediator usually chosen by the attorneys

20

M. Billing Options

- **Pay-As-You Go:**
  Cash, Check, Credit Card
- **Retainer**
- **Invoice**

21

N. Review Attorneys

- Mutually beneficial relationship
- Different attorneys for different types of clients
- My list has about 40 attorneys
- Also use the NJAPM member list for referrals
- If you do review work, you need to let me know
- Expectation – review attorney understands mediation process and client doesn't get everything they want!
- Doing review work is a great way to enhance mediation skills

22

O. ADR Organizations

- ABA Dispute Resolution Section: **http://www.americanbar.org/groups/dispute_resolution.html**
- Association for Conflict Resolution (including NJ Chapter) **www.acrnet.org**
- NJ / Association of Family and Conciliation Courts: **http://afcc-nj.org**
- NJSBA Dispute Resolution Section: **www.njsba.com**
- New Jersey Association of Professional Mediators: **www.njapm.org**
- The Justice Marie L. Garibaldi American Inn of Court for ADR: **www.innsofcourt.org/inns/garibaldiadrinn/**

23

P. NJAPM Accreditation

- Accredited Professional Mediator – APM
- Application on www.njapm.org website
- Must be an NJAPM member to apply
- Application is free
- Family/Divorce or Business/Commercial APM
- Required: Undergraduate Education
- Graduate Degree or Professional Licenses required, may be waived w/substantial mediation experience
- 40 Hours divorce training for divorce accreditation
- Required: 100 Hours of mediation experience; 48 hours are maximum internship hours to be applied
- Documentation includes 15 summaries of or 4 MOUs
- Required: Four references

Q. Jessani's 12-Step Program for Enhancing Your ADR Practice

STEP 1: **DON'T QUIT YOUR DAY JOB** without understanding the cost!

STEP 2: **PREPARE A BUSINESS PLAN** and track your progress relative to the plan.

STEP 3: **FOCUS ON BUILDING A BETTER MOUSETRAP** not on reinventing the wheel.

STEP 4: **DEVELOP YOUR UNIQUE SELLING PROPOSITION** to describe what makes you and your ADR practice unique.

STEP 5: **TAKE ADVANTAGE OF TRAINING** and credentialing opportunities.

STEP 6: **JOIN ADR ORGANIZATIONS** and network with fellow ADR practitioners.

STEP 7: **GET ON APPLICABLE REFERRAL LISTS** for your area of specialty.

STEP 8: **SEEK WRITING AND SPEAKING ENGAGEMENTS** and set practice goals accordingly. Advertising is expensive

STEP 9: **GET AN E-MAIL ADDRESS AND A WEB SITE**; these are essential to doing business in the 21st century.

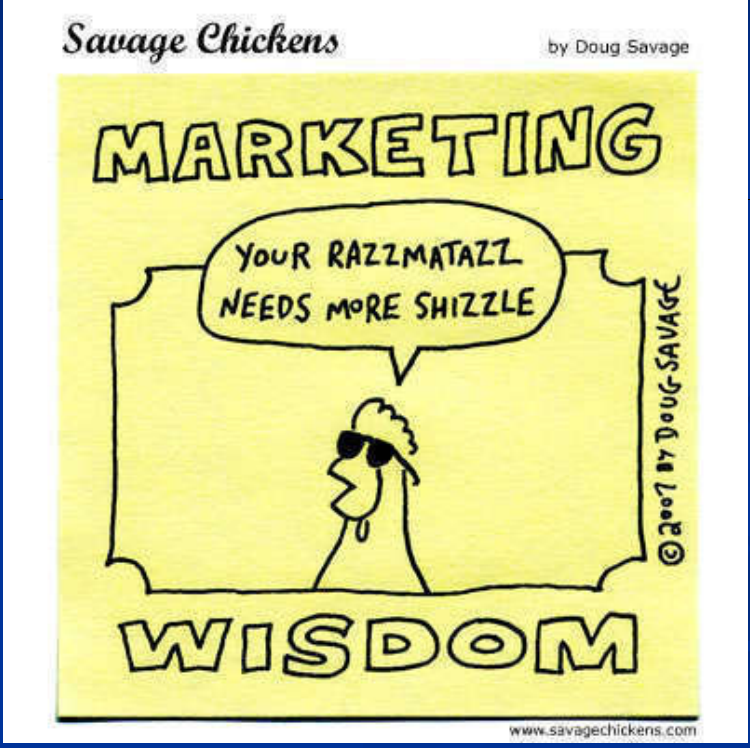
STEP 10: **PLAN FOR CHANGE**; nothing stays the same.

STEP 11: **STAY OUT OF TROUBLE** by observing generally accepted guidelines for the practice ADR.

STEP 12: **BE GRACIOUS**.

25

R. Questions/Comments



NJ ICLE 40-HOUR DIVORCE MEDIATION
1:40 ROSTER, POST-MESP
PROGRAM FOR MEDIATION OF ECONOMIC ASPECTS OF FAMILY LAW CASE

New Jersey Courts
Independence • Integrity • Fairness • Quality Service

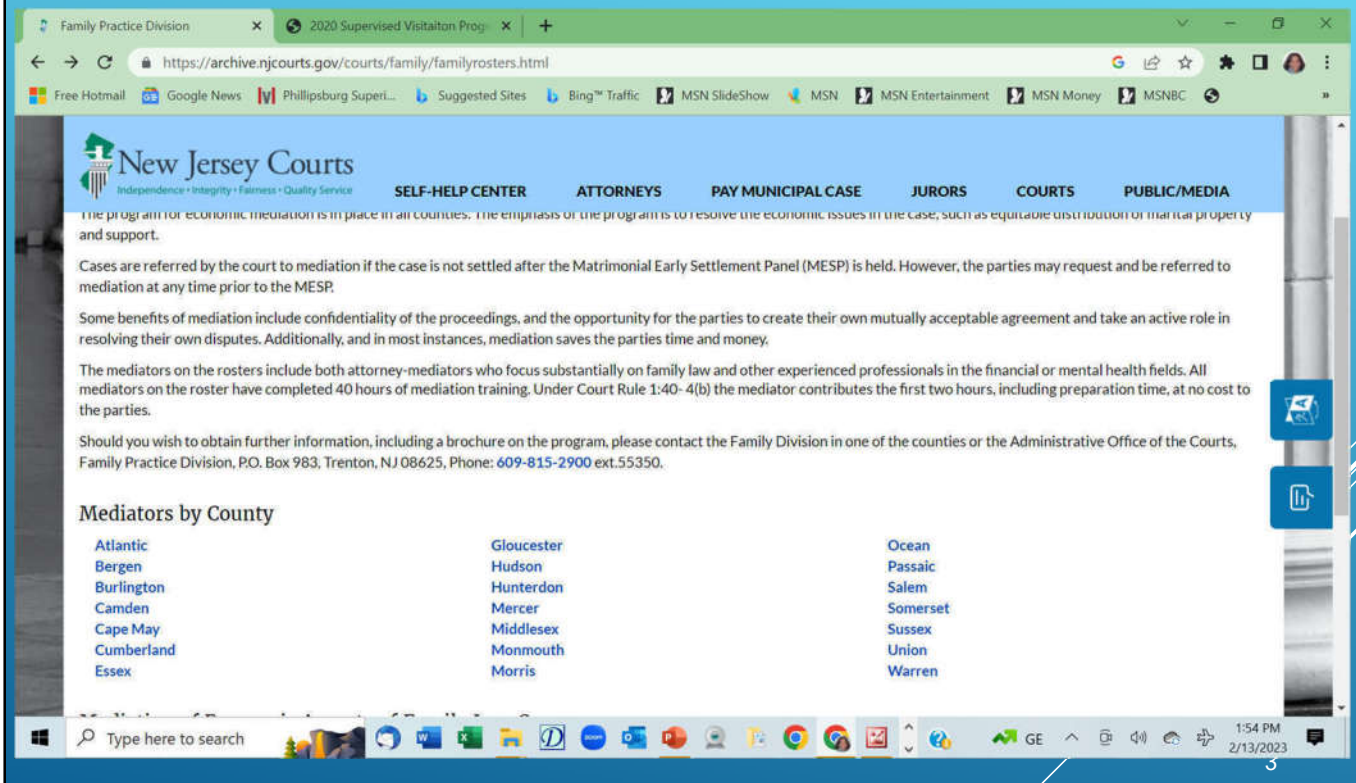
Anju D. Jessani, MBA, APM®
Accredited Professional Mediator
Divorce with Dignity Mediation Services
223 Bloomfield Street, Suite 104, Hoboken, NJ 07030
(201) 217-1090
ajessani@dwdmediation.org
www.dwdmediation.org

Updated 2/13/23

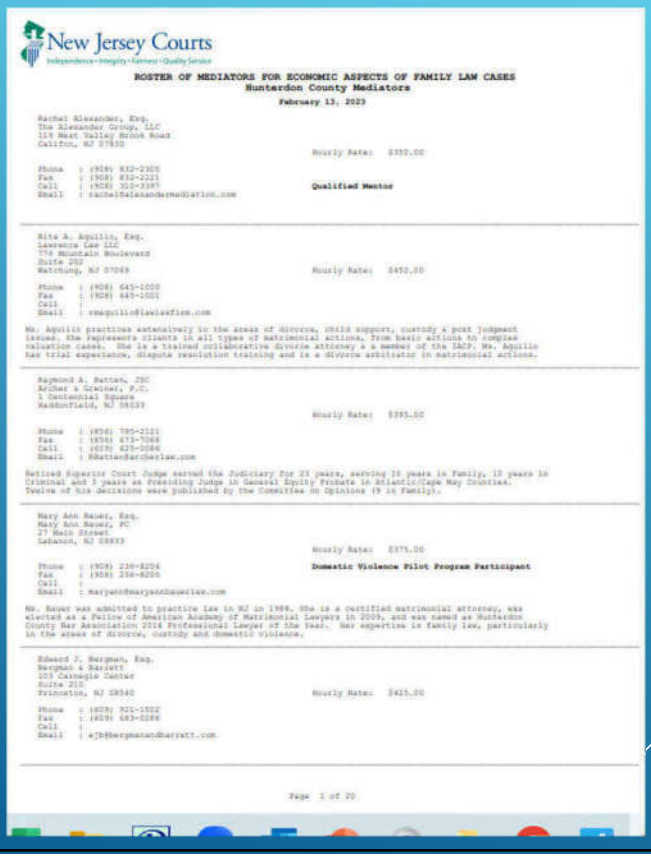
1:40 Family Roster Agenda

1. Organization of roster
2. County listings
3. Roster application
4. Mentoring Requirement

1. 1:40 Family Roster, Mediators Listed by County



2. Roster Of Mediators, By County Note Qualified Mentors



New Jersey Courts

ROSTER OF MEDIATORS FOR ECONOMIC ASPECTS OF FAMILY LAW CASES
Hunterdon County Mediators
February 13, 2023

Rachel Alexander, Esq.
The Alexander Group, LLC
159 West Valley Brook Road
Califon, NJ 07830

Hourly Rate: $350.00

Phone : (908) 832-2305
Fax : (908) 832-2221
Cell : (908) 310-3397
Email : rachel@alexandermediation.com

Qualified Mentor

Rita A. Aquilio, Esq.
Lawmore Law LLC
776 Mountain Boulevard
Suite 202
Watchung, NJ 07069

Hourly Rate: $450.00

Phone : (908) 645-1000
Fax : (908) 645-1001
Cell :
Email : raquilio@lawlawfirm.com

Ms. Aquilio practices extensively in the areas of divorce, child support, custody & post judgment issues. She represents clients in all types of matrimonial actions, from basic actions to complex relation cases. She is a trained collaborative divorce attorney & a member of the IACP. Ms. Aquilio has trial experience, dispute resolution training and is a divorce arbitrator in matrimonial actions.

Raymond A. Batten, JSC
Archer & Greiner, P.C.
1 Centennial Square
Haddonfield, NJ 08033

Hourly Rate: $395.00

Phone : (856) 795-2121
Fax : (856) 673-7068
Cell : (609) 425-0066
Email : RBatten@archerlaw.com

Retired Superior Court Judge served the Judiciary for 25 years, serving 10 years in Family, 10 years in Criminal and 5 years as Presiding Judge in General Equity Probate in Atlantic/Cape May Counties. Twelve of his decisions were published by the Committee on Opinions (9 in Family).

Mary Ann Bauer, Esq.
Mary Ann Bauer, PC
27 Main Street
Lebanon, NJ 08833

Hourly Rate: $375.00

Phone : (908) 236-8204
Fax : (908) 236-8205
Cell :
Email : maryann@maryannbauerlaw.com

Domestic Violence Pilot Program Participant

Ms. Bauer was admitted to practice Law in NJ in 1988. She is a certified matrimonial attorney, was elected as a Fellow of American Academy of Matrimonial Lawyers in 2009, and was named as Hunterdon County Bar Association 2014 Professional Lawyer of the Year. Her expertise is family law, particularly in the areas of divorce, custody and domestic violence.

Edward J. Bergman, Esq.
Bergman & Barrett
103 Carnegie Center
Suite 210
Princeton, NJ 08540

Hourly Rate: $425.00

Phone : (609) 921-1002
Fax : (609) 683-0288
Cell :
Email : ejb@bergmanandbarrett.com

Page 1 of 20

3. Roster Application, Page 1

Criteria for Admission to the Roster of Mediators for Economic Aspects of Family Law Cases

A Joint Credentials Committee of the Supreme Court Committee on Complementary Dispute Resolution and the Supreme Court Family Practice Committee will review all applications. All criteria must be met for approval.

Mediation Training
Successful completion of 40 hours of divorce mediation training approved by the Joint Credentials Committee. A copy of the certificate of completion must be included with the application.

Education/Professional Experience

1. **Attorneys**
   a. Juris Doctor (or equivalent law degree);
   b. Admission to the Bar at seven years;
   c. Licensed to practice law in New Jersey; and
   d. Practice substantially dedicated to matrimonial law.

or

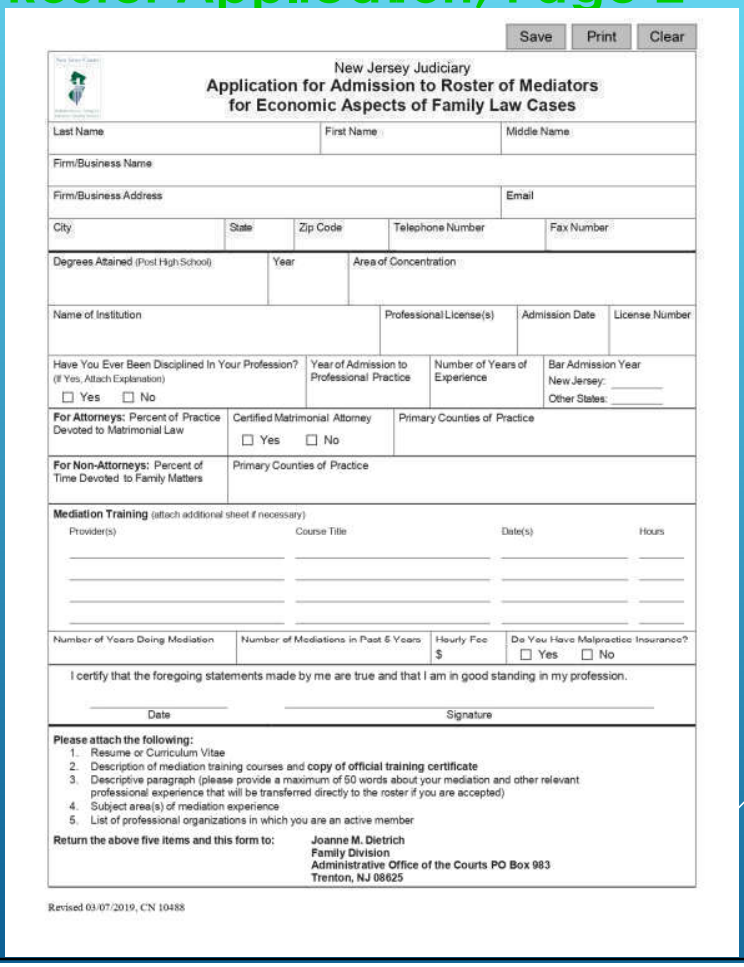
2. **Non-Attorneys**
   a. Advanced Degree in Psychology, Psychiatry, Social Work or Allied Mental Health field, Business, Finance, or Accounting or a CPA;
   b. At least seven years of experience in the field of expertise; and
   c. Licensed in New Jersey, if required, in the field of expertise.

Mediation Mentorship
After receiving a conditional approval, applicants must complete a mentorship. **The mentorship must be completed with an approved Family Part qualified mentor mediator**. The mentorship must be a minimum of 5 hours in at least two cases. The mentorship should not be completed until a conditional approval has been issued.

Annual Continuing Education
Following final approval for admission to the roster, attendance at a minimum of four (4) hours of annual continuing education is required as set forth under *Rule* 1:40-12(b)(2).

Revised 03/07/2019, CN 10488

3. Roster Application, Page 2



Save Print Clear

New Jersey Judiciary
Application for Admission to Roster of Mediators for Economic Aspects of Family Law Cases

Last Name	First Name	Middle Name
Firm/Business Name		
Firm/Business Address		Email

City	State	Zip Code	Telephone Number	Fax Number

Degrees Attained (Post High School)	Year	Area of Concentration

Name of Institution	Professional License(s)	Admission Date	License Number

Have You Ever Been Disciplined In Your Profession? (If Yes, Attach Explanation) ☐ Yes ☐ No	Year of Admission to Professional Practice	Number of Years of Experience	Bar Admission Year New Jersey: _____ Other States: _____

For Attorneys: Percent of Practice Devoted to Matrimonial Law	Certified Matrimonial Attorney ☐ Yes ☐ No	Primary Counties of Practice
For Non-Attorneys: Percent of Time Devoted to Family Matters	Primary Counties of Practice	

Mediation Training (attach additional sheet if necessary)

Provider(s)	Course Title	Date(s)	Hours

Number of Years Doing Mediation	Number of Mediations in Past 5 Years	Hourly Fee $	Do You Have Malpractice Insurance? ☐ Yes ☐ No

I certify that the foregoing statements made by me are true and that I am in good standing in my profession.

Date _____ Signature _____

Please attach the following:
1. Resume or Curriculum Vitae
2. Description of mediation training courses and **copy of official training certificate**
3. Descriptive paragraph (please provide a maximum of 50 words about your mediation and other relevant professional experience that will be transferred directly to the roster if you are accepted)
4. Subject area(s) of mediation experience
5. List of professional organizations in which you are an active member

Return the above five items and this form to:
Joanne M. Dietrich
Family Division
Administrative Office of the Courts PO Box 983
Trenton, NJ 08625

Revised 03/07/2019, CN 10488

4. Guidelines For The Mentoring Requirement

Guidelines for the Mentoring Requirement of the Family Economic Mediation Program
(Guidelines Promulgated December 22, 2016)

1. The following requirements must be met for a mediator to be included on the Judiciary's Family Part Economic Mediator roster. Economic Mediator applicants (applicants) shall complete the process in the following sequence:

    1. Complete a 40-hour training program complying with the requirements of the court rules.
    2. Complete the application process for admission to the Judiciary roster of mediators.
    3. Upon application approval, applicants must be mentored by an approved Family Part roster mentor mediator (mentor) for a minimum of five hours in at least two cases in the Family Part. The Family Part Economic Mediation roster includes those mediators who have been approved as mentors. The applicants must select a mediator from the roster who has been designated as a mentor.

2. In the mentored cases, it is the obligation of the mentor to inform the litigants prior to the mediation that a second mediator (the applicant) will be in attendance and why. If either party objects to the presence of the second mediator, the applicant may not attend the mediation. In all mentored cases, the mentor conducts the mediation, while the applicant observes.

3. Applicants are provided with the same protections as the mentor mediator under the Uniform Mediation Act.

4. Prior to the observation by the applicant, the mentor shall meet with the applicant to discuss the Family mediation process. The mentor shall provide the applicant with submissions by the parties. As part of the mentoring, the mentor shall again meet with the applicant after the session(s) to discuss the mediation as well as any other questions regarding the process. These meetings are in addition to the five hours of observation.

5. The applicant **shall not** be monetarily compensated for participating in this mentoring process.

6. Following completion of the required mentoring sessions, the applicant shall certify her/his compliance with that requirement by completing the Certification of Completion of Mentoring Requirement form (Certification) (CN 12055). This Certification shall be submitted to the Administrative Office of the Courts, Family Practice Division, Richard J. Hughes Justice Complex, 7th Floor North, PO Box 983, Trenton, NJ 08625-0983, or via fax to: 609-984-0067.

7. The applicant will not be added to the Judiciary's Family Economic Mediation roster unless and until all of the requirements set forth above have been completed.

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PRIVATE DISPUTE RESOLUTION

Robert E. Margulies, Esq.

MEDIATION: ANTIDOTE TO LITIGATION?

In litigation the corners are defined and the Kabuki dance that litigators undertake is well choreographed. Unfortunately for clients, litigation is becoming prohibitively expensive. In New Jersey 98.1% of all civil cases are resolved without a full trial. This rate is reasonably consistent throughout the country. Businesses recognize the cost and aggravation savings of an alternative process to litigation. The optimal alternative is mediation. Although both the state and federal courts have mediation programs that are conducted in tandem with the processing of a lawsuit, private mediation should be considered either before filing a lawsuit or early on in dispute resolution and impasse breaking.

Rationale for Mediation

There are at least three principal reasons that a good mediator should be employed to try and help parties solve disputes early in the litigation/dispute cycle. Cost can be divided into three categories. The cost of legal fees, expert fees and litigation support is staggering. A Rand study suggests that 80% of the cost of litigation is the discovery process. Parties have to become aware that the diversion of monetary resources from litigation into settlement may be advantageous. The loss of revenue when litigants are diverted from their otherwise productive endeavors is significant. The aggravation factor is a cost whose value is often beyond the bounds of bearability.

Second, unless a matter is settled, the risk of loss or winning remains extant. A party has minimal control of a lawsuit. The parties' input consists of their advocate being able to influence

a judge or jury. The jury represents the delegation of the responsibility of making a decision from the disputants to six people randomly picked from the forum community. Is the jury process appropriate for business disputes? A rational response is no - there is too much risk due to the vagaries of the jury selection process. There is no history of decision making by jurors so that not even a rational guess as to the outcome may be ventured regarding a party's desired result.

Mediation provides an opportunity to control risk by eliminating it. In addition, parties don't need to be stuck in the lawsuit remedy box. Voltaire, the famous French philosopher is reputed to have stated: "I was ruined but twice in my life - once when I lost a lawsuit and once when I won one".

The third incentive to mediation is the time factor. The extent to which a lawyer can help his client gain a business result as opposed to spending time in the litigation adds significant value. The time factor becomes more important depending on the complexity of the matter. The advent of e-mail discovery in a relatively straightforward employment case will not likely be either time or cost effective. The same concept applies to extensive analysis or a "paper chase."

Litigators often complain that mediation is being considered too early in the process, i.e., before discovery has been adequately advanced. If the focus of the parties is solving a problem rather than designing a fight, you might expect that focused information exchange, i.e., prioritized discovery, would more efficiently produce the information necessary for an informed and voluntary settlement decision. To suggest that an expert report is a prerequisite to mediation, except in the most unique circumstance, is naive. This doesn't mean that clients shouldn't have the ability to have sufficient information to understand a claim and/or defense in order to be able to evaluate the risk involved. A good mediator will focus the parties' attention on prioritizing such an exchange.

Alternatives

If you agree that litigation is too time consuming, expensive and unpredictable, you might ask why not arbitrate a matter instead of using mediation. The advantage to arbitration is supposed to be a quick, efficient, final and binding determination which puts the dispute behind the parties. Arbitration today, in many cases, has become as expensive and divisive as litigation. It continues to be unpredictable in avoiding the risk that remains until it is subsumed by the arbitrator's determination. There is no binding precedent to rely upon. Even after an arbitration decision parties seem to insist on going the litigation route to try and upend a negative result. The 11th Circuit Court recently excoriated the litigants for frivolous litigation following an evidently unexpected adverse arbitration result by the aggrieved party, followed by a court challenge.

Mediation provides an opportunity to readjust the expectations of the parties. When a case comes to a lawyer for analysis and action, most lawyers tend to anchor to their client's position. This is natural in order to impress the client you are on their side and will be their champion. The filter that the lawyer provides often obfuscates an objective analysis and assessment of realistic expectation in the outcome. This leads to the usual posturing stance that lawyers mistake for effective negotiation.

An experienced mediator may help the parties objectify their analysis so they don't run the risk of leading their client into the litigation abyss. Mediators should be facilitative in their approach, but that doesn't mean they have to be wishy-washy. An effective use of risk benefit analysis techniques is the "silver bullet" of an effective mediator.

Choosing the Mediator

The most important decision to be made in mediation is how to choose a mediator. There are several premises that we must accept. No one really wants a neutral mediator; everyone is looking for the edge. The most that you can expect is a comfort level by reason of the mediator acting as

a facilitator as opposed to an evaluator. The problem with an evaluative mediator, one that has all the answers, is that their superior solution may not fit either your need or necessarily be objective. A settlement judge's technique of pounding the parties with his/her answers to all of the issues is a technique that is not mediation. If the mediator is a former jurist, he or she does not have the "day of reckoning" awaiting as they did when they were on the bench. Parenthetically, there are a number of former jurists trained as mediators who understand how to use their accumulated knowledge to facilitate a settlement as opposed to deciding the case.

Let the other side choose the mediator, subject only to your veto power. The veto would be exercised only in the instance when you know the particular mediator will be unhelpful. If the adversary picks the mediator, they are more likely to trust in his or her judgment. You have already created some leverage in the negotiation. The mediator is not an adjudicator, so the prohibition of ex parte communication does not apply. Be sure to interview the mediator in advance of agreeing to hire him or her. You should inquire as to their technique, substantive experience regarding your particular claim, as well as probe any conflicts or allegiances that might affect your client's confidence in their judgment or suggestions.

Determine whether you want a judge, a lawyer or an Indian chief to mediate your dispute. If your client needs a decision, go to arbitration or trial. If you want a settlement coach, pick an individual who has facilitative skills as well as the substantive background to understand the peculiarities of your particular dispute. Don't get stuck on requiring a subject specific lawyer or judge as mediator unless they have excellent mediation skills. Remember - everyone brings their own background and prejudices to the table. A good mediator must be able to take that baggage and place it on the side in order to help.

Goals

You can either win or lose a mediation. To win, the real decision maker must be prepared. It is inappropriate preparation for a lawyer to tell their client that you are their white knight, they should not say anything and you will make things go well. The principal should participate in the dialogue with the mediator, both in the presence of the adversary and privately in caucus. You should also analyze and discuss acceptable options and prepare a negotiation strategy in advance.

The settlement options to help resolve the case may not be accepted legal remedies but, instead, may be business solutions. Don't forget about the simple apology, recommendation or something which has value, but which is non-monetary that may make the difference in enticing the adversary to settle the dispute. Creative ideas such as granting scholarships, charitable contributions or use of services without further charge for a specified time period.

A mediation is not necessarily a failure because there is not a final settlement. Often times the readjustment of the adversaries' expectation will realign future settlement negotiations. For instance, if the allocation among multiple defendants were accomplished without agreement on the quantum of the settlement fund, that case will likely settle eventually because the most difficult issue has been resolved.

Confidentiality

One of the cornerstones of the mediation process is confidentiality. The process is unique in that as a result of New Jersey's enactment of the Uniform Mediation Act, *N.J.S.A.* 2A:23C-4, the mediator has acquired his own privilege which is not held by the parties, but is retained by the mediator. This means that the mediator in all but extreme circumstances is not available to participate in the litigation process as a witness if the mediation fails.

Surprisingly, New Jersey has already addressed the extremely strong policy conditions surrounding mediation confidentiality in *State v. Williams*, 184 *N.J.* 432, 446-50 (2005). Although a mediator may testify regarding whether a settlement was reached, I predict that most mediators will not become the judge in that circumstance. Instead, the mediator should leave the fight over the enforcement of the settlement to the other participants, including the lawyers and parties who were present. *Lehr v. Afflitto* , 382 *N.J. Super.* 376, 391-96 (App. Div. 2006). In business disputes a confidential resolution is often not obtainable in court, although the parties may understand it is necessary to protect the business or participants in the dispute. The need for confidentiality may create reverse leverage in the negotiation, which should not be left on the table.

Posturing

Parties often arrive at mediation with strong positions or requirements for offers or demands or other constraints on negotiation which don't advance settlement prospects. Although positional bargaining and posturing are accepted behavior, most parties fail to exert the leverage they have in the negotiation to their advantage. If you consider a mediation merely a supervised negotiation, you may approach the process differently. In that case, you should attempt to arm your client and the mediator with ammunition to solve your client's problem as well as meet the adversary's needs. Remember, it takes all parties to settle.

For instance, it may be apparent for corporate accountability reasons that a dispute cannot be resolved without appropriate accounting information or an expert report. If the adversary needs that ammunition in order to convince their client to resolve the dispute, why fight it? In addition to the elimination of risk in resolving the matter, you may win the mediation by merely readjusting the adversary's expectations. The requirement of a party deposition is usually a different circumstance.

Consider whether you may lose leverage by taking the deposition by relieving the other side of their anxiety level, having participated in the deposition, without any concomitant gain.

Consider utilizing objective criteria to level the playing field. For example, what is referred to as "objective criteria" in "Getting to Yes" Fisher, Patton and Ury (2d Ed. Penguin) are standards, governmental reports, established precedent or reported jury verdicts or settlements. Make sure that the mediator has this information so that he or she can help educate your adversary and you can keep your clients' expectations within proper bounds.

Don't be afraid to consider that your client's expectations may be readjusted. Creativity and flexibility in resolving problems are some of the mediator's tools. The extent to which your client, who obviously knows their business better than the mediator, can propose alternative solutions, creates the best atmosphere for dispute resolution. Obviously, the better you have prepared the client for the eventuality that the mediator may want to readjust their expectation, the less of a surprise it will be when it happens.

In the private caucus session where the mediator meets alone with the lawyer and his or her client, feel free to bounce ideas off the mediator without worrying about whether that will create a position with your adversary. Of course, you must trust the mediator not to divulge this information if you use him or her as a sounding board. Clear it in advance; make sure that you communicate the specific information that you want the mediator to retain as absolutely confidential. The information may be a fact, an analysis, a case, an offer or demand. If you release the mediator to convey previously confidential information do so with specificity. Remember that the use of confidential information in mediation may leverage your position far beyond withholding the information for use in litigation.

Direct Communication

You have a wonderful opportunity to communicate directly with your adversary's decision maker in mediation. Often that opportunity without the usual filter of a lawyer allows communication of the information which will create the atmosphere for the principals to negotiate and get the deal done. Don't be afraid to whisper to the mediator that their persistence in keeping the discussion going is the necessary ingredient to allow the negotiation to continue to a fruitful end. Often times participation in mediation is wrongfully perceived as a sign of weakness. Don't fall for that ruse. In determining to settle or continue a law suit girding your loins for battle is always the alternative. Quaere, what is the best alternative to settlement?

Self determination is another keystone to the process. *Lerner v. Laufer*, 359 *N.J. Super.* 201, 216-18 (App. Div. 2003). When you solve the claim in mediation take the necessary time to consider all outstanding issues and "paper" the settlement. Depending on the sophistication of the matter you may hand write, record the oral argument with the parties' participation on a tape machine (a record), type on a lap top computer or dictate the resolution to a secretary to be typed. Be clear in your settlement document because courts recognize a strong public policy of enforcing settlements. The lawyers, not the mediator, should create the agreement.

Business clients, in particular, understand the advantages of prompt, less expensive problem solving. Help your clients set their goals based on need not want; let a mediator facilitate resolution by playing hard ball on the facts and being soft on the parties. Don't be offended if someone has to vent. Hopefully if the venting becomes a constant whine, the mediator will move the process along. Remember to allow creativity to mold solutions. If you approach mediation with a strategy, a prepared client and a facile mediator you'll likely have a satisfied client and a good result.

CONFIDENTIALITY AGREEMENT

This will acknowledge that the undersigned, personally and as a representative of _____ has been invited to attend and participate in Mediation, an Alternative Dispute Resolution Procedure, involving _____, _____and _____ I understand that this Mediation is a confidential proceeding among these entities and what takes place as part of the Mediation is not for publication or disclosure. My presence at the Mediation is subject to the following commitments made by me.

All information presented to the Mediator shall be confidential and shall not be disclosed by me to any third person or entity not present at the Mediation, without the specific consent of all parties and the mediator. The Mediator shall not be subject to subpoena to either give testimony or to produce any documents furnished to the: Mediator as part of the Mediation. The Mediator shall not be requested to give testimony at any other proceeding. No statements made to or documents specifically and independently prepared for the Mediator shall be construed as an admission or declaration against the interests of any participant in the mediation. Documents may be destroyed or returned to the participants by the Mediator at the conclusion of the Mediation. Proposals made during the Mediation by the or a party of counsel and the views and comments of the Mediator shall not be introduced as evidence in any other proceeding, and shall not be disclosed by me to any third party or person. The Mediator's comments and opinions are for the purpose of the Mediation and do not represent independent legal advice or opinion. The provision of this Article shall be strictly adhered to, subject only to judicial directive or order.

The Mediator shall not be liable for any act or omission in connection with this Mediation Agreement I understand that the Mediator shall not be looked to by me for the purpose of giving any legal advice or opinion. I have the right to counsel, and shall rely upon my counsel for all legal representation.

AGREED AND ACKNOWLEDGED;

By: _____

Dated: _____

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AGREEMENT TO MEDIATE

This agreement is based upon the participants' representation that they intend to create through mediation an agreement that addresses and settles major areas of dispute related to ??????????, and which is fair and workable for both participants.

Therefore, the parties agree:

1. Costs of Mediation. Mediation shall be conducted by the mediator who shall be compensated at the rate of $400.00 per hour for time spent in the conduct of mediation sessions and follow-up work on behalf of the participants to achieve the goals of mediation, including meetings with the participants, possibly meetings with the participants' attorneys, drafting post-mediation memoranda setting forth the agreements reached, a final memorandum of settlement, or drafting other related documents. Session fees are due at the end of each session. Fees incurred between sessions shall be paid at the next scheduled session. Post-session activities, if any, such as drafting documents, shall be paid within 30 days of invoicing.

2. Advance. An advance payment of $1,200.00 shall be paid by the participants to the mediator upon the signing of this agreement. Those funds will be held in the mediator's firm's attorney trust account. Those funds will be withdrawn and used to pay for all work done between mediation sessions and for the drafting of a memorandum of understanding until the conclusion of the mediation and all services are concluded. Any remaining balance of the advance will be applied to the participants' final bill.

3. Privacy of Mediation. (Privilege and Confidentiality)

a. **Privilege.** All communications that occur during mediation, both orally and written, whether during sessions or outside of sessions, are subject to privilege pursuant to the New Jersey Uniform Mediation Act (UMA). This law strictly prohibits disclosure of information discussed in or obtained through mediation ***to the court***. Accordingly, all communications between and among the parties/participants and the mediator shall not be disclosed to any court. Pursuant to this privilege, the mediator has the right to refuse to disclose any mediation communication, as that term is defined in the UMA, to the court, and may prevent any other person from disclosing a mediation communication(s) of the mediator.

There are exceptions to this privilege:

i. If a participant in mediation makes a threat or statement or a plan to inflict bodily injury, the mediator shall inform the person who has been threatened and report the threat to law enforcement authorities.

ii. The mediator has an affirmative duty to report to the Division of Child Placement and Permanency if he/she has reasonable cause to believe that a child has been subjected to abuse and/or neglect.

iii. The mediator has an affirmative duty to report ongoing criminal activity or threats of criminal activity to law enforcement authorities.

b. **Confidentiality.** The parties understand and agree that mediation depends upon the development of trust among the parties/participants and the mediator resulting from openness, frankness, and reasonable risk-taking. As a result, **the mediation must be afforded the protection of complete and unfettered confidentiality.** The mediator, parties and all participants will treat all information provided during mediation sessions, and among the parties/participants between sessions, as confidential and will not reveal same to any third party, except in the event that one of the parties/participants reveals information about which the mediator has a mandatory obligation to report such as ongoing or future criminal activity, threats against the life or safety of another person, child abuse/neglect, and domestic violence. All mediation parties/participants agree that communications during the entire mediation process are confidential. No party or participant will disclose the contents of these communications to any third party unless required by a court to do so or to the extent necessary to obtain professional advice from attorneys, therapists, tax advisers and other similar professionals, all of whom will be subject to the same confidentiality. The mediator may communicate with the participants' attorneys. Any such communication and/or disclosures made to the participants' attorneys will also be confidential and privileged as part of the mediation.

c. If the mediator meets with parties/participants in caucus (individually), such caucuses are part of the mediation and subject to privilege and confidentiality as to non-participants.

d. No party or participant shall provide any other person, court, or entity with notes or transcripts made of the mediation sessions, except to the extent necessary to obtain professional advice from attorneys, therapists, tax advisers and other similar professionals, all of whom will be subject to the same confidentiality.

e. Only the mediation parties and their attorneys will be permitted to and be present at and participate in mediation sessions. Third parties may not participate without consent of all participants and such participation is at the final discretion of the mediator ***only if*** the mediator determines that their participation may facilitate settlement. All persons who participate in mediation sessions shall be required to sign the Mediation Agreement and are subject to the confidentiality of mediation.

f. The parties agree that neither will call or subpoena or allow anyone else to subpoena the mediator or any employee or agent of the mediator as a witness to testify in any court proceedings or arbitrations, nor will either party subpoena or allow any attorney acting on his or her behalf to subpoena any records, notes, or other documents of the mediator in any matter related to the mediation. If a party to this agreement tries to have the mediator produce documents and/or appear in court in any situation in which the statutory privilege applies, that party will pay the mediator's legal fees in opposing the production and/or appearance as well as compensation at the mediator's hourly rate for the mediator's time in connection with the opposition.

g. **No video or audio recording shall be made of any mediation sessions whether in person, virtual (i.e. Zoom, Facetime, Microsoft Teams, Bluejeans, etc.), or by telephone. Photographs and/or screen shots shall not be taken by any party or participant without consent of all participants and the mediator.**

4. Role of Mediator.

a. The parties agree and understand that the role of the mediator will be to assist the parties in attempting to resolve the issues in dispute to the end that they might reach agreement.

b. The mediator will not render legal advice to either party or to the parties collectively. The mediator does not represent either party as an attorney. In fact, in functioning as a mediator, the mediator is not rendering legal advice or functioning as an attorney.

c. At the conclusion of the mediation, if the parties have reached an agreement, the mediator will prepare and forward to the parties a Memorandum of Understanding which memorializes the oral agreements reached during the mediation sessions. That memorandum or form of agreement will not be signed by the parties and is not a binding agreement. The parties will thereafter have the memorandum reviewed by their respective attorneys so that it might be put in final, legal form that is acceptable to both parties and their attorneys.

5. Consultants/Other Professionals. Persons other than the mediator such as child custody and parenting time specialists, financial advisors, forensic accountants, attorneys with other areas of specialization, etc. may be consulted when the parties agree to bring such consultants into the mediation process. The parties further agree to pay such consultants directly for their services on terms to which the parties and the consultant agree in order to assist the parties and the mediator in the mediation process. All consultants who are brought into the mediation process will be required to sign the mediation agreement and are subject to the privilege and confidentiality of the mediation process.

6. Attendance at Mediation Sessions. The parties will be expected to arrange their business and personal affairs to enable them to attend mediation sessions as scheduled. Mediation sessions will be scheduled at the convenience of the parties insofar as possible, taking into consideration the mediator's schedule as well.

7. Notice of Cancellation. Except in the event of illness or emergency, notice of cancellation of mediation sessions must be given by the parties not less than two full business days in advance of the appointment. Otherwise, the parties will be charged in full for the canceled session.

8. Full Disclosure of Financial Information. Each party will be required to provide and disclose fully and accurately all financial information, including financial statements, income tax returns, and similar financial documents requested by the mediator, and all information requested by the other party if the mediator finds that the disclosure may aid the mediation process. The parties are hereby informed that if there are subsequent findings by a court or arbitrator that a party failed to disclose fully and accurately all his or her assets, debts, income, and expenses, such non-disclosure or fraudulent disclosure may constitute grounds for nullifying the agreement.

9. Maintaining the *status quo* during mediation. The mediation parties/participants agree to participate in mediation in good faith and to maintain the *status quo* as to all issues until

an agreement is reached. The parties agree to not make any changes to the *status quo* unilaterally without first discussing same in mediation and obtaining consent of the other party. When property is an issue in the mediation process, neither party will, without the consent of the other, transfer, encumber (loans, mortgages, liens, etc.), conceal, or in any way dispose of real estate or tangible personal property during the pendency of the mediation.

10. Separate Meetings (Caucuses). The mediator or the parties/participants may request separate meetings (caucuses) when either feels this may help the mediation process. When necessary, the mediator will endeavor to give each party substantially equal time for such meetings, should it be agreed that caucusing may aid the mediation process. Unless agreed in advance by both parties/participants and the mediator, any information provided by a party during an individual session or caucus will not be withheld from the other party. Settlement positions and legal strategy may be kept confidential between the mediator and one party.

11. Independent Legal Counsel of the Parties. The parties are encouraged to retain and consult with independent legal counsel early in the mediation process. Legal counsel can help the parties understand applicable law and ascertain the legal parameters of their case to guide them during the mediation process. The mediator will communicate with the attorneys between sessions to apprise them of the procedural status of the mediation, if authorized by the parties, and the mediator determines same to be appropriate and necessary; however, the mediator will not disclose the substance of the mediation discussions to any third-party non-participants without the express consent of all participants. After a final agreement is reached, each party should have the Memorandum of Understanding reviewed by his or her attorney prior to signing a formal, written agreement or consent order. The mediator should not be considered by the parties to be a legal advisor.

12. Termination of Mediation. Mediation is a voluntary process. Either party or the mediator can terminate the mediation process any time. However, the parties agree that anyone wishing to terminate mediation will do so during a mediation session in order to allow discussion.

13. Impasse. If the parties are unable to reach an agreement about any or all issues, the parties and the mediator will discuss options for resolution of the remaining issues to be resolved. These options may include separate sessions with the mediator, referral of particular issues to other professionals, changing the mediation to arbitration for resolution of certain issues, or suspension or termination of the mediation.

14. Divorce or Post-Divorce Litigation and the Role of the Mediator. The mediator in his capacity as a mediator does not represent the parties in mediation in or out of court, does not provide legal advice, does not file court papers on behalf of either party, and will not appear in court on behalf of either party.

15. Observation for Mediation Trainees. We_____ consent/ _____ do not consent to allow a mediator in training to observe one or more mediation sessions. The trainee

will only observe the mediation, will not participate or be actively engaged in the mediation session, and is subject to confidentiality and privilege.

16. VIRTUAL/REMOTE MEDIATIONS SESSIONS. If mediation sessions are held virtually remotely/virtually, the following provisions shall apply:

a. Each participant will be sent an email with instructions as to how to log on and a link to the virtual session;

b. All permitted participants will be required to identify him/herself when seeking entry to the video, telephonic, or virtual mediation session.

c. Each party will provide BorgerMatez, P.A. his/her credit or debit card information prior to the commencement of the mediation which will be charged at the conclusion of the session. The parties agree that the mediator is authorized to charge his/her credit or debit card for services rendered. In the alternative, a party may pay an advanced payment for each two-hour session prior to the scheduled mediation session;

d. The privilege and confidentiality of mediation is applicable to all virtual sessions. No person other than the parties and their attorneys may be present in the room in which they are participating in the virtual mediation session unless there is consent of all participants and the mediator in advance. No one who is not an approved participant can be located in a place where they can see or hear the virtual mediation session.

17. Closing of File. Because mediation is a confidential process, there is no need for your physical or digital file to be retained after the mediation is concluded. Therefore, approximately 30-60 days after the conclusion of your mediation, your entire file will be destroyed. If you provide any original documents that you want returned, you are responsible to notify BorgerMatez, P.A. prior to the conclusion of the mediation or immediately thereafter. You will not be notified of the destruction of your file. The only document that will be retained is a digital copy of your memorandum of understanding, if one is drafted.

18. Binding Agreement. By signing this form of agreement, you agree that this is a legally binding agreement.

_____ _____

\- Party - Party

Date: Date:

_____

Bruce P. Matez, Esquire – Mediator
Date:

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BERNER
Law & Mediation Group

AGREEMENT TO MEDIATE

This AGREEMENT TO MEDIATE is signed by the parties and their Mediator, the Berner Law & Mediation Group ("Firm") to create and clarify the mediation relationship and process.

PURPOSE OF MEDIATION

Mediation is designed to enable the parties to discuss and reach informed agreements, where desired, as to the best arrangements for the individuals and the family in a situation where spouses or parents are living apart or considering or intending to do so. The parties understand that it is for the parties, with the Mediator's concurrence, to determine the scope of the mediation, and this will be accomplished early in the mediation process.

ROLE OF THE MEDIATOR

The Mediator's role is to facilitate the parties' communication and understanding of the issues. The Mediator will assist the parties in the discussion of the issues by advising them of the decisions to be made and, if needed, possible alternatives. The Mediator will make no decisions but will simply help the parties make their own decisions.

Although the Mediator is an attorney and draws upon his/her legal experience, the Mediator will not be providing legal advice or any other legal assistance for either of the parties in the context of this mediation.

The Mediator shall conduct the mediation in accordance with the professional standards and ethics as promulgated by the Model Standards of Practice for Family and Divorce Mediators, as adopted by the Family and Divorce Mediation Council of Greater New York, and the Association of Conflict Resolution, Family Section, which is made available on the Mediator's website, www.MediationOffices.com.

VOLUNTARINESS

Mediation is a voluntary process, and either party or the Mediator may terminate mediation at any time. It is recommended that any concern or dissatisfaction with the mediation process be discussed as soon as it may arise to address such concerns in a timely and appropriate manner. Each party understands that because mediation is not always an easy process, he or she will make his or her best efforts to discuss the consideration of withdrawing from the process in the presence of the other party and the Mediator in an attempt to make the most informed decision possible.

FAIRNESS

Although each party may have conflicting interests and would-be adversaries if the issues were presented to a court, the goal in mediation is to jointly problem-solve toward finding a fair and equitable solution that addresses the needs and concerns of all family members as much as possible.

COMMUNICATION GUIDELINES

The most productive atmosphere for mediation is created when each person shows respect for the opinions and attitudes of the other, even where there is disagreement. Difficult conversation can be improved if one speaks for him or herself and refrains from telling the other what he or she needs, wants, or thinks.

SHARING OF INFORMATION

The parties recognize that in order to reach a satisfactory decision and toward the goal of reaching informed decisions, each party needs to be able to talk in a free, open, and honest atmosphere. To help create this atmosphere, the parties agree to exchange all information and documentation available relating to the subject of this mediation and that such information shall be confidential, as provided below. The parties agree to complete financial disclosure statements, including but not limited to a listing of all retirement accounts and other tangible and intangible assets, all forms of income, copies of current (and prior) tax returns, and any other requested or relevant financial documents. If either party has any reason to doubt the honesty, accuracy, or completeness of the other's disclosed relevant information, it is agreed to inform the Mediator as soon as a such concern arises.

CONFIDENTIALITY

The voluntary nature of mediation relies on the development of trust from increasing openness and risk-taking. As a result, everyone involved in mediation, all information shared, and the mediation process itself needs the protection offered by complete confidentiality to all outside parties and proceedings unless verbal consent is given by all participants. This confidentiality provision shall apply to any attorneys participating in the process or any additional neutral professional.

It is agreed that all communications between the parties, their attorneys (if any), and the Mediator about the dispute come within the rules of evidence, which exclude from court or any other proceeding any disclosures made with a view toward settlement. However, when credible information concerning child abuse or neglect or serious threatened harm to anyone comes to the attention of the Mediator, he/she may not adhere to confidentiality restrictions.

Since the law is still developing as to the extent a Mediator is protected by the laws of confidentiality, by signing this Agreement to Mediate, you agree that you will not call the Mediator as a witness to testify in any court or any other proceeding regarding any aspect of the mediation. The parties shall not require the production in court or in any other proceeding any records or documents made by the Mediator. The parties understand that the Mediator will discard all mediation notes subsequent to the mediation and all supporting records after 60 days unless requested otherwise by the parties prior to that time. If either party decides to subpoena the Mediator or his records, the Mediator shall have the right to quash the subpoena. That party agrees herein to reimburse the

Mediator for whatever expenses he/she incurred in such action (including attorney fees) plus the hourly rate charged by the Mediator for his/her time taken up by this matter, including any time to appear or prepare for such appearance. Please be aware that the Uniform Mediation Act (available at www.mediationoffices.com) represents the national standard of guidelines for confidentiality in mediation, is the governing law in the State of New Jersey, and unless otherwise agreed to by the mediation participants, shall be the confidentiality guidelines agreed to herein. The confidentiality of this process shall be deemed a condition that we are relying upon to work together.

PRESERVING THE STATUS QUO

While mediation is ongoing, and except in the ordinary course of business or usual household practice, the parties agree not to (1) buy, sell, transfer, conceal, or dispose of any property that may be the subject of this mediation; (2) make any changes in insurance(s); or (3) make any significant changes in the status quo, including, but not limited to incurring additional debt, without first discussing the issues in mediation so that both parties can have input into how any such changes would be made.

The parties understand that they cannot, in good faith, work both cooperatively and litigiously at the same time and therefore agree to refrain from pre-emptive maneuvers and adversarial legal proceedings (except in the case of an emergency) while actively engaged in the mediation process.

FEES

The mediation and related services performed by the attorneys of the Firm shall be billed at the following rates:

Adam J. Berner, Esq.	$	/hr
Amelia Nickles, Esq.	$	/hr
Ellie Ackerman, Esq.	$	/hr
Paralegal	$	/hr

There is an additional fee of $50.00 per hour for appointments that meet after hours, which is after 6 PM. It is agreed that the Mediator will be paid hourly for all work done during the mediation process, including meetings, preparation for meetings, document drafting and review, telephone calls, text messages, emails, video conferencing, correspondence, and other services. The Firm shall have the right to charge a one-hour cancellation fee for appointments not canceled within 24 hours prior to a scheduled appointment. The amount of the eventual fee will be based upon the hourly time charges of the Mediator and other members of the Firm, along with any out-of-pocket disbursements that are incurred on the parties' behalf. Unless otherwise arranged, the parties agree that each will be equally responsible for the fees of the Mediator and the Firm.

The parties shall provide a form of payment, such as a credit card, to pay for work conducted during and between mediation sessions. The parties authorize Berner Law & Mediation Group to charge the credit card on file for each appointment and billable time based on the monthly invoice. The parties agree that in the event the credit card on file becomes invalid, they will provide a new valid credit card upon request to be charged for the payment of any outstanding balances owed.

The parties have the option of paying an initial retainer to be determined by the attorney assigned to the case for work conducted during and between mediation sessions and shall pay an additional, agreed upon retainer before the Mediator begins drafting an Agreement. The parties will replenish the Mediator's retainer account each time the balance drops below $_____. The replenishment shall be governed by this Agreement to Mediate in the same manner as the initial retainer fee. The retainer fee and additional retainer fee do not necessarily represent the amount of the overall fee that the parties may incur by virtue of the Mediator's or the Firm's services. The retainer will be credited toward the hourly rates and any disbursements advanced.

You will also be responsible for direct payment or reimbursement of disbursements incurred or advanced on your behalf. Since it is not practical for us to calculate the exact amount expended on your case for photocopying charges, postage, and credit card fees, in addition to the fees charged above, you will be billed an extra 2.5% of the total fees for these ancillary expenses. This sum shall be due, collectible, and payable under the same terms set forth in this agreement. However, Federal Express charges, court filing fees, messenger services, accounting fees, appraisal fees, expert fees, and the like shall be additional charges. In addition, fees for having to process any bounced checks shall be charged at $20.00 per bounced check.

Where applicable, the fee for drafting the Agreement, if any, shall be not less than $_____. A deposit will be required for the Mediator to begin drafting the Agreement, and the completed document will not be released until the final balance is made in full. Time spent drafting the Agreement will be charged at the same hourly rate as the mediation, including telephone conversations with either party or with their advisors to finalize the Agreement.

The parties understand that these fees are not contingent upon the "success" of the mediation. In the event that either or both parties should fail to pay any fees as defined in this Agreement, each party shall be held responsible for any and all costs incurred by the Mediator in the collection of such fees.

MEDIATION NOT BINDING

None of the agreements made in mediation are binding until a formal Agreement is signed with proper legal formalities. Even if the parties agree to something in one meeting, all agreements are regarded as tentative to allow for the opportunity to consider carefully and to obtain separate legal advice about the meaning and effect of the agreement. If a party changes his or her mind about an agreement made in one meeting after he or she leaves and reconsiders it, this is acceptable and is not regarded as a broken "promise." Careful thought is needed before any agreement is finalized. The parties understand that it is the responsibility of each, not of the Mediator, to see to it that the other party carries out the terms and conditions of the Agreement and or Judgment.

SAFETY

Each party agrees that if there has been any violence or abuse in their relationship that may limit his or her ability to effectively participate in mediation or raise any safety concerns, that party will report this to the Mediator. Regarding safety issues, parties may inform the Mediator either directly during a mediation session or confidentially in a private session or by telephone. If this issue arises, we will then discuss whether mediation can proceed and develop an appropriate plan of action. Parties also agree to notify their respective attorneys of any concerns they may have in this regard.

INDEPENDENT COUNSEL AND ADVISORS

The parties understand that the Mediator does not represent either or both of them. During the mediation, the parties are each encouraged to consult with or be represented by an independent attorney at any time, certainly before any agreement is signed. Such representation serves to ensure a better understanding of the legal issues, as well as each party's legal rights and responsibilities. At the request of either party, the Mediator can be available to speak with the attorneys. However, any release to speak with an attorney shall not be deemed a waiver of confidentiality. Upon request, the Mediator will provide parties with a list of attorneys who are familiar with mediation and who can serve as independent counsel while still supporting the mediation process. Attorneys serving in this process are best used not as advocates for particular positions but as a resource of legal information and settlement alternatives to enable parties to represent themselves. The parties understand that the Mediator cannot take responsibility for the level of review and/or involvement that each may choose for his or her respective attorney.

Other advisors, such as accountants or appraisers, may also be valuable during mediation, and the Mediator will recommend this when it seems appropriate. The information obtained from such persons shall be gathered in a manner mutually agreed on by the parties. The parties will make the actual selection of advisors and payment for their services. Unless otherwise agreed in writing, any jointly retained neutral which may be brought into the mediation process shall be bound to the confidentiality provisions herein.

To the extent that you participate in Zoom mediation, you acknowledge and agree to follow the Guidelines for Online Mediation Sessions attached to this document.

This AGREEMENT TO MEDIATE is signed by the parties and the Mediator and acknowledges the agreement to participate in the mediation on the basis of the Mediation Process Summary outlined herein, which we have read and understand and generally discussed with the Mediator and the other party.

Dated: _____ _____

Dated: _____ _____ _____

Dated: _____ _____
Mediator

Guidelines for Online Mediation Sessions

1. Sign the Agreement to Mediate and scan and email it back to the mediator's office (or e-sign on Client Portal) in advance of the meeting or mediation. If you have any questions, you would like to ask prior to signing the document, you can reach out to us prior to your appointment, or you can raise your question(s) with the mediator during the first session and then return the signed Agreement to Mediate at the conclusion of the session.

2. Pay the fee for the mediation session in advance of the scheduled session.

3. Our platform for mediation sessions is Zoom. You can join the meeting or session by clicking an emailed invitation link. It is helpful if you try to do this 3-5 minutes before the start time to be sure you can connect.

4. To minimize ambient noise, you might want to use headphones or earbuds and shut off all phones, email alerts, and radios.

5. Video or audio recordings of mediation sessions are not permitted, whether in-person, online, or by telephone. Photographs may only be taken with permission.

6. Only people who have been agreed upon by both clients will be able to participate in a mediation session. If a client intends to invite their attorney or another advisor to attend a session, please notify the mediator in advance so that the other client may invite their attorney or advisor. All parties attending a session will sign the Agreement to Mediate.

7. Confirm that you cannot be overheard. This includes children, who should be kept busy for the length of the meeting or session so that you are not distracted. To preserve the privacy of our meetings from others in hearing distance, you might want to use headphones or earbuds.

8. There are no individual conversations with the mediator unless agreed in advance, *i.e.,* if the mediator's process is to hold pre-sessions or caucuses during the mediation.

9. All parties participate remotely.

10. If a video/audio link is lost, we will wait until it is restored.

11. There often is a lag in transmission, so take a long breath after a person finishes speaking before you start to speak to avoid interrupting.

12. The session may terminate if the quality of the connection is poor or if a breach of the guidelines may have occurred.

BERNER
Law & Mediation Group

Date

Mr./Ms. Client 1
Address
Address

Mr./Ms. Client 2
Address
Address

Re: Settlement Agreement

Dear:

This Letter is to confirm our understanding of the role of the Berner Law & Mediation Group ("the Firm") in drafting a Settlement Agreement (the "Agreement") for both of you.

You have asked us, and we have agreed to reduce to writing the understandings that you reached voluntarily through the mediation process. You have specifically asked us to provide this drafting service because it is your belief that since we have been privy to your discussions in mediation and have come to understand and appreciate the needs and concerns that you each have, and for your trust placed in us, we are in a unique position to draft a document consistent with your goals and intentions of preserving the cooperative spirit that initially brought you to the mediation process and that ultimately enabled you to reach a comprehensive agreement.

You have both told us that:

1. you are firmly committed to the terms arrived at during the mediation, and
2. those terms are faithful to both of your objectives, and
3. there are no remaining points of legal contention between the two of you.

CONFLICT OF INTEREST

You are aware that traditional legal ethics view a couple who is separating or divorcing as having a conflict of interest. Accordingly, there are some concerns with one attorney serving both sides where such a conflict may exist. We have agreed that the Firm may provide this legal drafting service because you have reached a comprehensive and mutual agreement. To the extent that the legal system may continue to perceive that such a conflict exists, by signing this Letter, you both agree that you explicitly waive any potential claim of a conflict on our part.

We cannot advise you individually of your respective rights. We cannot look out for your individual best interests in this situation. If for any unexpected reason, either of you reconsiders your commitment to the

terms of your understanding, then we agree that the Firm will stop drafting until you have reached a resolution.

DRAFT DOCUMENT ONLY

The document that we will draft will represent the understandings that the two of you worked out during the mediation process. It will not necessarily be the final Agreement. When preparing your draft Agreement, if we have any questions or identify any issues that you should consider before signing, we will note such comments or questions in the draft itself. These items will need to be resolved prior to your signing a final Agreement.

You agree to carefully review the draft to ensure it is your mutual understanding as well. In the event the Agreement is different in any respect from what either of you believes was agreed to during the mediation process, you should advise us of that immediately. As needed, we can meet jointly to review the draft and discuss any changes requested by both of you.

You will notice that there will be some provisions included in your Agreement that have not been entirely or explicitly discussed in the mediation. As per your request, we will include such customary language included in agreements of this nature as part of a legally enforceable agreement. Although sometimes called "boilerplate," these standard clauses are not without meaning, and they have specific legal consequences. Such provisions are drafted merely for informational purposes for your benefit and are not an inherent part of your Agreement unless you choose to include them. If you do not understand any of these provisions, we will explain them to you. You have asked us to include these provisions in order to expedite this process in an efficient and cost-effective manner. You should not rely on these provisions as advice of counsel but should consider them after consultation with your own independent attorneys.

SEPARATE REVIEW ATTORNEYS

As we discussed, you understand and agree that the Firm cannot advise either of you individually. Accordingly, we have urged each of you to seek independent legal counsel to review your legal rights and responsibilities with respect to all aspects of this settlement and the draft Agreement. You can obtain review services on an hourly basis from many experienced attorneys.

Benefits from such independent attorneys include obtaining advice as to:

1. whether the Agreement meets your respective interests and objectives, and
2. what other procedural alternatives may be available to achieve more favorable terms, if any, and
3. advice as to your legal rights and options, and
4. alternative ways to fashion a settlement agreement.

You should be aware that when an agreement prepared by one attorney for both parties, as here, is signed without independent review, the absence of review is a factor that may taken into consideration if the agreement is challenged in a legal proceeding later. To the extent that you do not already have your own independent attorneys, we will provide a list of attorneys whom we believe can serve you well in helping you make informed decisions while working within the collaborative spirit of mediation. Naturally, you are each free to select any attorney of your own choosing.

FEES

The fee for drafting the Agreement shall be a minimum of $_____ (which has been received, thank you) and otherwise based on the hourly rate of the attorney working on your matter, which for _____, Esq. shall be $_____ per hour. A deposit of $_____ shall be paid in order to begin drafting the agreement. Prior to completing the draft Agreement, we will contact you for the remaining balance, for which payment will be requested prior to sending out the completed document.

For any time incurred after your receipt of the draft document, we will send you a bill based on the hours actually expended, at least every 60 days, when applicable. Time spent on your case (computed in units of 6 minutes), includes drafting services, telephone calls, e-mails, and other correspondence. All billing statements are payable when received. You agree to review all statements promptly and to promptly raise any questions that you may have regarding any statement. You will not be billed for any time that may be spent in discussion of any statement or bill.

In addition, you are responsible for paying all out-of-pocket disbursements, which include but are not limited to Federal Express or other overnight service, messenger service, photocopying, and postage. Disbursements are to be paid by you promptly when billed or as requested.

NO ATTORNEY-CLIENT PRIVILEGE

Because this drafting service is being provided to both of you, we agree that there will be no attorney-client privilege for either of you between each other. Further, we have agreed to continue to apply our confidentiality agreement as provided in our Agreement to Mediate.

As with the mediation, you both agree that neither you (nor anyone representing you) will subpoena the Firm's records or seek to take testimony from any member of the Firm, or act in any other way to divulge the Firm's records or any communications between either or both of you and the Firm. If we are required to answer any such subpoena, you agree to reimburse us for any expenses we incur in resisting such disclosure, including our legal fees. You will also pay each attorney's standard hourly rates for any time spent responding to the subpoena.

TERMINATION

You each have the right, in your sole discretion, to terminate the Firm's role as your drafting attorney. Similarly, we have the right to withdraw from serving in this role if you fail to cooperate or to provide accurate and complete information and documents relating to the Agreement or if you engage in any conduct that would make it inappropriate for us to continue serving you, or if this matter becomes a contested one. If the Firm's role as drafting attorney for you is terminated for any reason before signing the Agreement, you agree to pay for our time spent in drafting the Agreement. If our charges do not equal the entire amount paid by you when our role is terminated, any unused portion of the retainer will be refunded to you.

If, however, we have completed the initial drafting of the Agreement, there will be no refund of any unused portion of the retainer, and the minimum drafting fee will be charged.

NONPAYMENT

If you do not pay the retainer, fees, or disbursements to the Firm as contemplated by this Letter within 30 days after billing or if you fail to cooperate with us or you do not perform your responsibilities as set forth in the annexed Statement of Client's Rights and Responsibilities, the Firm may withdraw in our role in providing you this drafting service without relieving you of any obligations for services and disbursements to the time of our withdrawal.

CORRESPONDENCE

You have the right to be provided with copies of correspondence and documents relating to this matter. We will keep you informed of the status of the drafting.

ARBITRATION

In the unlikely event that a dispute may arise concerning our drafting/revision fees, you may seek arbitration, which will be binding on you and the Firm. In the event of a dispute or upon your request, we will provide you with information concerning the arbitration procedure.

SIGNING

By signing this Letter below, you agree

1. to the understanding of our role described in this Letter; and
2. that neither of you will use our drafting role to challenge the Agreement; and
3. that you have come to an agreement on your own free will, with the opportunity to consult with and be represented by your own independent counsel; and
4. that you also acknowledge your signing of the Agreement to Mediate, which provides for confidentiality in any further proceeding and obligates you to compensate the Firm for any involvement after the mediation process.

Again, we commend both of you for your commitment to working out your divorce settlement in a collaborative process. It has been a privilege working with you.

If you agree to the above, please return one signed copy of this Letter to our office and retain copies for your records. If you have any questions regarding the content of this Letter, please call us at your earliest convenience.

Sincerely,

_____, Esq

BERNER LAW & MEDIATION GROUP

I agree and understand the nature of the legal drafting service outlined above and specifically have been informed of the limitations, advantages, and risks associated with one neutral attorney drafting our legal agreement. I have read this letter carefully and the attached Statement of Client Rights and Responsibilities, and I understand all terms and conditions herein. I have had a chance to ask any questions regarding such terms and now agree to these terms and conditions without reservation.

_____ _____

Client 1 Client 2

Date: Date:

STATEMENT OF CLIENTS RIGHTS AND RESPONSIBILITIES IN CIVIL FAMILY CASES

A. Client Rights

1. Clients have the right to have their attorneys diligently advocate their interests within the bounds of the law and legal ethics.
2. Clients have the right to have the fee arrangement fully and completely explained prior to entering into any agreement for services.
3. Clients have the right to have a written Retainer Agreement describing the financial terms of the relationship between the client and the attorney.
4. Clients have the right to refuse to enter into any unacceptable fee arrangement or modification of a fee arrangement.
5. Clients have the right to be provided information as to the attorney(s) who will be primarily responsible for their matter and all other legal staff who will be working on the matter as well as information as to the costs for those individuals.
6. Clients have the right to be provided bills on a regular basis, itemized as to the charges and time spent on each activity.
7. Clients have the right to be informed of and be present at any court proceeding involving their case unless otherwise directed by the court.
8. Clients have the right to be provided copies of all documents presented to the court by any party in their matter unless otherwise ordered by the court.
9. Clients have the right to be afforded reasonable access to their attorneys.
10. Clients have the right to make the final decision as to whether, when, and how to settle their cases as to economic and other positions to be taken with respect to issues in the case.
11. Clients have the right to be informed of the various alternative dispute resolution processes to resolve their divorce settlement.

B. Client Responsibilities

1. Clients shall provide full and accurate information to their attorneys regarding this matter.
2. Clients shall be available to participate in a timely fashion regarding their matter and to respond reasonably to requests from their counsel.
3. Clients shall advise their attorneys promptly of any change in their lives that might reasonably be expected to affect the handling of their matter.
4. Clients shall pay for the legal services rendered on their behalf within the time period set forth in the retainer agreement.
5. Clients shall be required to review diligently all bills submitted by their attorneys and within reasonable time to raise any objections regarding billing.
6. Clients shall not take any position in their matter for any improper purpose, such as to delay the proceeding or intentionally increase the cost to other litigants.
7. Clients shall not seek to use their attorneys for any improper means.
8. Clients must recognize and be reasonable for the costs associated with any action initiated or requested by the client.
9. Clients shall provide sufficient time for their attorneys to explain to them the financial costs and other ramification of a potential action for their matter and reasonably to consider the advice of their attorneys.

Receipt Acknowledged: Date: _____ _____
Client 1

Date: _____ _____
Client 2

BINDING TERM SHEET

John Doe v. Jane Doe
Docket No.: FM-XX-XXXX-XX

The parties, John Doe ("John") and Jane Doe ("Jane"), engaged in mediation with Phyllis S. Klein, Esq., on February 1, 2021. John Doe is represented Attorney Smith, Esq. of the law office of Attorney Smith, LLC, and Jane Doe is represented by Attorney Jones, Esq. of the law offices of Attorney Jones, LLC. The parties, whose signatures appear below, acknowledge and agree that the terms set forth herein are agreed to herein and represent a binding agreement upon the parties only for only the terms so set forth and is effective and binding at the time of signature. Ultimately, this Binding Term Sheet may be amended, or a more formal Agreement or Consent Order may be drafted, that will reflect said terms, may elaborate said terms and may address additional issues.

1. Parenting Time Schedule. The parties agree to the following parenting time schedule:

Week	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Week1	Father	Father	Mother	Mother	Mother	Mother	Mother
Week 2	Father	Father	Mother	Mother	Father	Father	Father
Week 3	Father	Father	Mother	Mother	Mother	Mother	Mother
Week 4	Father	Father	Mother	Mother	Father	Father	Father

Both parties, shall, however, reserve the right to seek a modification consistent with New Jersey law.

2. Summer Parenting Time: The parties agree that each parent shall be entitled to two weeks of summer vacation with the children each year, which will be taken consecutively. However, should either party wish to enroll the children in a summer overnight academic program, it may be for three consecutive weeks, but those weeks shall be allocated to that parent's share of the summer. That parent will commit to being in the same city during at least two of the three weeks. Any time that that parent is not present, the other may visit the children. It is also agreed that both parties' summer vacation schedules shall be established prior to either signing up the children for summer activities, which activities shall be scheduled on each party's own summer custodial weeks at each parent's sole cost and expense. The parties will confirm the summer schedule, including vacation, activities and regular weekly parenting time by April 15th of each year.

3. Parenting Exchanges. At this time, due to the current COVID-19 pandemic, the children are in school both in-person and remotely. Thus, when the children are in school or attending an activity, the parenting exchanges shall naturally take place at the children's school or summer activity. However, when the children are attending school remotely, or the children are

not attending school or a summer activity, then the parties agree that the exchanges shall take place at _____.

4. Home Provisions for the Children. Each parent shall ensure that each of their homes contain appropriate clothing, toiletries and other amenities for the children, as no overnight bags shall be transported with the children for exchanges, other than the children's personal items. The exception are items that would not naturally be duplicated, such as winter jackets and snow boots.

5. Three Weekends in a Row. The parties agree that in the event that the exercise of a holiday or special event weekend results in one party having three weekends in a row, then the parent who is losing his or her weekend in the process shall be able to select either the weekend before or the weekend after the conflicting weekend, except that he or she cannot select the weekend of the other party if it is party of a vacation weekend or a holiday weekend. The selection will naturally result in each party having two weekends in a row.

6. Holidays. With exception to the holidays listed below, the parties agree to be bound by the terms dictated within their MSA, dated _____.

7. Memorial Day Weekend. The parties agree to alternate Memorial Day Weekend each year, with Jane being entitled to it in odd years and John being entitled to it in even years. Memorial Day Weekend shall commence on the Friday before the weekend after school (or from 10:00 a.m. if the children are not in school) and conclude with children being dropped off at school Tuesday morning (or at 10:00 a.m. if the children are not in school).

8. Labor Day Weekend. The parties agree to alternate Labor Day Weekend each year, with Jane being entitled to it in even years and John being entitled to it in odd years. Labor Day Weekend shall commence on the Friday before the weekend at 10:00 a.m. and conclude with the children being dropped off at school on Tuesday morning (or 10:00 a.m., if the children are not in school).

9. Future Dispute Resolution. In the event of a dispute between the parties relating to an issue not addressed within this Binding Term Sheet, the parties agree that in the event that they cannot resolve the issue between them, that they will participate in at least one mediation session with Phyllis S. Klein, Esq. before bringing an application to the Court, except in the event of an emergency. Both parties agree to submit their positions to the mediator and the other party in writing prior to the first session, along with all supporting evidence, and to fully cooperate in the mediation process in an effort to minimize the need for judicial intervention. In the event that the mediation is not successful, either parent may make a request to submit the issue for arbitration or make the appropriate application to the Court seeking a determination as to same.

10. It is expressly understood that the parties shall not do anything directly or indirectly to alienate the children's affections for the other party, or color their attitude towards the other party. The parents shall exert every reasonable effort to maintain free access and unhampered contact between the children and each parent and to foster a feeling of affection between the children and each parent. The parties shall take all actions necessary to support the other's relationship with the children. The parties shall not do anything which may injure the children's opinion nor attitude towards the other party, or which may hamper the development of the children's love and respect for the other party, including speaking negatively about the other party in front of or to the children. The parties agree to conduct themselves in a manner that shall be in the children's best interests, and neither shall do anything that shall adversely affect the children's general morals, health, or welfare. In addition to John's right to object to the transition to the next Phase for other reasons, John may object to transition to the next Phase, or object while in a Phase, should Jane violate the provisions set forth in this Paragraph. All references to the parties shall be deemed to include the parties' spouses.

11. The parties appreciate that in order to continue assessing what is in the children's best interests, and in the normal course, either party may ask the children about what occurs when in the other party's custody, however they shall not make inquiries that could be perceived as probing or interrogating and shall not punish the children for failing or refusing to respond as the inquiring parent wishes.

_____
JOHN DOE
Dated:

_____
JANE DOE
Dated:

_____
ATTORNEY SMITH, ESQ.
Attorney for John Doe
Dated:

_____
ATTORNEY JONES, ESQ.
Attorney for Jane Doe
Dated:

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Memorandum of Understanding
between Gary and Holly

March 11, 2016

I. Not a Contract

This document reflects certain agreements reached by the parties during mediation. The terms described in this memorandum shall not be binding until they are incorporated into a Settlement Agreement prepared by the parties' attorneys and signed by the parties.

II. Facts and Assumptions

The following facts and assumptions were relied upon by the parties during mediation:

1. The parties were married on March 10, 1999. Gary's date of birth is November 10, 1970 and Holly's date of birth is January 3, 1970.

2. The parties have one child, Thomas, date of birth, February 1, 2005.

3. Holly works for XYZ Corp. She works 8:00 a.m. to 4:30 p.m. four days a week. She earns $25,000 and receives no benefits.

4. Gary is a Financial Analyst. He has been there for five years. His base is $130,000 before bonus. His average bonus has been $50,000 to $60,000.

5. Attached as **Schedule A** are pages of each party's case information statement setting forth a list of all assets and debts.

III. After Mediation the Parties Agreed as Follows:

1. ***Custody***: The parties shall share joint legal and physical custody of Thomas.

2. ***Parenting Time***:

A. The parties will follow a 50/50 schedule, in which one party will have Monday and Tuesday overnight every other week, the other Wednesday and Thursday overnight every other week, and they will alternate the weekend with Thomas. Attached as **Schedule B** is a sample calendar.

B. To facilitate this schedule, the parties will attempt to reside in close proximity to one another once the marital home sells.

C. If either party finds it necessary to be away from Thomas 6 hours or more during his or her parenting time they will give the other party the first option of caring for with him.

D. It is understood that flexibility is essential to the success of this co-parenting arrangement if either parent needs to change the parenting time schedule because of extenuating circumstances such as sickness, special family

occasions (weddings, anniversary parties, funerals, etc.) or business commitments, the other parent will use their best effort to accommodate the request.

E. When Thomas reaches school age the parties will discuss and agree upon which school district he should be enrolled in if they live in different districts. If they cannot agree they will address the issue in mediation. These discussions will begin in the spring preceding his enrollment.

F. While the parties are living together, if a party takes Thomas away overnight, they will advise the other party of where they are staying.

3. ***Holidays***: Holiday parenting time shall supercede the daily schedule.

A. **HOLIDAY and BIRTHDAY SCHEDULE**

Month	***Holiday/Birthday***	***With Which Parent in Odd Years***	***With Which Parent in Even Years***
January	*New Year's Day*	*Mother*	*Father*
February	*President's Day weekend*	*Father*	*Mother*
March/April	*Easter weekend*	*Mother*	*Father*
	Spring Break (1 week)	*Father*	*Mother*
May	*Mother's Day weekend*	*Mother*	*Mother*
	Memorial Day weekend	*Mother*	*Father*
June	*Father's Day weekend*	*Father*	*Father*
July	*Independence Day weekend*	*Father*	*Mother*
September	*Labor Day weekend*	*Mother*	*Father*
October	*Halloween*	*Father*	*Mother*

Month	***Holiday/Birthday***	***With Which Parent in Odd Years***	***With Which Parent in Even Years***
November	*Thanksgiving weekend*	*Mother*	*Father*
December	*Christmas Eve*	*Father*	*Mother*
	Christmas Day	*Mother*	*Father*
	Post-Christmas Winter Break until December 31st	*Father*	*Mother*
	New Year's Eve	*Mother*	*Father*

B. Thomas's Birthday: Both parties shall have access to Thomas on his/her birthday. The parent who has parenting time that day will allocate two hours to the other parent. If comfortable, the parties will share a celebration with Thomas.

C. Parties' Birthdays: Each party shall be entitled to have Thomas with them on their birthday.

4. ***Vacations***: Each party shall be entitled to take Thomas on two weeks of vacation each year. When taking Thomas away on vacation, each party shall provide the other with a copy of their vacation itinerary together with telephone numbers, addresses, and flight numbers at least two weeks in advance of departure.

5. ***Participation***: Each party shall be entitled to attend all of Thomas's sporting and extracurricular activities regardless of the parenting schedule. Each

shall take the steps necessary to avail themselves of all information directly from the source. Each shall keep the other advised of all last minute or verbal changes in such activities and schedules in order that they might both continue to actively co-parent Thomas.

6. ***Contact***: Each party shall keep the other informed of the telephone number and address of their primary residence. In addition, each party shall have reasonable telephone, e-mail, and any other access to Thomas while he is in the other party's custody.

7. ***Thomas's Well-Being***: The parties agree to cooperate in order to maximize Thomas's emotional and physical well-being, and to give and afford him a sense of security and the affection of both parents. Neither party shall, directly or indirectly, influence Thomas so as to prejudice him against the other and each will be respectful of the other party while in Thomas's presence. They will endeavor to guide Thomas so as to promote the affectionate relationship between Thomas and both parties.

8. ***Access to Medical Information***: Both parties shall be entitled to complete and full information from any physician, dentist, consultant or specialist attending to Thomas for any reason whatsoever, and to have copies of any reports rendered as soon as available. If a verbal report is issued to one party, he or she shall advise the other of the content of such report as soon as reasonably possible.

9. ***Access to School Records***: Both parties shall be entitled to complete and full information from any teacher or school giving instruction to Thomas and to have copies of any reports rendered. If a verbal report is issued to one party, he or she shall advise the other of the content of such report as soon as reasonably possible.

10. ***Consultation:*** The parties shall consult with each other with respect to Thomas's education, activities, illnesses or operations, health, welfare and other matters of similar importance affecting Thomas, whose well-being, education and development shall at all times be the paramount consideration. Decisions regarding these matters shall be made jointly, however, emergency decisions may be made by the parent having custody at that time with the other parent being contacted as quickly as possible.

11. ***Touch Point:*** The parties have agreed that on Sunday of each week they will e-mail one another to update each other as to any changes in Thomas's schedules for that coming week, as well as reporting on any behavioral, emotional, or physical concerns. This communication will take place more frequently when necessary in Thomas's best interests. Unless there is an emergency and the need for a response is immediate, each party shall respond to the other within 12 hours.

12. ***Custody Upon Death of a Party*:** In the event of either party's death, the surviving party shall immediately have sole and exclusive custody of Thomas and he/she shall physically reside with the surviving party. The surviving party specifically agrees to maintain, allow and permit Thomas's relationships with his/her grandparents and other relatives.

13. ***Child Support***:

A. Commencing upon the closing of title on the marital home, Gary shall pay to Holly child support in the sum of $_____ per week. See worksheet attached as **Schedule C**. Said child support shall be payable directly to Holly on the first of the month each month.

B. Child support shall be reviewed when Thomas begins college if he lives away from home.

14. ***Work Related Childcare/Extraordinary Expenses for Thomas:*** The parties agree to share Thomas's agreed upon work related child care and extraordinary costs payable __% Gary and __% Holly. Said costs shall be discussed and agreed upon in advance and shall include camps, lessons, tutors, sports including equipment and uniforms, cell phones, class trips, pre college programs and work related child care.

15. ***Health Insurance and Unreimbursed Expenses***:

A. Gary shall continue to maintain health insurance coverage for the benefit of Thomas through his employment until Thomas is emancipated (unless agreed otherwise) and for Holly until the entry of the Final Judgment of Divorce. Upon the entry of the Final Judgment of Divorce, Holly shall have the option to maintain medical insurance coverage for herself under COBRA, if applicable, at her expense. The parties shall pay the cost of Thomas's health insurance in proportion to their incomes. In the event that Gary no longer has health insurance available to him through his employment, or it becomes too expensive, the parties will determine whether Holly is in a position to obtain medical insurance coverage for Thomas through her employment. If neither party has health insurance available to him or her through their employment, then the parties shall secure private health insurance for Thomas and shall pay the cost of same in proportion to their incomes. The parties will cooperate to select the most comparable and affordable coverage available.

B. Commencing upon the closing of title on the marital home, Holly shall be solely responsible for her unreimbursed medical, dental, psychological, prescription drug and eyeglass expenses and shall indemnify and hold Gary harmless with regard to same. Commencing upon the closing of title on the marital home, Gary shall be solely responsible for his own medical insurance,

unreimbursed medical, dental, psychological, prescription drug and eyeglass expenses and shall indemnify and hold Holly harmless with regard to same.

C. Holly shall be responsible for the first $250 in unreimbursed medical and dental expenses per year for Thomas. After Holly pays the first $250 per year, then the parties shall pay Thomas's unreimbursed medical, dental, psychological, prescription drug, orthodontia, and vision expenses in proportion to their incomes. Said proportionate share at this time is: Gary shall pay __ percent, and Holly shall pay __ percent. Each party shall consult with the other when incurring non-emergent extraordinary medical and dental expenses on behalf of Thomas, if reasonably possible. Neither party shall unreasonably withhold consent to such treatment. An extraordinary expense for purposes of this Agreement shall be one which exceeds $150.00 per incident. Both parties shall use in-network providers for Thomas unless otherwise mutually agreed.

16. ***Accountings:*** The parties will provide monthly accountings, including proofs, to one another for expenses paid on Thomas's behalf under paragraphs 14 and 15 together with proofs. Reimbursement due one to the other will be paid within 15 days.

17. ***College Costs:***

A. The parties acknowledge that they have an obligation to contribute to the cost of Thomas's post-high school education. Thomas will be

expected to apply for all available grants, federally subsidized loans and scholarships. The balance of Thomas's college costs will be shared in a manner to be determined when Thomas is a senior in high school taking the parties' financial circumstances into consideration.

B. A joint decision as to where Thomas shall attend school shall be made between the parties and Thomas taking into consideration his academic abilities and the parties financial circumstances at that time. Discussions regarding Thomas's choice of schools shall begin in the fall semester of his junior year of high school.

C. College expenses shall currently be defined as SAT/ACT testing fees, application fees, tuition, room and board, books and fees, room set-up costs, computer costs, reasonable transportation costs, and costs of Thomas's college search including transportation for visits to five (5) agreed upon potential schools.

18. ***Emancipation:***

A. Child support for Thomas shall terminate upon his emancipation. He shall be deemed, for the purpose of this Agreement, to have become emancipated, and the parties' legal obligation to support him shall end, upon his death or the first to occur of the following events:

B. Attaining the age of eighteen (18) years, provided the child has completed high school and does not continue his education;

C. Marriage, whether void, voidable, or annulled;

D. Entry into the armed forces;

E. Graduation or termination from a continuous four-year undergraduate college education as defined in F below;

F. In lieu of a four-year college education, graduation or termination from a post-high school technical or vocational course of study unless she immediately continues his education;

G. Termination of post-high school education shall be defined to include being enrolled on less than a full-time basis, i.e., less then 12 full credit hours, or failing to maintain a passing average for more than one academic year;

H. A child shall be deemed emancipated if the child engages in full-time employment; however, employment of the child during the attendance of post-high school education, summers or school recesses shall not be deemed full-time employment for the purposes of this clause.

I. In the event Thomas is forced to interrupt his college education or post-high school education for reason of illness, said interruption shall not be considered an event of emancipation.

19. ***Status Quo:*** The current financial status quo shall be maintained until the closing of title on the marital home, at which point, the support provisions set forth herein take effect.

20. ***Alimony:***

A. Commencing upon the closing of title on the marital home, Gary shall pay to Holly as alimony the sum of $_____ per year, or $_____ per month, together with the additional alimony as set forth herein. Said alimony shall be paid to Holly on the first day of each and every month.

B. As further additional alimony, Gary shall pay to Holly __% of any gross additional compensation received from his employment, including gross cash bonus monies, deferred compensation, stock or stock options up to total compensation of $_____.

C. Alimony shall be payable directly to Holly on the first of the month for said month.

D. All forms of alimony shall terminate upon

(a) the Wife's death,

(b) the Wife's remarriage,

(c) Husband's death, or

(d) _____, whichever occurs first.

E. Alimony shall be tax deductible to the Husband and taxable income to the Wife.

F. The Wife's cohabitation with an unrelated adult in a relationship tantamount to marriage shall constitute a change in circumstance allowing the Husband to seek a review of alimony in accord with applicable statutes and/or case law at the time.

G. The Husband understands and has been advised that he receives no alimony pursuant to this Agreement, and he hereby waives, releases and relinquishes any claim he may have to receive alimony now and in the future. The Husband understands that this waiver of alimony and support shall be permanent and irrevocable.

21. ***Marital Life Style:*** The parties acknowledge that the marital lifestyle was reflective of a monthly budget of approximately $_____ per month. The parties acknowledge that following the divorce they will each be required to adjust their lifestyles and, despite that change in lifestyle and their inability to enjoy the same life style enjoyed during the marriage, they have each entered into this agreement freely and voluntarily.

22. ***Life Insurance:***

A. Gary shall carry life insurance in the face amount of $_____ on his life naming Holly as beneficiary. Said obligation shall terminate upon the termination of alimony hereunder.

B. Gary shall carry life insurance in the face amount of $_____ on his life naming Thomas as beneficiary until emancipation. He shall name Holly as trustee/custodian of proceeds, which shall be utilized for Thomas's health, education and welfare.

C. Holly shall carry life insurance in the face amount of $_____ on her life naming Thomas as beneficiary until emancipation. She shall name Gary as trustee/custodian of proceeds, which shall be utilized for Thomas's health, education and welfare.

D. Should either party fail to have the aforementioned coverage in place on his or her life at the time of his or her death, said coverage amount shall constitute a primary lien against his or her estate, payable on behalf of the beneficiaries as designated above.

E. Each party shall provide proof of the aforementioned life insurance coverage and beneficiary designation upon the execution of an Agreement incorporating the terms herein, and on the anniversary date each year thereafter.

23. ***Equitable Distribution***:

A. Cutoff Date: After consulting with counsel, the parties have agreed to a cutoff date of _____ for the purposes of determining equitable distribution.

B. Marital Home:

(1) The parties acknowledge that they own the former marital home located at _____, New Jersey. They believe the home has a value of approximately $_____. There is an outstanding mortgage with a balance of approximately $_____.

(2) The parties intend to list the marital home with _____ at a list price of $_____ as of _____.

(3) Neither party will draw any additional equity out of the marital home or allow any liens or judgments to be entered against it pending sale or buyout.

(4) Upon sale, the net proceeds, after paying routine closing costs, will be divided equally between the parties, and each party shall be responsible for capital gains consequences, if any, on his or her share.

(5) Both parties will cooperate in listing and showing the property. If they cannot agree upon a list price or reduction in list price, they will follow the recommendations of the realtor unless both parties agree otherwise.

(6) The parties shall agree upon a neutral real estate attorney to represent them on the sale of the property and the fee will be shared equally.

(7) In the event there are items neither party wants at the time of sale, they will share equally the cost of having said items removed from the marital home.

C. Retirement Accounts: The parties acknowledge that they have the following retirement accounts, the marital portion of which will be equalized as of the first of the month following the entry of the Judgment of Divorce in this matter. The parties shall share equally the cost of having the necessary Qualified Domestic Relations Order prepared. The parties shall be entitled to market gain/loss to the date of distribution.

(1) Gary's Plans:

(a)

(b)

(2) Holly's Plans:

(a)

(b)

D. Bank Accounts:

(a) *Checking Account*: The parties acknowledge that they have a joint bank account with Bank of America. They will continue to utilize this account to pay joint bills until the closing of title on the marital home. Thereafter, once all checks have cleared, the account will be closed and the balance divided equally between the parties.

(b) The parties have each established separate checking accounts, which currently have nominal balances. Each party shall retain his/her account without claim by the other.

E. Credit Card Points: The parties acknowledge that Gary has Marriott points and Holly has United points. The parties have determined the accounts cannot be divided. They agree that they are each entitled to one-half the existing points. They will each facilitate the other making reservations to utilize his/her share of the points.

F. Cash Surrender Values of Life Insurance: The parties represent they have no life insurance policies with cash surrender values.

G. Thomas's 529: The parties have established a 529 plan for Thomas's benefit with Axa. Gary is listed as the owner and will assure and provide proof that Holly is the alternate owner. Gary will provide copies all account

statements to Holly within 10 days of receipt. The monies in the account will be utilized for Thomas's post high school education.

H. Vehicles: Holly shall retain ownership of the 2012 Honda CRV in her possession. Once support begins hereunder, she shall be responsible for the insurance on said vehicle and all other related expenses, and shall indemnify and hold Gary harmless with respect to same. Gary shall retain the 2011 Honda Pilot in his possession. He shall be responsible for the loan payment and insurance on said vehicle, as well as all other related costs and he shall indemnify and hold Holly harmless with respect to same. The parties have waived any credit between them to equalize the values.

I. Household Contents of Marital Home: To be equitably distributed between the parties.

24. ***Debt***:

A. Each party shall be responsible for his or her own credit card debt and any other debt incurred and each shall indemnify and hold the other harmless with respect to same.

B. Except as otherwise set forth herein, Gary represents and warrants to Holly that he has not incurred any debts or obligations for which she or her estate may be liable. Except as otherwise set forth herein, Holly represents and warrants to Gary that she has not incurred any debts or obligations for which he or

his estate may be liable. If either party has incurred such debts or obligations, he or she shall be solely responsible for them, and if the other party is called upon to make any payment or contribution toward same, the responsible party shall indemnify and hold the other party harmless from any obligation thereon. If a third party attempts to collect a debt, then the responsible party shall pay all costs and counsel fees incurred in connection with said liability. In the event a party is retaining the use of a credit card which has the other party named as a co-signer or user, that party's name shall be removed within 30 days from the date herein.

25. ***Tax Issues:***

A. The parties will file joint income tax returns. For tax year 2015 and they will share equally any refund received, and pay equally any taxes due, as well as the cost of preparing their returns.

B. For tax year 2016, the parties shall share equally any tax loss carry over resulting from their joint returns. They agree that each party is entitled to the benefit of one-half of same on their respective future tax returns. They will likewise share the tax deductions relative to the marital home until sale.

C. The parties will alternate claiming Thomas with Gary claiming for odd tax years and Holly for even tax years.

26. ***Counsel Fees***: Each party will be responsible for their own counsel fees in this matter.

27. ***Mediation Costs***: To be paid from joint funds.

28. ***Mediation***: The parties agree that if any conflicts arise with respect to issues addressed herein they will attempt to resolve them between themselves. If they are not able to do so, they will pursue mediation prior to litigation.

2A:34-23 Alimony, maintenance.

2A:34-23 Alimony, maintenance.

Pending any matrimonial action or action for dissolution of a civil union brought in this State or elsewhere, or after judgment of divorce or dissolution or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, including, but not limited to, the creation of trusts or other security devices, to assure payment of reasonably foreseeable medical and educational expenses. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require.

The court may order one party to pay a retainer on behalf of the other for expert and legal services when the respective financial circumstances of the parties make the award reasonable and just. In considering an application, the court shall review the financial capacity of each party to conduct the litigation and the criteria for award of counsel fees that are then pertinent as set forth by court rule. Whenever any other application is made to a court which includes an application for pendente lite or final award of counsel fees, the court shall determine the appropriate award for counsel fees, if any, at the same time that a decision is rendered on the other issue then before the court and shall consider the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party. The court may not order a retainer or counsel fee of a party convicted of an attempt or conspiracy to murder the other party to be paid by the party who was the intended victim of the attempt or conspiracy.

a.In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:

(1)Needs of the child;

(2)Standard of living and economic circumstances of each parent;

(3)All sources of income and assets of each parent;

(4)Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate

employment;

(5)Need and capacity of the child for education, including higher education;

(6)Age and health of the child and each parent;

(7)Income, assets and earning ability of the child;

(8)Responsibility of the parents for the court-ordered support of others;

(9)Reasonable debts and liabilities of each child and parent; and

(10) Any other factors the court may deem relevant.

The obligation to pay support for a child who has not been emancipated by the court shall not terminate solely on the basis of the child's age if the child suffers from a severe mental or physical incapacity that causes the child to be financially dependent on a parent. The obligation to pay support for that child shall continue until the court finds that the child is relieved of the incapacity or is no longer financially dependent on the parent. However, in assessing the financial obligation of the parent, the court shall consider, in addition to the factors enumerated in this section, the child's eligibility for public benefits and services for people with disabilities and may make such orders, including an order involving the creation of a trust, as are necessary to promote the well-being of the child.

As used in this section "severe mental or physical incapacity" shall not include a child's abuse of, or addiction to, alcohol or controlled substances.

b.In all actions brought for divorce, dissolution of a civil union, divorce from bed and board, legal separation from a partner in a civil union couple or nullity the court may award one or more of the following types of alimony: open durational alimony; rehabilitative alimony; limited duration alimony or reimbursement alimony to either party. In so doing the court shall consider, but not be limited to, the following factors:

(1)The actual need and ability of the parties to pay;

(2)The duration of the marriage or civil union;

(3)The age, physical and emotional health of the parties;

(4)The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other;

(5)The earning capacities, educational levels, vocational skills, and employability of the parties;

(6)The length of absence from the job market of the party seeking maintenance;

(7)The parental responsibilities for the children;

(8)The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;

(9)The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;

(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

(11) The income available to either party through investment of any assets held by that party;

(12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;

(13) The nature, amount, and length of pendente lite support paid, if any; and

(14) Any other factors which the court may deem relevant.

In each case where the court is asked to make an award of alimony, the court shall consider and assess evidence with respect to all relevant statutory factors. If the court determines that certain factors are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. No factor shall be elevated in importance over any other factor unless the court finds otherwise, in which case the court shall make specific written findings of fact and conclusions of law in that regard.

When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony.

c.In any case in which there is a request for an award of alimony, the court shall consider and make specific findings on the evidence about all of the statutory factors set forth in subsection b. of this section.

For any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union. Determination of the length and amount of alimony shall be made by the court pursuant to consideration of all of the statutory factors set forth in subsection b. of this section. In addition to those factors, the court shall also consider the practical impact of the parties' need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled, with neither party having a greater

entitlement thereto.

Exceptional circumstances which may require an adjustment to the duration of alimony include:

(1)The ages of the parties at the time of the marriage or civil union and at the time of the alimony award;

(2)The degree and duration of the dependency of one party on the other party during the marriage or civil union;

(3)Whether a spouse or partner has a chronic illness or unusual health circumstance;

(4)Whether a spouse or partner has given up a career or a career opportunity or otherwise supported the career of the other spouse or partner;

(5)Whether a spouse or partner has received a disproportionate share of equitable distribution;

(6)The impact of the marriage or civil union on either party's ability to become self-supporting, including but not limited to either party's responsibility as primary caretaker of a child;

(7)Tax considerations of either party;

(8)Any other factors or circumstances that the court deems equitable, relevant and material.

An award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the award. The court may modify the amount of such an award, but shall not modify the length of the term except in unusual circumstances.

In determining the length of the term, the court shall consider the length of time it would reasonably take for the recipient to improve his or her earning capacity to a level where limited duration alimony is no longer appropriate.

d.Rehabilitative alimony shall be awarded based upon a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award.

This section is not intended to preclude a court from modifying alimony awards based upon the law.

e.Reimbursement alimony may be awarded under circumstances in which one party supported the other through an advanced education, anticipating participation in the fruits of the earning capacity generated by that education. An award of reimbursement alimony shall not be modified for any reason.

f. Except as provided in subsection i., nothing in this section shall be construed to limit the court's authority to award open durational alimony, limited duration alimony, rehabilitative alimony or reimbursement alimony, separately or in any combination, as warranted by the circumstances of the parties and the nature of the case.

g.In all actions for divorce or dissolution other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just. In all actions for divorce, dissolution of civil union, divorce from bed and board, or legal separation from a partner in a civil union couple where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the party to pay in determining an amount of maintenance to be awarded.

h.Except as provided in this subsection, in all actions where a judgment of divorce, dissolution of civil union, divorce from bed and board or legal separation from a partner in a civil union couple is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage or civil union. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage or civil union by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution, except that interspousal gifts or gifts between partners in a civil union couple shall be subject to equitable distribution. The court may not make an award concerning the equitable distribution of property on behalf of a party convicted of an attempt or conspiracy to murder the other party.

i.No person convicted of Murder, N.J.S.2C:11-3; Manslaughter, N.J.S.2C:11-4; Criminal Homicide, N.J.S.2C:11-2; Aggravated Assault, under subsection b. of N.J.S.2C:12-1; or a substantially similar offense under the laws of another jurisdiction, may receive alimony if: (1) the crime results in death or serious bodily injury, as defined in subsection b. of N.J.S.2C:11-1, to a family member of a divorcing party; and (2) the crime was committed after the marriage or civil union. A person convicted of an attempt or conspiracy to commit murder may not receive alimony from the person who was the intended victim of the attempt or conspiracy. Nothing in this subsection shall be construed to limit the authority of the court to deny alimony for other bad acts.

As used in this subsection:

"Family member" means a spouse, child, parent, sibling, aunt, uncle, niece, nephew, first cousin, grandparent, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half brother, or half sister, whether the individual is related by blood, marriage or civil union, or adoption.

j.Alimony may be modified or terminated upon the prospective or actual retirement of the obligor.

(1)There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse

or partner attaining full retirement age, except that any arrearages that have accrued prior to the termination date shall not be vacated or annulled. The court may set a different alimony termination date for good cause shown based on specific written findings of fact and conclusions of law.

The rebuttable presumption may be overcome if, upon consideration of the following factors and for good cause shown, the court determines that alimony should continue:

(a)The ages of the parties at the time of the application for retirement;

(b)The ages of the parties at the time of the marriage or civil union and their ages at the time of entry of the alimony award;

(c)The degree and duration of the economic dependency of the recipient upon the payor during the marriage or civil union;

(d)Whether the recipient has foregone or relinquished or otherwise sacrificed claims, rights or property in exchange for a more substantial or longer alimony award;

(e)The duration or amount of alimony already paid;

(f)The health of the parties at the time of the retirement application;

(g)Assets of the parties at the time of the retirement application;

(h)Whether the recipient has reached full retirement age as defined in this section;

(i)Sources of income, both earned and unearned, of the parties;

(j)The ability of the recipient to have saved adequately for retirement; and

(k)Any other factors that the court may deem relevant.

If the court determines, for good cause shown based on specific written findings of fact and conclusions of law, that the presumption has been overcome, then the court shall apply the alimony factors as set forth in subsection b. of this section to the parties' current circumstances in order to determine whether modification or termination of alimony is appropriate. If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

(2)Where the obligor seeks to retire prior to attaining the full retirement age as defined in this section, the obligor shall have the burden of demonstrating by a preponderance of the evidence that the prospective or actual retirement is reasonable and made in good faith. Both the obligor's application to the court for modification or termination of alimony and the obligee's response to the application shall be accompanied by current Case Information Statements or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original alimony award and from

the date of any subsequent modification.

In order to determine whether the obligor has met the burden of demonstrating that the obligor's prospective or actual retirement is reasonable and made in good faith, the court shall consider the following factors:

(a)The age and health of the parties at the time of the application;

(b)The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c)The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d)The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e)The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f)The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g)The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h)Any other relevant factors affecting the obligor's decision to retire and the parties' respective financial positions.

If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

(3)When a retirement application is filed in cases in which there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act, the obligor's reaching full retirement age as defined in this section shall be deemed a good faith retirement age. Upon application by the obligor to modify or terminate alimony, both the obligor's application to the court for modification or termination of alimony and the obligee's response to the application shall be accompanied by current Case Information Statements or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original alimony award and from the date of any subsequent modification. In making its determination, the court shall consider the ability of the obligee to have saved adequately for retirement as well as the following factors in order to determine whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate:

(a)The age and health of the parties at the time of the application;

(b)The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c)The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d)The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e)The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f)The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g)The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h)Any other relevant factors affecting the parties' respective financial positions.

(4)The assets distributed between the parties at the time of the entry of a final order of divorce or dissolution of a civil union shall not be considered by the court for purposes of determining the obligor's ability to pay alimony following retirement.

k.When a non-self-employed party seeks modification of alimony, the court shall consider the following factors:

(1)The reasons for any loss of income;

(2)Under circumstances where there has been a loss of employment, the obligor's documented efforts to obtain replacement employment or to pursue an alternative occupation;

(3)Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find remunerative employment at any level and in any field;

(4)The income of the obligee; the obligee's circumstances; and the obligee's reasonable efforts to obtain employment in view of those circumstances and existing opportunities;

(5)The impact of the parties' health on their ability to obtain employment;

(6)Any severance compensation or award made in connection with any loss of employment;

(7)Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;

(8)The reasons for any change in either party's financial circumstances since the date of the order from which modification is sought, including, but not limited to, assessment of the extent to which either party's financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order;

(9)Whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing employment investigations by the unemployed spouse or partner; and

(10) Any other factor the court deems relevant to fairly and equitably decide the application.

Under circumstances where the changed circumstances arise from the loss of employment, the length of time a party has been involuntarily unemployed or has had an involuntary reduction in income shall not be the only factor considered by the court when an application is filed by a non-self-employed party to reduce alimony because of involuntary loss of employment. The court shall determine the application based upon all of the enumerated factors, however, no application shall be filed until a party has been unemployed, or has not been able to return to or attain employment at prior income levels, or both, for a period of 90 days. The court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction of income.

l.When a self-employed party seeks modification of alimony because of an involuntary reduction in income since the date of the order from which modification is sought, then that party's application for relief must include an analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the order.

m.When assessing a temporary remedy, the court may temporarily suspend support, or reduce support on terms; direct that support be paid in some amount from assets pending further proceedings; direct a periodic review; or enter any other order the court finds appropriate to assure fairness and equity to both parties.

n.Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

(1)Intertwined finances such as joint bank accounts and other joint holdings or liabilities;

(2)Sharing or joint responsibility for living expenses;

(3)Recognition of the relationship in the couple's social and family circle;

(4)Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;

(5)Sharing household chores;

(6)Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and

(7)All other relevant evidence.

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

As used in this section:

"Full retirement age" shall mean the age at which a person is eligible to receive full retirement for full retirement benefits under section 216 of the federal Social Security Act (42 U.S.C. s.416).

amended 1971, c.212, s.8; 1980, c.181; 1983, c.519; 1988, c.153, s,3; 1997, c.302; 1999, c.199, s.1; 2005, c.171, s.1; 2006, c.103, s.78; 2009, c.43, s.1; 2014, c.42.

2A:34-23.1 Equitable distribution criteria.

4.In making an equitable distribution of property, the court shall consider, but not be limited to, the following factors:

a.The duration of the marriage or civil union;

b.The age and physical and emotional health of the parties;

c.The income or property brought to the marriage or civil union by each party;

d.The standard of living established during the marriage or civil union;

e.Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;

f.The economic circumstances of each party at the time the division of property becomes effective;

g.The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;

h.The contribution by each party to the education, training or earning power of the other;

i.The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;

j.The tax consequences of the proposed distribution to each party;

k.The present value of the property;

l.The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

m.The debts and liabilities of the parties;

n.The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;

o.The extent to which a party deferred achieving their career goals; and

p.Any other factors which the court may deem relevant.

In every case, except cases where the court does not make an award concerning the equitable distribution of property pursuant to subsection h. of N.J.S.2A:34-23, the court shall make specific findings of fact on the evidence relevant to all issues pertaining to asset eligibility or ineligibility, asset valuation, and equitable distribution, including specifically, but not limited to, the factors set forth in this section.

It shall be a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property while the party was married.

L.1988, c.153, s.4; amended 1997, c.407; 2006, c.103, s.80; 2009, c.43, s.2.

BASIC MEDIATION TRAINING – CASE DIGESTS

By Robert E. Margulies, Esq.

Lerner v. Laufer, 359 N.J. Super. 201 (App. Div. 2003)

Question Presented: Can an attorney reviewing a mediated agreement limit the scope of engagement specifically to exclude discovery, valuation and advice as to whether the agreement is fair and equitable and should be signed?

Facts: Parties to a divorce attended mediation with an attorney, who prepared a comprehensive PSA and provided the wife with a list of attorneys to consult with before signing the agreement. One of those lawyers was William Laufer. The mediator sent Laufer a copy of the PSA. Laufer spoke with the wife by phone and met with her on February 2, 1994. At their meeting, he gave her a 2-page letter setting forth the limited scope of his representation. The letter confirmed that he would review the PSA, and that there would be no formal discovery, he had no information as to the values of assets, and he was not in a position to advise her whether the agreement was fair on the issues of equitable distribution, alimony or child support, or to advise whether she should sign it.

Laufer's letter further noted that he had discussed the PSA with the wife, that she represented that she was satisfied with it and thought it a fair compromise of the issues. Laufer noted in the letter that he was satisfied that the wife understood the agreement, that she felt it was fair and that she believed the settlement would allow her to maintain "a respectable lifestyle."

Laufer's letter further confirmed that the wife was accepting his services based on the terms set forth in the letter and that she would not assert any claim against him based on negotiations or execution of the PSA.

The wife signed the letter, and then she and Laufer reviewed and discussed each term of the PSA, as well as the question of the value of the parties' interest in a valuable private company. Laufer suggested minor modifications to the PSA, some of which were incorporated. His comments were not intended to renegotiate the agreement; rather, he made suggestions to make the agreement more clear and concise. At a 4-way conference the parties executed the PSA.

Five days later, Laufer's office issued a standard retainer letter to the wife, including boiler plate language that he anticipated the services to be provided would involve legal research, factual investigation regarding assets, income, financial needs, and other matters. It further indicated that the wife would "have the benefit of my advice and my prediction of the likely results if the matter were not settled."

At the uncontested divorce hearing on April 11, 1994, the wife testified that the PSA was largely the result of mediation, and she confirmed that Laufer was not involved in discovery proceedings,

that he had given her the letter, that she waived appraisals on real estate and business interests and relied on representations by her husband and the mediator in entering into the PSA.

The PSA specifically noted that the parties were aware that the company in which they held an interest was contemplating an I.P.O., likely to increase the value of their stock many times over. When, two months after entry of final judgment the wife learned that the business was going to proceed with an I.P.O, she hired new counsel and sought to vacate the divorce judgment, claiming that, during mediation, representations had been made to her that a decision had been made that the company would not go public. The court vacated the judgment and dismissed the complaint, but not on these grounds; rather, the judge found the parties had lied about the cause of action for divorce.

The parties again engaged in mediation and negotiated a second amended PSA. The divorce was re-filed and the parties appeared for a second uncontested divorce in 1999.

Thereafter, the wife filed a malpractice action, alleging Laufer had engaged in negotiations on her behalf and had drafted provisions detrimental to her interests. She alleged that, as a result of his representation, she had entered into an unfair agreement. She alleged that her lawyers had failed to conduct appropriate discovery or retain experts to value assets, had been negligent in the negotiation and preparation of the PSA and failed to determine appropriate alimony and equitable distribution.

The trial judge dismissed her malpractice complaint, finding no basis to permit the wife to agree to a limitation on the scope of his representation, subsequently affirm her understanding and agreement to that limitation under oath, and then seek to collect against her lawyers because she settled for less than half of the marital estate.

The wife appealed, arguing that Laufer had a duty to perform the duties usually expected of a matrimonial lawyer, and that his letter did not constitute a limitation on the scope of his representation. Laufer argued that RPC 1.2(c) allows an attorney to limit the scope of representation "if the client consents after consultation." He further urged that the wife was estopped from claiming the PSA was unfair because she had testified at the uncontested hearing that she knew she had the right to a trial and she specifically waived that right.

Held:

1. There is no breach of the standard of care when a client signs a "precisely drafted consent agreement to limit the scope of representation" that excludes specified services that the attorney might otherwise perform for a matrimonial client. The Appellate panel was satisfied that Laufer's letter was "unmistakable" in making clear that Laufer neither would perform the services as specified in the letter nor opine on whether the agreement was fair or whether the wife should sign it.

2. Laufer's efforts in negotiating and suggesting modifications to the PSA neither invalidated the limitations on his representation, nor make him liable as though no limitations existed, nor changed the wife's expectation of the services he would perform.

3. The decision is limited to the facts presented in this case. The wife had not raised any issues regarding her competence, her knowledge of the parties' finances, her voluntariness in submitting to mediation, or her request that the court approve the PSA. The wife had not alleged that she was a victim of domestic violence, that the PSA violated any law or public policy, that the children's best interests were offended or that the agreement fostered non-disclosure to any taxing authorities.

4. The wife was not entitled to damages. She had an opportunity in 1999 to request a full review of the 1994 proceedings. In opting not to pursue that, she could not show any damages she suffered as a result of the first PSA.

Note: The court criticized Laufer's conduct in two respects: 1) his letter violated RPC 1.8(h) in providing that the wife could not sure him for malpractice; and 2) he should not have sent her the standard retainer, which conflicted with his February 2, 1994 letter, even though the wife did not argue that she believed the retainer letter changed the agreed-upon scope of representation outlined in the February 2 letter.

The Appellate Division further suggested that, when a mediated agreement is incorporated into a final judgment, any limitation to the scope of representation should be fully disclosed to the court, and if the court requests, a copy of the signed retainer agreement should be provided to the court for review.

Lehr v. Afflitto, 382 N.J. Super. 376 (App. Div. 2006)

Questions presented:

1. Did parties to mediation reach a binding agreement in the mediation process?

2. Had parties to mediation expressly waived confidentiality so as to permit the mediator to testify at a hearing addressing whether or not an enforceable agreement had been reached?

Facts: Divorcing parties attended mediation pursuant to the post-MESP Economic Mediation Pilot Program. After three sessions, the mediator sent a letter stating that most of the issues were resolved, outlined the terms the parties had agreed on, and noted that defendant's attorney would prepare a PSA. As to the remaining issues to be settled, the mediator made some recommendations.

Plaintiff's counsel advised the court of the settlement, indicating an MOU was in process after which a PSA would be prepared, and requesting an uncontested hearing date. Plaintiff's counsel wrote to defendant's counsel confirming that the next court date, originally to be a conference, would be rescheduled to an uncontested hearing later that month. Shortly thereafter, the defendant's attorney sent a letter to the plaintiff's attorney advising that the terms were not agreed. Plaintiff's attorney then wrote again to the Court to report the defendant's position, and noting that the plaintiff was not willing to return to mediation.

At the next court date, the defendant's counsel requested a Harrington hearing to determine whether an agreement had, in fact, been made. (See Harrington v. Harrington, 281 N.J. Super. 39 (App. Div.), certif. denied, 142 N.J. 455 (1995)). The trial judge denied this request, allowed the plaintiff to testify as to the terms of the MOU, and entered final judgment incorporating those terms.

The defendant appealed, arguing that a) the trial court erred in ruling that the mediator's letter constituted an enforceable agreement; b) the judge improperly denied the request for a Harrington hearing and c) public policy considerations critical to the mediation process prohibited enforcement of the alleged agreement. The Appellate Division remanded the case for a Harrington hearing to determine whether agreement had been reached. The Court, however, did not address the confidentiality question.

On remand at the Harrington hearing, the plaintiff's counsel called the mediator as a witness. The mediator testified that his letter did not constitute a settled agreement, that he had advised the parties initially that there would be no agreement without a writing signed by both of them, and that there were three significant financial issues on which no preliminary agreement had been reached. Nonetheless, the trial judge found there was a binding agreement.

The defendant appealed again, arguing that a) the trial judge erred in affirming the judgment of divorce, b) he should not be bound by the mediator's letter which did no more than set forth the

parties' preliminary understanding; and c) the court erred in finding there had been a meeting of the minds and in incorporating the terms in the mediator's letter into a final judgment.

Held: The Appellate panel agreed with the defendant and reversed, noting there was no waiver of R.1:40-4(c), which prohibits a mediator from participating in a subsequent hearing of the mediated matter. The Court was troubled by the fact that the mediator had been subpoenaed and had testified in light of the confidentiality accorded to mediation communications. The mediator had informed the parties at each mediation session that the meetings were confidential and "without prejudice, that no Court will know what went on in this mediation, until there's a written, signed agreement." The NJ Court Rules, at R.1:40-4(b) state that mediation proceedings are confidential unless otherwise agreed by the parties. Appendix XIX of the NJ Court Rules describing the guidelines for the post-MESP pilot program specifically states that R.1:40 governs the mediation under that program. R. 1:40-4(c) provides that, except as otherwise provided by the Court Rules, "no disclosure made by a party during mediation shall be admitted as evidence against that party" in a court proceeding....(and) [n]o mediator may participate in any subsequent hearing or trial of the mediated matter of appear as witness or counsel for any person in the same or any related matter."

While the case was pending, NJ enacted the Uniform Mediation Act ("UMA") N.J.S.A. 2A:23C-1 to-13. The UMA provides a privilege for parties, third party participants, and mediators to refuse to disclose – and prevent others from disclosing -- mediation communications, unless all agree in writing to a waiver or a court finds that the need for the information substantially outweighs the need to protect the privileged communications. Although the UMA was not the law at the time of the hearing, the Appellate Court found that the principles of the UMA apply to R. 1:40, which was in effect at the time. The communications were privileged and there was no waiver of that privilege. Moreover, the Court held that "the need for [the mediator's] testimony did not substantially outweigh the private and public interests in protecting confidentiality" and ruled that the mediator should not have been permitted to testify.

On other grounds, the Court held that the agreement could not be enforced because the three unresolved financial issues involving obligations for college, child support, and interim marital expenses were interrelated with the issues on which the parties had agreed, and there was no mechanism for resolving them. The Court found that it would not be possible to fully implement the alleged agreement without resolving those issues.

State v. Williams, 184 N.J. 432 (2005).

Question Presented: May a mediator appointed by a municipal court under R.1:40-4 testify in a subsequent criminal proceeding as to statements made by a participant in mediation.

Facts: Williams was arrested after an argument that escalated into a physical fight with his brother-in-law. Williams filed charges against the brother-in-law for harassment in Municipal Court. The court appointed a mediator to resolve the dispute. Mediation was not successful.

Meanwhile, Williams was indicted for aggravated assault and two charges of weapons possession. At trial, he claimed self-defense and sought to have the mediator testify in his defense that the brother-in-law had attempted to strike him with a shovel. Outside of the jury's hearing, the judge heard the mediator's testimony, indicating that the brother-in-law had confessed to "wielding" a shovel at Williams. The judge, however, excluded the testimony under R.1:40-4(c). Williams was convicted.

On appeal, the Appellate Division upheld the exclusion of the mediator's testimony and affirmed the conviction. The Supreme Court granted Williams' petition for certification on one issue: was the mediator's testimony admissible? Williams urged 1) the mediator's testimony could exculpate him, 2) the trial court had deprived him of his right to present his defense, - specifically the mediator's testimony as substantive evidence that his brother-in-law had the shovel; and 3) boost his own credibility as a prior consistent statement; 4) interfered with his ability to impeach the State's witnessses who testified that the brother-in-law had not charged at William with the shovel

The Court relied on R.1:40-4(c), which provides that no mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter. Clearly, the mediator here would be called to appear as a witness, and the criminal trial was related to the municipal court proceedings, stemming from the same incident.

Williams, however, requested relaxation of the rule. The ensuing analysis required examination of the 14th amendment guarantee of a right to a fair trial, and the 6th amendment guarantees that a defendant must be confronted with the witnesses against him and have compulsory process to secure testimony. These rights together guarantee a meaningful opportunity to present a complete defense. Id. at 443.

Held: There was an insufficient basis to overcome the mediation communication privilege. Although the UMA was not in effect at the time of trial, the Court found that the principles of the UMA were an appropriate analytical framework to determine whether Williams could overcome the mediator's privilege against testifying. It was his burden to show that the need for the evidence substantially outweighed the privilege, and that the evidence was not otherwise available.

The Court cited several public policy concerns. For one, mediation communications are made by parties without the expectation that will be binding. For another, courts do not want to allow mediation to serve as "a fact-finding expedition." Further, the appearance of mediator neutrality is critical and courts should be wary of mediator testimony which will inevitably be regarded as favoring one side or the other. For these reasons, there is a substantial interest in protecting mediation confidentiality. Thus, the inquiry to be made was whether this mediator's testimony was necessary to a fair trial for the defendant.

The Court found that the mediator's testimony was not necessary. His description of the mediation session demonstrated chaos, raised voices and little knowledge of what happened in the fight. The Court noted a number of other facts affecting its assessment of the mediator's credibility: He was a neighbor of Williams' mother; Williams' defense attorney had conferred outside the court room with the mediator; his testimony did not corroborate Williams' version of the fight; and the defendant's counsel had induced the mediator's breach of confidentiality without first seeking the court's approval. All in all, the Court found that the mediator's testimony "was not sufficiently probative" to outweigh preservation of the mediation privilege.

The Court also analyzed whether the evidence offered by the mediator was otherwise available. Both parties had the opportunity to present evidence bearing on the self-defense assertion. There were eye witnesses who testified and were cross-examined. Moreover, the defendant himself was able to testify as to what his brother-in-law said in mediation.

DISSENT: Although other witnesses could testify as to statements made by the brother-in-law, only the mediator was impartial and so, in that respect, the information he could provide was not otherwise available, nor was it cumulative. Further, the dissent expressed its belief that the Court had overstepped its bounds when stating that the mediator's testimony lacked reliability or trustworthiness.

Addesa v Addesa, 392 N.J. Super. 58 (App. Div. 2007).

Question Presented: Was it appropriate for the trial judge to order a plenary hearing regarding a PSA that resulted from mediation, even though an order requiring the mediator to appear for deposition and produce his file was not appropriate?

Facts: After mediation, parties entered into a PSA and judgment of divorce was entered. The wife sought to vacate the judgment, set aside the PSA on the ground that it was unconscionable, and have an evidentiary hearing. The trial court ordered the mediator to appear for deposition and produce his file. The judge granted the motion, vacated the judgment and ordered a plenary hearing. A different judge conducted the hearing. Judge Farber determined that it had been improper for the first judge to require the mediator's testimony and file, and determined that, after conducting the hearing, the agreement was unconscionable and there was sufficient basis to vacate the judgment and set aside the PSA.

Held: The Appellate Division agreed. It was inappropriate to order the mediator to testify and produce his file. The panel noted that, prior to the mediator's deposition the trial judge had separate access to virtually all of the documents subsequently provided by the mediator. As to the merits of the case, there was sufficient basis to order a hearing. The parties' certifications raised issues of fact as to the wife's knowledge and receipt of information, as well as to the unconscionability of the PSA. The wife had been led to believe assets were worth substantially less than their true value, and she accepted representations by the husband, which she was told were complete and candid. In the PSA, the parties specifically stated that the agreement was based on full and fair disclosure of the value of the assets.

The Court noted that there is no basis to treat a voluntary mediation agreement differently than a negotiated PSA. Agreements reached in either process may be reformed based on unconscionability, fraud, or mistake and concealment. As the Court stated, "there may be more reason to apply the principle [to mediated agreements] since the mediator has no authority to compel disclosure and the process is dependent upon the candor and forthrightness of the parties."

Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, LLC, 215 N.J. 242 (2013).

Questions Presented:

1) Does R. 1:40-4(i) require that a settlement agreement reached in mediation be reduced to writing and signed at the time of the mediation, or will an oral settlement be enforced?

2) Did the parties' conduct constitute a waiver of the mediation-communication privilege?

Facts: In 2005, Willingboro Mall, LTD sold property to 240/242 Franklin Avenue, LLC. Willingboro later filed a mortgage foreclosure action on the property and the trial judge ordered the parties to non-binding mediation. Counsel for the parties appeared at mediation, along with Willingboro's manager. During the mediation, there was an oral offer and acceptance, but the terms of settlement were not reduced to writing during the mediation session.

Three days later, Franklin advised the judge the matter was settled, setting forth the terms of settlement. In a separate letter, Franklin confirmed it was holding the agreed upon amount to fund the settlement, advised he had executed a release, and represented the monies would be disbursed when Willingboro filed a stipulation of dismissal in the foreclosure action and delivered a discharge of the mortgage. Franklin then filed a motion to enforce the settlement, attaching certifications from its attorney and the mediator. Those certifications included communications made during the mediation. Willingboro requested an evidentiary hearing and a period of discovery, which the court granted.

The parties agreed to waive any confidentiality issues in connection with the mediation, and to allow testimony for purposes of the motion to enforce the settlement agreement, but not for purposes of the underlying foreclosure action.

After discovery and four days of hearings, Willingboro moved to expunge all confidential communications disclosed in the process, based on the privileges set forth under the UMA and R.1:40-4. The judge ruled that Willingboro had waived the privilege and found that an enforceable agreement had been reached as a result of the mediation process, even though the terms were not reduced to a formal writing at the session.

On appeal, the Appellate Division affirmed, and upheld the oral agreement, finding that plaintiff had waived the mediation communication privilege, both expressly and by itself disclosing privileged communications from the mediation. See Willingboro Mall v. 240-242 Franklin Avenue, 421 N.J. Super. 445 (App. Div. 2011). Before Judges Cuff, Simonelli and Fasciale. Opinion by Cuff, P.J.A.D.

Held: A unanimous Court affirmed the Appellate Division decision.

1) Under R. 1:40-4(i), agreements reached in mediation must be in writing to be enforceable.

2) The parties' conduct constituted waivers of the mediation communication privilege.

Thus, even without a signed writing, the Court upheld the agreement because a) Willingboro did not seek to bar enforcement of the settlement based on lack of a signed agreement, and b) both parties effectively waived confidentiality. The mediator had breached confidentiality by indicating not only that the parties had reached settlement, but by validating the terms set forth in Franklin's letter without Willingboro's consent. Willingboro, however failed to timely move to strike or suppress those disclosures, and instead itself disclosed confidential communications. Willingboro was therefore effectively estopped from arguing that the privilege had been breached.

As a general rule for future cases, agreements reached in mediation must be reduced to writing before the mediation comes to a close in order to be enforceable. Further, any party seeking to invoke a privilege must do so in a timely way.

A party who itself discloses privilege communications "cannot later complain tat it has lost the benefit of the privilege it has breached."

Minkowitz v. Israeli, 433 N.J. Super. 111 (App. Div. 2013)

Questions Presented:

1. Can an arbitrator resume the role as arbitrator after mediating a dispute between the same parties?

2. Can parties who have contracted to submit their dispute to binding arbitration change the process to mediation with the same person acting first as arbitrator and then as mediator, resulting in an enforceable settlement agreement?

Facts: Divorcing parties agreed to submit their issues to binding arbitration. They met with the arbitrator, but before hearings started, they decided to engage in settlement discussion and mediation with the arbitrator, to narrow the issues for trial. In this process, they reached a series of agreements, which were incorporated into the arbitration. After mediation negotiations broke down, the arbitration process resumed. The plaintiff sought to set aside the agreements reached in the process and to remove the arbitrator from the case, claiming the arbitrator exceeded his powers by acting as a mediator and then reverting back to the role of arbitrator. The defendant sought to affirm the parties' agreements and have them confirmed as an arbitration award.

Held: Under the Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13, an arbitrator may not assume the role of mediator and thereafter serve as arbitrator unless there is an express agreement by the parties. When an arbitrator first acts as arbitrator and then serves as mediator, the resulting settlement agreements will be enforceable.

Not so, however, when a mediator changes roles and subsequently assumes the role of arbitrator, unless the parties contract to the contrary. The Court upheld the arbitration agreements reached prior to the mediation, as well as the agreements reached in mediation. All arbitration awards made after arbitration resumed after mediation, however, were vacated, and a new arbitrator would be appointed for any further arbitration proceedings.

The Court distinguished between arbitration as an "evaluative process" which is governed by the law on arbitration, in which parties "present their evidence for a final determination," and mediation as a "facilitative process" which is governed by the law on mediation, in which the mediator "encourages confidential disclosures" so that parties can reach agreement. The conflict between these two roles occurs when the mediator who has received confidential information from the parties later assumes the role of arbitrator, and is therefore in a position to use the confidential information against a party. Allowing a mediator to switch to serving as an arbitrator on the same case erodes the integrity of the mediation process.

The Appellate Division declined to vacate the agreements entered into between the parties pre-mediation or the memorandum of understanding they entered into as a result of mediation. The court affirmed the arbitration agreements holding that the process by which it was reached did

not violate the Arbitration Act. The Court affirmed the MOU, holding that the parties had executed the MOU and knowingly and voluntarily reached, and incorporated it into a signed written agreement which was enforceable.

The Court declined, however, to enforce the arbitration awards in the arbitration that resumed following mediation. Once the arbitrator assumed the role of mediator, the arbitrator lost the "appearance of neutrality" necessary to conduct a binding arbitration proceeding. Thus, an arbitrator appointed under the Act may not assume the role of mediator and thereafter resume the role of arbitrator. To bolster this point, the Court cited to the Code of Ethics for Arbitrators in Commercial Disputes, specifically Canon IV.H, which prohibits an arbitrator from being present or otherwise participating in the settlement discussions unless requested by all parties to do so.

Walker v. Walker, 2014 N.J. Super. Unpub. LEXIS 379

Questions Presented:

1) Must counsel be disqualified from representing respective clients because they have personal knowledge of facts regarding whether the parties consented to have their mediator serve as their arbitrator?

2) Must co-counsel for a party be sequestered from each other's depositions?

3) Must defendant's co-counsel be sequestered from the plenary hearing?

4) Should the court draw an adverse inference against the defendant if his lawyers refuse to be deposed?

Facts: In mediation, parties executed a Memorandum of Agreement ("MOA") setting forth a partial agreement and providing that the remaining issues in the divorce would be addressed in arbitration by the same attorney who acted as mediator. The clause of the MOA providing for arbitration specifically designated the mediator to serve as the binding arbitrator; stated that all issues in dispute would be presented to the arbitrator for resolution; provided that the parties could appeal the arbitration award to the same extent as if a verdict had been rendered after trial; and authorized the arbitrator to decide children's issues pursuant to the requirements of Fawzi v. Fawzi.

After 2 ½ years of failed attempts to arbitrate the remaining issues, the plaintiff filed a motion to vacate the Arbitration Agreement and return the litigation to the courts. The motion was denied and the plaintiff appealed.

While the case was pending, the Appellate Division issued its decision in Minkowitz. As a result, the parties filed motions raising issues of whether each party had consented to having the mediator serve as arbitrator and had knowingly waived this conflict of interest.

During mediation and throughout the litigation, the defendant had been represented by two attorneys from one firm acting as co-counsel. The plaintiff had a series of counsel, some of whom had been involved in negotiating the MOA. Because the critical issue was whether there was a clear and specific agreement as to the mediator/arbitrator's dual role and whether any conflict had been waived, it was apparent that the attorneys involved in negotiating that agreement would be witnesses. Thus, the issue of attorney-as-witness arose with respect to the lawyers who had been involved in those negotiations.

Holding:

The Rules of Professional Conduct governing attorneys, R.P.C. 3.7, provides that a lawyer may not serve as an advocate at trial in which the lawyer is likely to be a necessary witness, unless 1)

the testimony relates to an uncontested issue; 2) the testimony relates to the nature and value of legal services rendered in the case; 3) disqualification of the lawyer would work substantial hardship on the client. Further, a lawyer may serve as an advocate at trial in which another lawyer in the same firm is likely to be called as a witness, unless precluded from doing so under other RPCs. The rule exists, at least in part, to avoid confusion on the part of the trier of fact who may not be able to distinguish the lawyer as reciting facts from the lawyer as arguing and commenting on those facts.

The analysis requires a balancing of the interests of the client and the interests of the tribunal and the opposing party. Is the tribunal likely to be misled? Is the opposing party likely to be prejudiced? This depends on the case, the anticipated testimony by the lawyer, and the likelihood that the lawyer's testimony would conflict with other witnesses. Any risk of prejudice must be weighed against the potential harm to the client of disqualify his or her counsel.

In this case, the discussion of using the mediator to then serve as arbitrator likely occurred only among the attorneys, so their testimony was necessary on this issue. Defendant's counsel would not be disqualified from continuing to represent the defendant. The right to choose one's own counsel is an important right that is not disturbed absent an actual conflict that "undermines the integrity of the court."

Defendant's counsel would not be disqualified from further representing their client. Clearly, their testimony would be necessary, because it was the lawyers who participated in the discussion about having the mediator serve as arbitrator, and they further would have reviewed correspondence and contracts related to retaining the arbitrator. Moreover, disqualification of the defendant's attorneys, who had represented him for over five years, would have caused "an extreme hardship" to the defendant. One of the plaintiff's lawyers had represented her for three years, and had been paid over $262,000 during the litigation. Thus, he would also not be disqualified.

The Court held that sequestration from the hearing would be unreasonable because it would tread on each party's right to be represented by an attorney of their own choosing. It would also prevent those attorneys from representing their clients to the best of their abilities.

The Court found no harm in sequestering defendant's co-counsel from one another's depositions, and ruled that neither could attend the deposition of the other.

On the final issue, the Court noted the four factors to be considered in determining whether to draw an adverse interest (1) was the witness within one party's control; 2) was the witness available; 3) would the witness's testimony elucidate relevant and critical facts; and 4) would the testimony be superior to other testimony on the same issue. Because plaintiff's counsel had not addressed these issues, and because the court viewed that it could not consider these four factors until the end of the hearing, the Court ruled that the request to draw an adverse inference was "premature."

D.A v. R.C., 438 N.J. Super 431 (App. Div. 2014)

Question Presented: Must parties in a post-judgment matter involving custody and parenting time, be required to submit to mediation under R.5:8-1?

Facts: Parents of a 14-year-old had agreed ten years earlier to a parenting arrangement, which father sought to modify. At oral argument, the trial judge urged the parties to either go to mediation or sit with counsel in a conference room and negotiate a parenting schedule. The court scheduled the case to return to the courthouse for mediation, but when the parties appeared the judge held an informal hearing, did not have the parties mediate, and ordered 50-50 parenting. One week later, the parties were back in court on an order to show cause. The trial court judge asked whether mediation was "out of the question." Both parties indicated they were unwilling to mediate, despite the judge's attempts to get them to change their minds. Thereafter, defendant appealed, arguing, inter alia, that the judge erred in failing to order the parties to mediate as required under R.5:8-1.

Held: Rule 5:8-1 requires parties to mediate if there is a genuine and substantial custody or parenting time issue. The trial judge apparently did not know he was obligated to refer the case to mediation. To make mediation meaningful, the trial judge should enter a case management order that 1) identifies the issues for mediation; and 2) sets an initial time frame to report back to the court. The Appellate Division noted that the judge must guard against allowing either party to abuse the mediation process by using it as a means to "delay, frustrate or otherwise undermine the custodial parenting time rights of the adverse party." In light of the intransigence of the parties, the Appellate panel "strongly suggest[ed]" that the trial judge closely monitor the mediation process and receive periodic reports from the mediator.

[*Note: trial judges might assume this means the mediator is to discuss what happens in the process, which would violate the confidentiality of mediation under both the UMA and R.1:40. Any such reports should be limited to whether there is progress and a basis for continuing mediation, or whether it is not going to succeed*]

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The following two cases are unreported and, although they do not serve as legal precedent, they present issues for mediators to consider.

Gubler v. Gubler, App. Div. Docket No. A-2552-20, Decided April 5, 2022. Mediation occurred in August 2018, and the mediator prepared the MOU. Wife sought to amend a default judgment of divorce that incorporated a mediated settlement agreement. The mediation agreement signed by the parties provided for full disclosures and production of all documents requested by the mediator or either party. The mediation retainer agreement further "strongly urged" the clients to obtain separate legal counsel during the mediation process. After two mediation sessions, the mediator prepared a 16-page MOU, which stated:

- It was "not binding contract unless the parties "took action to make it binding"
- "[t]he parties recognize their right to counsel, but decided to waive that right and to enter into agreement without benefit of separate and independent counsel"
- "however, they have specifically decided to waive their right to do so and enter into an agreement without the benefit of separate and independent counsel." MOU: ALSO had a provision "Waiver of Attorney and Agreement"
-

The waiver provision stated:

> The parties have reviewed the terms and conditions of this agreement with the mediator and by themselves and may or may not have consulted with legal counsel with regard to the terms and conditions of this as well as their rights and obligations legally from the marriage. Nonetheless, they have chosen to accept the terms and conditions hereof without further assistance or any assistance of legal counsel. They represent that at no time were they under undue influence or duress, and that, knowing all of the undertakings set forth herein and knowing all of their rights, they freely and voluntarily enter into this agreement, waiving their respective rights to have the [c]ourt decide each issue, with or without the assistance of counsel, and substituting their judgment for the judgment of the [c]ourt. They understand that they have the right to have a full disclosure of all of the assets, liabilities and income of the other under the supervision of independent attorneys and the [c]ourt, and with their respective rights to further discovery. They agree to be bound by this agreement as if it were an order of the [c]ourt.

Three years later, the wife filed a motion, claiming that the MOU was "unconscionable" because it was based on information controlled by the husband, there was no exchange of information regarding certain valuable assets, etc. She claimed she was bullied and intimidated into entering the agreement without an attorney.

The court found no evidence that the wife was coerced, under duress, deprived of her right to counsel or discovery and found further that the MOU was not unconscionable. The Appellate Division affirmed and further upheld the judge's denial of the wife's request to compel further mediation.

Consider: Do you, as the mediator, prepare strong waiver language? If so, how do you advise the parties as to the effect of the waivers?

Blount v Adkins, App. Div. Docket No. A-2791-19, Decided June 7, 2022. Just as with other agreements, while courts may be disposed to uphold mediated agreement, enforceability remains subject to judicial control, particularly when changed circumstances occur post-judgment. In this case, the question to be determined was the reasonable expectation of the parties. The mediated agreement provided that the parents would equally split "extraordinary expenses." At the time, the child was already attending private school. The issue presented was whether private school was to be included as an "extraordinary expense" subject to a 50-50 allocation, or was it subject to a different allocation under the parties' agreement. The lower court ruled that, because the parties' incomes had changed, there should be a different allocation of responsibility. It did not, however, determine whether private school was to be considered an "extraordinary expense." The Appellate Division remanded the case to the lower court to address this.

Consider: Clarity and thoroughness is important, but who is responsible for making sure of this? The mediator? The attorneys? What if one or both parties do not have an attorney? If the mediator is responsible and does not adequately provide this clarity, what recourse do the parties have?

About the Panelists…

Adam J. Berner operates a private mediation practice with offices in Hackensack, New Jersey, and New York City. He has more than 20 years of experience in the matrimonial ADR field.

Mr. Berner is Past President of the Family & Divorce Mediation Council of Greater New York, where he has served as a member of the Board, Chair of the Continuing Education Committee and as a regular contributor to the Council's newsletter. He is Founding President of the Collaborative Divorce Association of New Jersey and a founding member of the New York Association of Collaborative Professionals and the New Jersey Council of Collaborative Practice Groups. He is an Advanced Practitioner Member of the Association of Conflict Resolution (formerly AFM) and an Accredited Member of the NYS Council on Divorce Mediation. A Certified Mediator at the Manhattan, Brooklyn and Staten Island Mediation Centers, Mr. Berner is a member of the Association of the Bar of the City of New York Alternative Dispute Resolution Committee, the New Jersey Association of Professional Mediators (NJAPM) and the New Jersey State Bar Association's Family Law Section. He has been a member of mediation & arbitration panels including those for the Equal Employment Opportunity Commission, the United States Postal Service Redress Program, the Association of the Bar of the City of New York Civil & Family Mediation Referral Panel and the National Association of Securities Dealers (NASD).

An instructor for ICLE's 40-hour Divorce Mediation Training, Mr. Berner is a frequent lecturer, trainer and workshop leader who has trained attorneys, court personnel, schools, clergy and corporate staff. He has been an adjunct professor at the Cardozo School of Law, where he has taught collaborative family law and divorce mediation. He has also served as the Director of Training at the New York Center for Interpersonal Developments' (NYCID) Mediation & Conflict Resolution Training Institute.

Mr. Berner received his undergraduate and law degrees and mediation training at the Cardozo School of Law. He has received more than 1,000 hours of mediation training focusing on an array of different models and approaches.

Jennifer L. Brandt, Brandt Law & Mediation, LLC in Springfield, New Jersey, is a mediator and attorney with experience in high conflict, intractable litigation. She mediates civil, commercial, contract, family business and family law disputes, and has appeared in federal district court including FEMA and United States Bankruptcy Court cases.

Admitted to practice in the state and federal courts of New Jersey and Massachusetts, and before the United States Supreme Court, Ms. Brandt is a member of the American, New Jersey State and Union County Bar Associations. She has served as a New Jersey-court approved mediator in civil and family cases as well as a federal court mediator for the United States District Court and the United States Bankruptcy Court. A member of the Board of Directors of the Foundation for Sustainable Rule of Law Initiatives (FSRI), Ms. Brandt is a member of the New Jersey Association of Professional Mediators (NJAPM) and serves on the State Court Early Settlement Panel Program. She is an Executive Board Member of the American Inn of Court for Alternative Dispute Resolution as well as a member of the Justice Marie Garibaldi ADR American Inn of Court.

Ms. Brandt received her B.A. from Brandeis University, her J.D. from Suffolk University Law School and her Masters degree in Diplomacy and International Relations from Seton Hall University School of Diplomacy and International Relations.

Jeffrey Fiorello is a Partner in Cohn Lifland Pearlman Hermann & Knopf LLP in Saddle Brook, New Jersey, and concentrates his practice in family law mediation, assisting parties in the amicable resolution of their issues concerning custody and parenting time, spousal and child support, college contributions, distribution of assets and debts, and related issues. He has also handled family law litigation, domestic violence, civil litigation and appeals.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Mr. Fiorello is a Trustee and Past President of the Passaic County Bar Association. He is Past Chair of the Association's Family Law and CLE Sections, and the Association's Activities and Social Committee. Mr. Fiorello is Past Chair of the New Jersey State Bar Association Family Law Section Executive Committee and Past Chair of the Association's LGBT Section. He has been Co-Chair of the Legislative Committee, has served on the Nominating Committee and has been a Trustee of the Association. He has also been a Panelist for the Matrimonial Early Settlement Program in Passaic County and has served on the District XI Ethics Committee.

Mr. Fiorello is a former member and Barrister of the Northern New Jersey Family Law American Inn of Court. He is the recipient of several honors, including being selected as the 2014 Professional Lawyer of the Year, Passaic County, by the New Jersey Commission on Professionalism in the Law and as the 2015 Passaic County Distinguished Family Law Practitioner of the Year.

Mr. Fiorello received his B.A., *cum laude*, from Rutgers University and his J.D. from Seton Hall University School of Law. He was Judicial Clerk to the Honorable Ralph L. DeLuccia and the Honorable Carol Weaver McCracken, Superior Court of New Jersey.

Honorable David J. Issenman, JSC (Ret.) is Of Counsel to Skoloff & Wolfe, P.C. in Livingston, New Jersey, and heads the firm's mediation and arbitration practice. He is a former Superior Court Judge, Family Division, Union County, and served on the bench from 1992-2012.

Admitted to practice in New Jersey and before the Third Circuit Court of Appeals and the United States Supreme Court, Judge Issenman is a member of the Executive Committee of the New Jersey State Bar Association's Family Law Section and has been a member of the Union County Bar Association and the New Jersey Council of Juvenile and Family Court Judges. He is a Master of the Barry I. Croland Family Law American Inns of Court and has been a member of the Richard J. Hughes American Inn of Court and an Adjunct Professor at Kean College. A lecturer for ICLE, the AAML and other professional organizations, he was the 2004 recipient of the Union County Bar Association's Hon. William J. McCloud Award and a 2018 recipient of the New Jersey State Bar Association's Serpentelli Award for significant contributions to family law.

Judge Issenman received his B.S. from Ithaca College, his M.B.A. from Adelphi University and his J.D., *cum laude*, from Seton Hall University School of Law. He was Law Secretary to the Honorable Harold A. Ackerman, JSC and the Honorable A. Donald McKenzie, JSC.

Anju D. Jessani, MBA, APM is an Accredited Professional Mediator by the New Jersey Association of Professional Mediators (NJAPM) and an Advanced Practitioner Member of the Association for Conflict Resolution. Her firm, Divorce with Dignity Mediation Services, has offices in Hoboken and Clinton, New Jersey. Her practice consists of family/divorce mediation, securities mediation and arbitration, and civil/business mediation.

Prior to establishing her mediation practice in 1997, Ms. Jessani served as Vice President for JP Morgan and Chase Manhattan Bank. She is on the New Jersey Administrative Office of the Court's roster of Family/Divorce, Foreclosure and Business/Civil Mediators, and serves as a mentor to mediators applying to qualify for the Business/Civil roster. She has been a member of the multi-disciplinary Association of Family and Conciliation Courts, and is Past President of the New Jersey Association of Professional Mediators (NJPAM).

The primary author of *Parenting Time: A Child's Right,* Ms. Jessani has written several articles on mediation topics which have appeared in the *American Journal of Family Law*, *CPA Journal*, the *New Jersey Law Journal* and other publications. She is an instructor for ICLE and NJAPM's divorce mediation training programs, editor of the NJAPM publication *Mediation News* and has received special recognition from the New Jersey State Bar Association's Board of Trustees and NJAPM.

Ms. Jessani received her B.A. from Douglass College, Rutgers University, and her M.B.A. from The Wharton School, University of Pennsylvania. She received her formal training in mediation from the Center for Family and Divorce Mediation in New York, and her practical training in mediation through the Hudson County Court Mediation Program.

Phyllis S. Klein, Phyllis Klein Mediation in Chatham, New Jersey, was a founding Member of Hagan, Klein & Weisberg, LLC and a Partner in that firm for 28 years. She limits her practice to family law matters and focuses in alternative dispute resolution, primarily mediation and parent coordination. She has also been involved in several reported decisions.

Admitted to practice in New Jersey, New York and Connecticut, Ms. Klein is a Court-Approved Mediator and a member of the Family Law Sections of the New Jersey State, Essex County and Morris County Bar Associations, as well as the New Jersey Association of Professional Mediators (NJAPM). She is former Co-Chair of the Executive Committee of the ECBA Family Law Section, a former member of the District VB Ethics Committee and a former member and Chair of the District VC Fee Arbitration Committee.

Ms. Klein is a member and Past President of the Barry I. Croland Family Law American Inn of Court and has lectured for ICLE, the American Trial Lawyers Association and several bar associations and family law American Inns of Court. She is a contributing author to the custody chapter of *New Jersey Family Law Practice* and was the 2003 recipient of the Essex County Bar Association Family Law Section's Family Law Achievement Award and several other honors.

Ms. Klein received her B.A.A.S. from the University of Delaware and her J.D. from New York Law School. She was Law Clerk to the Honorable Carmen A. Ferrante, J.S.C.

Michael R. Magaril, The Law Offices of Michael R. Magaril in Mountainside, New Jersey, limits his practice to divorce, family law and related issues. He is also a qualified mediator and collaborative divorce attorney.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Mr. Magaril is a Blue Ribbon panelist on the Union County Early Matrimonial Settlement Panel, a member of the New Jersey Family Court's Roster of Economic Mediators and has been appointed by the Family Court as a Guardian *ad Litem*, Parenting Coordinator and arbitrator. He has also been designated a "Mediator Mentor" and in 2019 was the recipient of the William J. McCloud Award bestowed by the Union County Bar Association for his lifetime contribution to the practice of family law in Union County.

Mr. Magaril received his B.A., with honors, from Haverford College and his J.D., *magna cum laude*, from the University of Miami School of Law, where he was Managing Editor of the *University of Miami Law Review*.

Robert E. Margulies is a Principal in the Jersey City, New Jersey, firm of Schumann Hanlon Margulies LLC. He has been the managing member of The Resolution Group, a high-level mediation and arbitration practice, and has also maintained a full law practice with a concentration in litigation, commercial matters, personal injury, civil rights, employment and discrimination, insurance, products liability and appellate practice.

Admitted to practice in New Jersey, New York and Massachusetts (inactive), and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York; the First, Second, Third and Tenth Circuit Courts of Appeal; the United States Tax Court and the United States Supreme Court, Mr. Margulies is a member of the American and New Jersey State Bar Associations, and a past President of the Hudson County Bar Association. He has also been a member of the Supreme Court of New Jersey Arbitration Advisory Committee and Complementary Dispute Resolution Committee, where he has served as Chair of the Civil Mediation Subcommittee. Receiving accreditation as a Mediator from the Center for Effective Dispute Resolution in 2011, Mr. Margulies served for 7 years on the NJSBA Judicial and Prosecutorial Appointments Committee and is Past Chair of the NJSBA Dispute Resolution Section and the Executive Committee of the General Council. He is Past President of the Association of County Bar Presidents, a Fellow of the American Bar Foundation and on the roster of the American Arbitration Association as an arbitrator/mediator.

A court-approved mediator since 1995, Mr. Margulies has been the principal lecturer for ICLE in mediation and arbitration for more than two decades. He is a former Master of the Hudson American Inn of Court and the Family Law American Inn of Court, and Executive Director and a founder and Master of the Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution. Mr. Margulies was an Adjunct Professor at Seton Hall Law School, where he taught advanced mediation, and has taught negotiation at Peking University in Beijing for EMBA students. The recipient of the 2006 Distinguished Service Award bestowed by ICLE, he is also the 2003 recipient of the Boskey Award as ADR Practitioner of the Year and the 2011 Jeydel Award for ADR Excellence from the Garibaldi American Inn of Court.

Mr. Margulies received his A.B. from Duke University and his J.D. from Suffolk University Law School. He served in the U.S. Army as a 1st Lieutenant in the Medical Service Corps from 1968 to 1971, with a tour of duty in Vietnam.

Bruce P. Matez, APM practices with Weir LLP in Cherry Hill, New Jersey. He concentrates his practice in ADR matters, including mediation, arbitration, Collaborative Divorce and out-of-court

settlement negotiations. He is a trained Collaborative Divorce professional, an approved *R*. 1:40 Post MESP Economic Mediator and has been appointed by the court and colleagues as a Parenting Coordinator and Guardian *ad Litem* for minor children.

A former member of the Executive Committee of the New Jersey State Bar Association Family Law Section, Mr. Matez has also served on the Family Law Committees of the Camden, Burlington and Gloucester County Bar Associations. He is Past President of the New Jersey Association of Professional Mediators (NJAPM), a founding member of the South Jersey Collaborative Divorce Professionals (a.k.a. BetterWayDivorce), the Justice Marie Garibaldi American Inn of Court for Alternative Dispute Resolution and a member of several other professional and community organizations.

Mr. Matez was a founding member of the Thomas S. Forkin Family Law American Inn of Court, served on the organization's Executive Committee from 1997-2009 and is a Master *emeritus*. He has lectured for ICLE and the Camden County Bar Association, taught family law mediation and family law motion practice at Rutgers Law School-Camden, and in 2018 was the recipient of the Honorable Joseph M. Nardi, Jr. Award for his commitment to the practice of law encouraging and exemplifying civility, humility, compassion and a moral/ethical obligation to the welfare of children and families, in general. In 2022 he was the recipient of the Richard Jeydel Award bestowed by the Justice Marie Garibaldi American Inn of Court.

Mr. Matez received his undergraduate degree from the University of Maryland, College Park, where he was elected to *Phi Beta Kappa*, and his J.D. from Villanova University School of Law. He clerked for the Honorable Samuel D. Natal, J.S.C., Family and Criminal Parts, Camden County.

Sharon Ryan Montgomery, Psy.D. is a licensed psychologist in private practice in Morristown, New Jersey. Her areas of expertise are in all areas of forensic psychology, child custody evaluations, child sexual abuse, criminal and personal injury, family violence, mediation/arbitration, therapeutic mediation, parenting coordination, therapeutic visitation, child and adolescent psychopathology, and emotional sequelae/complications of juvenile diabetes. She also sees patients in individual, marital and group psychotherapy, and served as a psychologist and Coordinator of the Family Enrichment Program at Morristown Memorial Hospital for several years.

A Board-Certified Forensic Examiner, Dr. Ryan Montgomery is a Diplomate of the American Board of Forensic Examiners and holds certification in group psychotherapy from the New Jersey Academy of Group Psychotherapy. She has been Clinical Supervisor of Morris County's Family Court Mediation Program, on the Steering Committee of the New Jersey State Bar Association's Child and Family Project, and a member and President of the Morris County Psychologist Association. Dr. Ryan Montgomery has also been a member of the New Jersey Psychological Association (NJPA) and the American Psychological Association. She was a member of the Task Force for the American Bar Association, Family Law Section, Standards of Practice on Divorce Mediation, and the Board of the New Jersey Psychological Association, chairing its Interpersonal Relations Committee, and has been a member-at-large on the NJPA Executive Committee. She has served as President of the New Jersey Chapter of the Association of Family and Conciliation Courts (AFCC).

A lecturer at national and international child abuse conferences and for ICLE and the Newly-Appointed Judges Orientation Program, Dr. Ryan Montgomery has served as an expert witness in

numerous custody disputes in several New Jersey counties. She has also conducted evaluations in criminal matters and has testified in court on numerous occasions.

Dr. Ryan Montgomery holds a doctorate in psychology from Rutgers University.

Marcy A. Pasternak, Ph.D. is a clinical and forensic psychologist with a practice in Watchung, New Jersey. While her practice serves individuals of all ages in both the clinical and forensic arena, Dr. Pasternak's special interests include marital and family therapy, divorce therapy, forensic evaluations concerning custody and parenting time, removal, grandparent visitation, risk assessment and personal injury. She often serves as a parenting coordinator and is a certified divorce mediator, conducting both divorce mediation and therapeutic mediation. She conducts Intensive Family Interventions through "Building Family Resilience," an outgrowth of her practice.

A licensed psychologist in New Jersey, New York and Vermont, Dr. Pasternak has been a member of the American, New Jersey and Somerset Hunterdon Psychological Associations, and has an APA Certificate of Proficiency in the Treatment of Alcohol or Other Psychoactive Substance Use Disorders and an NCC AP Master Addiction Counselor Credential. She has been a member of the New Jersey Psychological Association's Forensic Committee and is Past President of the New Jersey Chapter of the Association of Family and Conciliation Courts (NJ-AFCC).

Dr. Pasternak has served as a psychological expert in eleven New Jersey counties and as an adjunct staff member at Muhlenberg Regional Medical Center, and has been a Clinical Assistant Professor of Psychiatry at New Jersey Medical School, UMDNJ. She has given workshops and presentations to the mental health and legal communities.

Dr. Pasternak received her B.A., *magna cum laude*, from the State University of New York at Buffalo, where she was elected to *Phi Beta Kappa.* She received her Ph.D. in Clinical Psychology from Duke University.

Tamsen Thorpe, Ph.D. is a clinical and forensic psychologist, and owner of Directions CLS, LLC in Morristown, New Jersey. With more than 25 years of experience helping clients, she specializes in couples therapy, helping partners enhance communication, resolve conflict and deepen their connection. She has expertise in infidelity, high-conflict dynamics, divorce coaching and co-parenting; and also sees clients with general anxiety, panic attacks, social anxiety and obsessive-compulsive disorder (OCD).

Dr. Thorpe is a member of the American, New Jersey and Morris County Psychological Associations; the New Jersey Collaborative Law Group; and the New Jersey Chapter of the Association of Family and Conciliation Courts (AFCC). In addition to her counseling work she has conducted seminars on healthy relationships, affairs, step-families and parent-child-contact problems; and led corporate workshops on stress management and workplace relationships.

Dr. Thorpe received her B.S., magna cum laude, from Drew University; her M.S. in Organizational Psychology from Stevens Institute of Technology; and her Ph.D. in Clinical Psychology from The California School of Professional Psychology. She did a yearlong post-doctoral rotation at UCLA and received advanced training from The Gottman Institute, the AFCC and other organizations.

Amy Wechsler, Certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey, practices with Lawrence Law with offices in Watchung and Red Bank, New Jersey. She concentrates her practice in family law, mediation, arbitration, parenting coordination and collaborative divorce, and provides mediation services privately and through court programs.

Accredited as a Divorce and Family Mediator by the New Jersey Association of Professional Mediators (NJAPM) and a trained Collaborative Divorce Attorney, Ms. Wechsler serves on the New Jersey State Bar Association's Family Law Executive Committee (where she has been Chair of a Task Force on Parenting Coordination and the Children's Rights Subcommittee) and is Past President of the Somerset County Bar Association. She completed the Arbitration Training through the American Academy of Matrimonial Lawyers and is Past President of the Association of Family and Conciliation Courts-New Jersey Chapter (AFCC-NJ), an interdisciplinary association of professionals dedicated to improving the lives of children and families through the resolution of family conflict. Ms. Wechsler has been Co-President of the Association for Advancement of Collaborative Practice and a Board Member of the New Jersey Council on Collaborative Practice Groups. She is also Past Chair of the District XIII Attorney Ethics Committee and a former Trustee of the New Jersey Collaborative Law Group and the New Jersey Association of Professional Mediators (NJAPM).

Ms. Wechsler is the 2005 recipient of the Professional Lawyer of the Year Award for Somerset County bestowed by the New Jersey Commission on Professionalism as well as the NJ-AFCC Phil Sobel Award and the NJSBA Saul Tischler Award. She is a frequent lecturer and author on family law topics for ICLE, NJAPM, AFCC-NJ, the Association of Divorce Financial Planners (ADFP) and other organizations, and her articles have appeared in the *New Jersey Family Lawyer*.

Ms. Wechsler received her B.S. from the University of Connecticut, her M.S.W. in Clinical Social Work from Rutgers University and her law degree from Rutgers School of Law-Newark.

Cindy Ball Wilson, Wilson Family Law LLC in Chatham, New Jersey, devotes her practice exclusively to family and matrimonial law. Her broad expertise spans mediation, collaboration and litigation; and she handles high-net-worth clients with complex compensation needs and those who are facing financial challenges.

Admitted to practice in New Jersey and Maryland, and before the United States District Court for the District of New Jersey, Ms. Wilson is an approved family mediator in ten New Jersey counties and an Early Settlement Panelist in Morris and Union Counties. She is Secretary and Past President of the New Jersey Collaborative Law Group, a member of the New Jersey State Bar Association's Dispute Resolution and Family Law Sections, and a member of the Family Law Sections of the Morris and Union County Bar Associations. She is also a member of the New Jersey Association of Professional Mediators (NJAPM), the International Academy of Collaborative Professionals and the New Jersey Women Lawyers Association.

A member of the Barry I. Croland American Inn of Court, Ms. Wilson serves on the Executive Committee of the Justice Garibaldi American Inn of Court. She has been a guest lecturer on family law mediation topics at Seton Hall Law School and is the recipient of several honors.

Ms. Wilson received her B.A. from Rutgers University and her J.D. from Seton Hall Law School. While in law school, she was a law clerk for the New Jersey Office of the Attorney General in

the Division of Youth and Family Services (currently Child Protection & Permanency) and worked on cases involving abused and neglected children. After graduating law school, she was Law Clerk to Chief Judge Louise G. Scrivener, Family Division, Sixth Judicial Circuit, Montgomery County, Maryland, where she lectured about gun possession in domestic violence cases.