

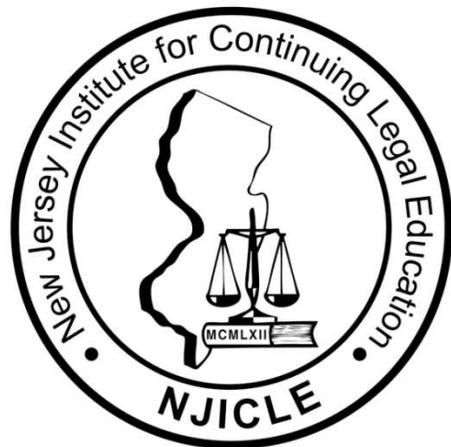
CIVIL MEDIATION TRAINING COURSE - WINTER 2026

2026 Seminar Material

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CIVIL MEDIATION TRAINING COURSE – WINTER 2026

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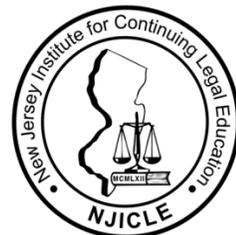
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In cooperation with the New Jersey State Bar Association **Dispute
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Training Role Plays
(General Information)

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CIVIL MEDIATION TRAINING - ROLE PLAY

THE HARASSMENT OF SALLY LABTECH

Sally Labtech, an employee of Municipal Hospital, who is African-American, had worked there for over ten years. The hospital, owned and operated by the municipality of OZ, was thought of as taking great pride in delivering top-notch medical services. Besides modern equipment, the hospital had all the standard human resources policies in effect, including a sexual harassment policy.

On August 10, 2017 Sally was approached in the lab by Mitzi, a maintenance worker who had been employed by the hospital for the past 5 years. In the presence of others in the lab, Mitzi came up to Sally, stroked her back and made a sexual overture to Sally. Sally was shocked, immediately recoiled and expressed to Mitzi that her behavior was completely inappropriate. She immediately, consistent with the hospital policy, reported the sexual harassment to her supervisor who arranged for action to be taken where Mitzi's duties were to be performed elsewhere in the facility, outside of the lab where Sally worked. Mitzi was also counseled to stay clear of Sally and again educated on the inappropriateness of the sexual behavior in the workplace.

As a result of this one encounter, Sally was emotionally upset but continued to work. On June 15, 2018 as Sally was heading from the cafeteria to the lab on the elevator, she heard a voice say "Hold the elevator" and Mitzi appeared. During the short elevator ride, where no words were exchanged, Sally got the feeling that Mitzi was leering at her in a salacious manner. She became extremely upset and complained to her new supervisor, Joan, whose response upon learning of the chance encounter in the elevator said "Get over it – that's not a big deal". Sally stewed over the elevator encounter which she knew was Mitzi's attempt to sexually harass her. The leering was unmistakable. As a result of her emotional upset, she visited both her local pastor, Reverend John, as well as her lawyer Phil.

Eventually on September 15th, 2019, after having taken a month and a half vacation and sick time leave, Sally left her position, claiming constructive termination as a result of the extreme sexual harassment she felt she had been subjected to. Thereafter, on October 15, 2019, Phil filed a sexual harassment and civil rights lawsuit against the Municipal Hospital of Oz, claiming damages for assault, emotional distress and future lost wages as a result of Sally's inability to function in the workplace.

A claim by the hospital has been made to XYZ Insurance Company, the Workers' Compensation carrier for assignment of counsel and coverage.

The case has been referred through the Presumptive Mandatory Mediation Program for mediation without discovery in early January, 2020. A telephonic conference call has taken place and the mediation session is about to begin.

Arriving for the session are Sally Labtech, along with her attorney Phil and her personal counselor Pastor John, assigned insurance counsel Joe Slick, insurance coverage counsel

representing the carrier, Henry Highbrow, Sally's former supervisor Joan, and the representative of the Municipal's corporation counsel's office representing the hospital, Alan Politico.

A Problem with Carpets and Shawls

GENERAL INFORMATION

Srinagar Products Export Ltd. (“SPE Ltd.:

) and East West Home Imports Ltd. (“East West Ltd.”) have enjoyed a good business relationship for 110 years.

SPE Ltd. Is based in Srinagar in the Kashmir Valley of India. It is run by Mandeep Kumar. The company specializes in the export of carpets and Kashmir shawls. All of the products exported by the company are either made in Srinagar itself or in the surrounding area. It has always been important to Mandeep to promote goods locally made in the Srinagar area outside of India –firstly, because the local goods are of excellent quality; and secondly, because the region has suffered over recent years due to ongoing internal conflict. Too often, international business has chosen to overlook Srinagar because of safety concerns. Mandeep was therefore delighted when Est West Ltd. Made an initial approach about a possible business venture.

SPE Ltd. Exports pure wool and wool and silk carpets and Kashmir shawls, including pashminas, to East West Ltd. The quantity of products and frequency of shipments has varied over the years, but for the last three years the arrangement has been that SPE Ltd. Has made three shipments to East West Ltd. During each 12-month period – namely in March, July and November. Each shipment has comprised US\$500,000 worth of carpets and US\$300,000 worth of shawls. The contract with East West Ltd. produces an income of US\$2,400,000 a year to SPE Ltd. and accounts for 70% of SPE Ltd.’s annual turnover. East West Ltd. makes payment for each shipment within 14 days of the arrival of the shipment in London.

East West Ltd. is based in Bristol, England. It is run by Alex Taylor. The company specializes in the import of home furnishings from Asia. Alex has a particular affection for India having spent time backpacking there as a student. Alex set up East West Ltd. after realizing there was a market in England for quality products made in Asia. The company focuses on the import of carpets and fabrics, including shawls. East West Ltd has well-established business links with the two biggest chains of department stores in England and most of the upmarket home furnishing shops in London. This means that all the imported products are sold on to retailers and East West Ltd. does not sell any of its imports directly to the public itself. SPE Ltd. is not the only company East West Ltd. deals with in India but it is the main source of the carpets and shawls it imports because the quality is so good. And SPE Ltd. is the company with whom East West Ltd. has had the longest business involvement. The contract with SPE Ltd. accounts for 40% of East West Ltd.’s annual turnover of US\$10 million.

Unfortunately, a dispute has arisen between the two companies. In March last year SPE Ltd. sent the usual shipment of carpets and shawls with a total value of US\$800,000. The shipment arrived in London on 30 March. Under the terms of the contract East West Ltd. should have made payments in full by 13 April. However, on 11 April SPE Ltd. received a payment of only US\$450,000. Mandeep waited for a few days before following this up, thinking that perhaps there had been a banking problem. However, as no further payment was received, SPE Ltd. e-mailed East West Ltd. to ask why there had not been payment in full for the shipment. East West Ltd. did

not reply to the e-mail immediately. But on 20 April, SPE Ltd. received a reply. The e-mail said that of the payment of US\$450,000, US\$250,000 represented payment for the carpets and US\$200,000 represented payment for the shawls. The e-mail further explained that questions had been raised by the buyers for the two department stores about the quality of the carpets and that was why the payment had been limited to 50% for the time being. As regards the shawls, upon inspection of the shipment it was clear that one-third of the shawls were damaged and could not be sold on, so that was why the payment was for only US\$200,000. The e-mail ended with the suggestion that the matter be discussed during in May last year when Mandeep would be in England to attend the wedding of Alex's daughter – Ellen.

Mandeep was very concerned by the content of the e-mail but decided it would be best to do as the e-mail suggested, and discuss the situation further when in England. However, Mandeep did check with the chipping company in Mumbai, in particular on the location of the containers on the ship, and was assured that the containers had been in the hold and not on the deck. The original contract between the two companies provides that SPE Ltd. is contractually responsible for the loading of the containers onto the ship in Mumbai and that East West Ltd. is contractually responsible for the shipment once the ship leaves Mumbai port.

Mandeep spent 10 days in England in May last year. This was the first time that Mandeep had been to England. The trip was very important for a number of reasons, including the fact that Mandeep felt very honored to be included in such an important family occasion for Alex. During the 10 days Mandeep spent some time in London with relatives and several days in Bristol, which is where the wedding was held. Mandeep had brought some beautiful Srinagar products as wedding gifts for Ellen.

The discussion with Alex about the March shipment took place the day before Mandeep returned to India. Alex talked about the apparent problem over the quality of 50% of the carpet shipment. At first Alex was non-specific about the actual quality issues raised by the buyers, but when pressed said the buyers had questioned the wool/silk mix (which should be 60/40) and the type of color dye used for the rejected carpets. SPE Ltd. has always maintained that the carpets it exports use only vegetable dyes and never chemical ones. The type of dye used is important as it significantly affects the price and overall quality of the carpets. A much higher price can be commanded for carpets made with vegetable dye. Mandeep sought to reassure Alex that the wool/silk mix was as it should be and that only vegetable dyes had been used.

With regard to the alleged damaged shawls, Alex told Mandeep that one third of the shawls were badly discolored and so had no retail value. Mandeep assured Alex that the shawls had been delivered to the shipping company in perfect condition. Mandeep also showed Alex the documents from the Mumbai shipping company confirming where the containers had been stored on the ship during transportation. Mandeep suggested that if the shawls were damaged then this must have occurred during the voyage and was not the fault of SPE Ltd. Mandeep also pointed out that a matter such as this should be covered under East West ltd.'s shipping insurance since East West Ltd. was contractually responsible for the shipment from Mumbai to London. So there was no good reason why SPE Ltd. should not be paid the US\$100,000 balance due to it for the shawls. Alex took photocopies of the documents Mandeep had brought and said East West Ltd. would consider its position further. Mandeep left the meeting not really understanding where matters

stood over the US\$350,000 unpaid balance of the March shipment.

Mandeep returned to Srinagar feeling disillusioned about SPE Ltd.'s business relationship with East West Ltd. The situation improved a little in June when East West Ltd. confirmed by e-mail that it had made an insurance claim for the damaged shawls and that it would make a payment once the claim had been settled. But the e-mail did not say when that was likely to happen.

As July and the time for the next shipment approached, Mandeep considered what to do. Mandeep decided to send the shipment as usual having heard nothing from East West Ltd. to the contrary. So in July SPE Ltd. sent the usual US\$800,000 shipment of carpets and shawls. The shipment arrived in London on 29 July. East West Ltd. should have made payment in full by 12 August. But by 13 August SPE Ltd. had received no payment at all from East West Ltd. SPE Ltd. sent an e-mail to East West Ltd. on 14 August asking why no payment had been received. In its response East West Ltd. referred to an earlier e-mail dated 28 June (never received by SPE Ltd.) stating that the July 2011 shipment should be delayed until further notice from East West Ltd.

By September, direct communications between the two companies had broken down completely. SPE Ltd. has received no further payments from East West Ltd. for either the March or July shipments and Mandeep has sought legal advice in respect of the US\$1,150,000 owed to the company. East West Ltd. maintains it owes SPE Ltd. nothing for the July shipment and that it is being charged US\$12,000 per month storage charges by London Docks Authority for the unclaimed shipment (calculated at 1.5% the value of the shipment). Alex has also sought legal advice on the situation and maintains East West Ltd. is entitled to claim the storage charges from SPE Ltd.

The lawyers for both parties have explained that the original contract between East West Ltd. and SPE Ltd. provides for the ICC Mediation Rules to be applied in the event of a dispute between the companies. The mediation will take place in Paris and will be attended by Alex and the lawyer for East West Ltd. and by Mandeep and the lawyer for SPE Ltd. Alex and Mandeep will both attend the mediation with full authority to settle on behalf of their company. In advance of the mediation, it was agreed via the lawyers for each company that there would be no shipment sent in November last year and neither company would make any claim against the other company in respect of the agreed non-shipment.

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GENERAL INFORMATION

CONDO CONSTRUCTION CLAIM HELL

Four claimants in Building B of a 150 unit condominium complex near the seashore brought a multi count complaint seeking damages against the Seaside Condominium Association, their Management Company, ACE and Board Members, which the Defendants had sued for construction deficiencies. The Defendants sued three contractors and an architect who had performed work on the premises. The third party defendants brought five sub-contractors into the litigation.

The causes of action alleged in the Complaint include breach of contract; breach of implied covenant of good faith and fair dealing; negligence; failure to perform statutory obligations by association and individual board members; breach of fiduciary duty by association and board members; violation of the Planned Redevelopment Full Disclosure Act (PREDFDA); negligent misrepresentation; common law fraud; and consumer fraud. The Plaintiffs sought compensatory, consequential and in appropriate causes of action, double damages; treble damages and counsel fees.

The matter arises from a fire of unascertained origin that destroyed and damaged several units in one of three buildings at the Sea Side Condo complex. The Condo Association, through its Management Company, contracted with TK Construction to perform demolition and reconstruction of the units. TK sub-contracted with SD for the demolition work, specifying that to the extent they could, to perform partial demolition down to the studs of the damaged units. Demolition and construction plans were prepared by an Architect, WF and provided to TK. TK only provided a portion of the plans to SD. Consistent with TK=s oral change to the contract, SD performed demolition of a number of units, including the four claimants, down to the foundation,

including the removal of walls, floors, ceilings, roof and brick veneer and as to the other units, the demolition was down to the studs and included removal of roof trusses. SD removed the demolition debris and was not required to replace any portion of the roof that it removed. SD left the site assuming its work had been completed, having completed the punch list items requested by TK.

The claimants allege that TK and SK failed to adequately safeguard the fire damaged open building adequately against water intrusion into the Claimant's units which was near the ocean and subject to extreme weather. Following the vacation of the site by SD, several storms caused water intrusion into the demolished area and besides additional damage, a serious mold growth formed which after testing was confirmed to be hazardous.

Following the water intrusion, TK was fired and claims that the dismissal was wrongful and that there is a balance owed on their contract.

WC Construction came on the premises and consistent with specs prepared by WF, the Architect, performed construction services to rebuild. Unfortunately, Plaintiffs allege that they did so before either discovering or remediating the mold condition. WC has an outstanding claim for its contract in the amount of \$125,000.00. The Plaintiffs assert that the mold remediation and reconstruction will cost \$350,000.00. The sub-contractors who performed the work for WC were paid only 50% of their outstanding contracts. They included brick work, drywall and ceiling, HVAC, cabinetry and flooring.

The parties, facing very extensive and expensive litigation, primarily due to the number of experts and number of depositions to be taken, as well as the risk of a jury trial of a complex construction matter have elected to attempt to mediate the matter before discovery is conducted.

Bank Card Processing v. Adult Entertainment Unlimited General Information

Adult Entertainment Unlimited (“AEU”) operates a web site which provides information, retail items and links to other adult web sites and an adult mail order business. David/Delia Denison is the President, chief technical officer and principal shareholder of AEU, but he relies very heavily on Wanda Walsh, his personal assistant and the company’s bookkeeper, to keep track of the details of AEU’s relationship with its banks.

AEU accepts bank credit cards for the goods and services it provides its customers, but lately they’ve been having serious problems keeping afloat because Bank Card Processing (“BCP”) has terminated its relationship with AEU. AEU cannot get payment for credit card charges without having a Bank, such as BCP, who is willing to process them. AEU has tried to get another credit card processing company to substitute for BCP, but every company it has approached has turned it down, because of AEU’s termination by BCP.

BCP started processing credit card transactions for AEU several years ago, shortly before being acquired by International Banking Services, (“IBS”) a Delaware corporation with divisions in all 50 States and Canada. To qualify for BCP services, AEU completed a “merchant bankcard application” for credit card processing services, which, among other things, described the business in which AEU engaged. Both parties also signed a Merchant Processing Agreement which set forth the terms of the relationship between AEU and BCP. The initial agreement had a three year term, but it was renewed for a second three year term late last year. Under the agreement, BCP agreed to process credit card transactions for AEU and AEU agreed to pay the specified fees and comply with the terms of the Agreement, including rules governing the Visa and Mastercard associations. Among the items covered in the agreements are the discount rate to be applied to AEU’s account, BCP’s right to keep a rolling reserve equal to a percentage of AEU’s bankcard volume and BCP’s right to charge AEU certain fees. The Agreement also gives both parties the right to terminate under certain specified conditions. In the event of termination of the contract by AEU other than for cause, the Agreement also gives BCP the right to collect a substantial termination fee, more or less equal to the economic benefit that BCP anticipated enjoying during the full term of the contract.

At the time of the initial processing contract between AEU and BCP, AEU’s business was limited to sale of books, videotapes and other items via mail and internet order. Early last year, shortly before execution of the new contracts, AEU opened a new division which operates an internet “portal” for various adult entertainment sites on the world wide web. AEU does not provide any content on its site, but it does “validate” the qualifications (primarily, the age) of visitors to its portal and, if they can satisfy the site’s validation requirements, AEU then gives its visitors access to various sites with adult content. AEU’s customers can pay for access on a per use or monthly or annual subscription basis; because of the pricing, most customers chose to pay on an automatic monthly subscription basis.

Six months ago, BCP terminated the contract with AEU because of what it characterized as excessive “chargebacks” on AEU’s account, i.e., a situation in which a customer questions a charge

Bank Card Processing v. Adult Entertainment Unlimited
General Information

on his or her credit card and, upon investigation, the credit card company authorizes a credit to the customer's account. BCP pointed out that the rules issued by Mastercard and Visa require a bankcard processor, like BCP, to terminate any merchant who has three successive months of chargebacks in excess of a certain minimal level. BCP says that AEU exceeded the level of chargebacks requiring termination.

Consequently, it had no choice but to terminate its processing of AEU's credit card charges or risk itself being expelled from the Visa/Mastercard processing system.

While AEU was aware of a number of chargebacks, AEU did not appreciate that three months of chargebacks at a certain level would lead immediately to termination of the contract. Whenever AEU learned of a chargeback, it would investigate the situation and it often found that, while the customer questioned the charge at the time of receiving the bill, AEU had ample documentation proving that the patron had, in fact, used the service. Moreover, BCP often did not advise AEU of the chargeback until long after the 90 day period in which a customer had a right to question a charge.

After it received notice of immediate termination, AEU more carefully investigated its chargeback problem, and is now convinced that the "excessive" chargebacks are the product of faulty processing and investigation by BCP. AEU found that on numerous occasions, BCP gave AEU only partial information or incorrect information regarding the need for chargebacks on behalf of customers who had paid for their products or services many months before the request for the chargeback – and chargebacks are supposedly only appropriate within weeks of the issuance of the credit card statement. Also, AEU learned that on many occasions BCP included incorrect information on their written requests to AEU regarding a request for a chargeback, making it impossible for AEU promptly to determine whether in fact the customer had used the service as charged.

Shortly after termination of the relationship, before AEU could get its information together to sue BCP, BCP sued AEU for termination charges under the Agreement and David/Delia Denison in his individual capacity as personal guarantor of the obligations of AEU under the Agreement. AEU has counterclaimed alleging fraud, negligent misrepresentation, breach of contract and breach of the implied covenant of good faith and fair dealing.

Note – Payment Declined:

Mastercard and Visa will no longer allow their cards to be used on the adult website Pornhub, which has reportedly included videos of child abuse and rape (it also hosts millions of other videos portraying consensual sex). Visa said that it would also suspend its network's payments to MindGeek, Pornhub's parent company, until it completes an investigation into their business ties. Pornhub said earlier in the week that it had made changes to block nonconsensual content.

CALIFORNIA FEUDING

GENERAL INFORMATION

Two couples are neighbors in Sunnyvale, California. One couple plants redwoods and drives a Prius. The other one installs solar panels and drives an electric car. The solar-panel couple sues the redwood couple because the trees block the sun, making the panels less effective.

This could happen only in California, you say to yourself, and, of course, you are right. California has more eco-conscious people per square foot than anyplace else, and occasionally they are bound to collide.

Yet there is another and more fundamentally serious reason why this tale of backyard bickering - recounted by Felicity Barringer in The Times on Monday - was more likely to occur in California than anywhere else: no state has done as much to sponsor, legitimize and reward environmental virtue.

California has long been an innovator. It passed laws governing automobile air pollution in 1966, well before Congress did. Since 1982, it has compensated utilities for helping consumers become more efficient, in effect rewarding them for selling less energy, not more. And in 2006, Gov. Arnold Schwarzenegger signed a measure requiring home builders to offer buyers solar panels. The worth of these and other efforts is reflected in one dramatic statistic: despite robust economic growth, the state's per-capita electricity use has been constant for 20 years, while the rest of the country's rose 50 percent.

California also has been well ahead of Washington on climate change, regulating carbon-dioxide emissions from vehicles and taking steps to reduce industrial emissions of greenhouse gases by 25 percent by 2025.

Obviously, there will be costs associated with all this virtue, and for some - like the Sunnyvale couples - there will be shoving and pushing. Given the alternative of a less hospitable globe, these seem to be small sacrifices.

(New York Times Editorial - April 8, 2008)

LAW OFFICE ESCAPADES

GENERAL INFORMATION

Lenny Lawyer was an autocratic manager of a small law firm engaged in a personal injury practice in York City, New Jersey. Having come from the old school, the firm obtained business from their reputation and two "investigators" who regularly visited the local hospitals and police precincts picking-up clients.

Alice Associate had worked for the firm for five years and was aware of the client procurement practices of the firm. She looked the other way because she received a pay check every week.

During the spring of 2020 Lenny was in the midst of a divorce and after one of the regular Friday evening get togethers at the local establishment, he asked Alice to join him for dinner. Alice knew he was troubled and lonely and did not want to disappoint her boss so she agreed and they went out to a local Italian restaurant. Following dinner and another bottle of wine, Lenny propositioned Alice which she attempted to politely reject. Since he was in no condition to drive home, she agreed to drop him at his apartment. The car ride was very upsetting since Lenny made inappropriate sexual suggestions during the trip.

The next business day Alice asked to see Lenny and confronted him with the inappropriate sexual behavior, which Lenny claimed not to remember. She requested that the firm provide the sexual harassment policy which no one had ever gotten around to write.

A few weeks later, following the weekly after hours wind down at the local bar, Lenny took Alice aside and again propositioned her, not having had anything serious to drink this time. This time she not only rebuffed him, but told him she could not continue to work for the firm and would not report to work on Monday because of his inappropriate behavior.

Alice further indicated that as a result of his sexual advances off work premises, she didn't think she could work in any law office ever again and demanded that she be immediately compensated for her emotional distress and loss of the law career in order to avoid a law suit.

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LARRY LAWYER'S ETHICAL DILEMMA

Larry Lawyer met Max Client and his wife Martha at a social function. Thereafter, Larry and his girlfriend Ethel, socialized with Max and Martha on a regular basis. Max was a sophisticated businessman whose wife Martha constantly tried to watch over his shoulder and participated in the business to the extent he would permit. After six months, Max started feeding cases to Larry and over the next several years a substantial part of Larry's practice was taken up with Max's matters. Max had a habit of holding back on the payment of fees so much so that the relationship between Max and Larry became one of debtor and creditor. When Larry's law business was in extremis, Max would borrow money and lend it to Larry to carry the business. Larry was content with this eccentric arrangement because one of the cases that he was handling promised, in his evaluation, a multi-million payoff. In December, 2017, the big case, to Larry's surprise and chagrin, was dismissed and Larry suggested that Max hire a particular lawyer, who had clerked for the Judge, in order to seek reconsideration on Max's behalf. Larry met with Max and got his grudging approval to pay \$20,000. to the lawyer to attempt to save the case. On January 27, 2018, Max drew a check to the law firm of Dewy, Cheatum and Howe for \$20,000. On January 23, 1998 the Judge had already denied the motion for reconsideration without oral argument. The law firm, which had prepared the papers in advance of payment, had expended \$7,500. in time against the \$20,000. fee. A check for the unused fee of \$12,500. was returned to Larry, made out to one of Max's companies.

On February 1, 2018 Larry Lawyer presented mortgage documents for a loan from a bank

to Max and Martha in the amount of \$250,000. Max signed the note and mortgage in Larry's presence, but Martha was not available. The next week, the documents signed by Martha were delivered to Larry's law office and Larry's firm submitted the documents to the bank, which advanced \$250,000; \$100,000. of which was used to pay off a prior loan that Max had taken from a different bank and paid over to Larry; \$50,000. was placed by the bank in an escrow sinking fund as further collateral to the loan; and \$100,000. was given by the bank directly to Larry Lawyer. Larry Lawyer was particularly anxious to receive the money because of the significant number of files his firm was handling and the fact that, from his accounting, he was owed \$200,000. in back counsel fees at that time. Larry Lawyer agreed to pay the carrying charges on the loan as an inducement to get the funds.

Six months later, the bank sought to foreclose the mortgage when no payments were made on the loan. Max and Martha initiated a lawsuit against Larry Lawyer to which Larry counterclaimed for the balance of counsel fees. Max and Martha also aggressively pursued an ethics proceeding which the Office of Attorney Ethics which agreed to process it in tandem with the lawsuits and sworn factual statements were given by Max and Martha to the OAE lawyers.

In addition, Max and Martha deny ever receiving a letter that Larry claims he sent advising that the balance of funds from Dewy, Cheatum and Howe were to be applied against counsel fees.

A Mediator is helping the parties resolve the issues two weeks before the ethics hearing is to take place.

DIFFICULT ISSUES - IMPOSSIBLE GAP

GENERAL INFORMATION

Health Care Services (“HCS”) is the liquidating member and successor on a claim of Organ Masters, LLC (“OM”). HCS seeks relief in an action of breach of duty and professional malpractice against defendant Trust Me Health Insurance (“TMHI”), a division of John Stokes and Company Insurance Agency. The basis of the claim is the failure to procure requested and appropriate insurance coverage for OM, a “disease management” company.

Defendant Stokes is a leading insurance brokerage. TMHI held itself out as a specialist in the health field as being able to make available to OM the disease management related performance coverage required by OM in its consulting and management work for Morizon, a large health insurer in the southwest United States. TMHI assured OM and Morizon that coverage would be available to them for a major contract they were entering into. OM was further assured by TMHI that it would be able to place this insurance with AGI an internationally renowned and highly rated insurance company. TMHI was involved in preparing the actual binders and policies. The coverage purchased by OM totaled about \$9.75 million dollars on five policies and was supposed to pay Morizon up to 80% of disease management fees paid by Morizon during the year, in the event there was a shortfall in savings in connection with the purchase of a disease management contract.

The policies of insurance were complicated and TMHI’s President participated in trying to coordinate the language of the disease management contract between OM and Morizon with the

arcane language of the five policies. OM claimed that based on the assurances from TMHI's President and in coordination with Morizon, they proceeded with the transaction.

The policy was placed with Sphere Insurance Company, an AGI subsidiary. When claims were eventually made for payment under the policy against Sphere, they were not honored. Due to non-payment of the disease management insurance claims by Morizon, it rescinded, its contract with OM and pursued arbitration for the money it should have been paid as an additional insured under the policies. OM settled with Morizon and together they pursued an action against Sphere. After spending \$3.1 million dollars in legal fees in two arbitrations and one litigation and after settling with Sphere for \$4.7 million dollars, OM settled with Morizon for \$10.7 million dollars, which included the insurance settlement, forgiveness of additional consulting fees and a write off of \$2.3 million dollars of accounts receivable.

OM claimed that the disease management insurance policies procured by TMHI did not function as represented and the policies were not placed with the higher rated insurer promised by TMHI. In the suit brought by OM against TMHI and Stokes, it sought damages of \$8.15 million dollars, including counsel fees and prejudgment interest.

John Smith, President of HCS met Harry Jones, a specialist in insurance products and then President of TMHI, at the inaugural Disease Management Leadership Conference. Mr. Jones promoted TMHI's disease management reinsurance product as a means to provide financial security required in those transactions. Mr. Jones further represented that TMHI was a division of Stokes, the world's fourth largest insurance brokerage and further represented that it was involved with many disease management companies and those types of transactions.

Disease management services are provided to medical providers and patients with chronic diseases and promote wellness to important medical outcomes while avoiding certain chronic emergent and/or catastrophic medical procedures and expenses.

The service agreement between OM and Morizon required a third party guaranty instrument (TPGI), a form of guaranty that assured payment to Morizon of at least 80% of the fees that OM may be required to pay back. This arrangement was common in the industry at the time. The insurance product procured by OM was intended to track and substitute for the TPGI.

A mediation is taking place between the last two remaining parties, HCS as liquidating member of OM and TMHI and the Stokes Agency, the insurance brokers. After the complaint has been filed, after signification document discovery has taken place with a discovery end date deadline 60 days away and with a request for a second discovery end date extension for an additional 120 days pending. How can you help?

TRIBUTE TO BABLO'S LIZARD

GENERAL INFORMATION

Twenty years ago, Aver Argenta, at that time a penniless arts student, began working for the famous sculptor and painter Bablo Bogasso in his Paris studio near the Sacre Coeur in Montmartre. They became friends and Bablo accommodated Avery at his home for a couple of years. Avery produced sculptures under Bablo's tutelage and managed the studio during Bablo's absences. In 1998, Bablo held one of his numerous exhibitions, called the "Lizard" exhibition, in which all the works (both paintings and sculptures) conveyed some resemblance or allusion to a lizard. The following year, Bablo commissioned and paid Avery as a fabricator to realize in bronze one of Bablo's own sculpture creations, based on a plaster maquette¹ designed and made by Bablo. Bablo donated the finished bronze sculpture to the Louvre Museum, where it was installed in the forecourt and has since become known as one of Bablo's finest works.

A short time later, Avery submitted a proposal to the Vatican for a sculpture s/he would create, to be permanently displayed in Saint Peter's square in Rome, as a gift from Avery. In support of this proposal, Avery secured letters to the Vatican from various admirers, including Bablo; a small financial contribution from the Italian minister for the arts; and a written agreement from Luigi della Nosco, a great patron of the arts and chairman of Agnosco SPA, a well-known engineering company based in Milan, under the terms of which Agnosco SPA would supply all the material sand a workplace and would assist in the production, all at no cost.

Upon receiving formal approval from the Vatican, Avery was employed by Agnosco SPA at its Turin Division to learn the welding and fiberglass techniques s/he would need to produce the sculpture. Avery began work on the sculpture at the Turin premises. Shortly thereafter Bablo died, leaving many of his works and all of his copyrights to his wife Louise.

Soon afterwards, Avery, as a tribute to a friend and benefactor and with no financial gain in mind, decided to change the design of the sculpture intended for the Vatican into a greatly magnified interpretation of one of Bablo's blue lizards. Louise agreed. Bablo's original version stood about one meter high. When it was eventually finished, Avery's version stood over 12 meters high and, but for being brown and a little fatter, was otherwise a virtually identical replica.

Avery had yet to decide upon a name for the work when the Vatican said it was not impressed with the changed design and withdrew its consent to any display in Saint Peter's Square, whereupon Luigi asked Avery for payment of 100,000 Euros for all the materials used in the manufacture of the sculpture and for the use of the Agnosco SPA premises. Avery refused, saying this was contrary to their agreement. In turn, Agnosco SPA refused to release the sculpture, which remained inside the Turin premises. Louise said she could do nothing to help Avery, who could not afford to take Agnosco SPA to court.

¹A maquette is a small model or rough draft for an architectural work or sculpture. It is used to visualize and test shapes and ideas without incurring the cost and effort of producing a full-scale product.

After Bablo's death, Louise attracted quite a lot of sympathetic publicity, since Bablo was well remembered and his flamboyant life with Louise had been a constant topic of media discussion. In one heavily publicized move, Louise established the Bogasso estate, a trust that she controlled and to which she transferred all the works and copyrights she had inherited. One of the claims she made constantly to the media was that she owns all Bablo's works, wherever they may be, and that those in museums or in private collections are merely on loan from the Bogasso Estate.

Four years ago, unbeknown to Avery, Agnosco SPA decided to close its Turin Division. Since it wanted to be sure that it could retain the sculpture, Luigi approached Louise and proposed an arrangement under which Agnosco SPA would display the sculpture in Milan and receive a small part of the proceeds of any subsequent sale. Louise agreed and they entered into a lease agreement under which:

- Agnosco SPA would lease the sculpture for six years from the Bogasso Estate by way of setting off what was described as "the debt" of 100,000 Euros owed by the Estate for the sculpture's fabrication, storage and refurbishment and for its relocation to the forecourt of the Agnosco SPA head office in Milan, where it would be placed on public display.
- Louise would specify the modifications considered appropriate to the sculpture prior to its erection in the forecourt.
- Agnosco SPA would erect the sculpture with appropriate modifications and maintain it.
- At the end of the lease term, the Bogasso Estate would be free to dismantle the sculpture and remove it.
- Louise would procure that, upon any sale of the sculpture, the proceeds would be split as to 30% to Agnosco SPA and as to 70% to Louise, and that the Bogasso Estate would reimburse Agnosco SPA the sum of 30,000 Euros which Agnosco SPA agreed to pay to Avery. (The agreement did not explain why this payment was to be made.) Alternatively, if the sculpture were to be donated, for example to an art gallery, Agnosco SPA would be given due recognition for its assistance in the creation of the work on a plaque attached to the base.

Avery knew nothing of this at the time. Last year, Avery found out that changes had been made to the sculpture and that it had been moved when s/he read a story about Louise in a magazine and saw a photograph of the sculpture in the forecourt of the Agnosco SPA building in Milan. The shape was slimmer and it was no longer brown but blue. The base displayed a plaque titled "Lizard by Bogasso, realized by Avery Argenta, Louise Bogasso and Agnosco SPA". Incensed, Avery approached Alexis della Nosco, cousin of Luigi (who had retired a year earlier) and the present chairman of Agnosco SPA. Alexis told Avery that the company was leasing the sculpture from

the Estate. During the conversation Avery mentioned that s/he was having financial difficulties and Alexis gave Avery 30,000 Euros in cash. Alexis refused to alter the plaque in any way, claiming s/he had no right to do so.

A friend recently informed Avery that, following expiry of the lease term, Agnosco SPA has offered to buy the sculpture from the Bogasso Estate for 900,000 Euros and that Louise has responded by asking for 1.8 million Euros, saying that this is the going rate for a Bogasso.

Upon hearing this, Avery approached Louise to explain that, although the work is a well-crafted interpretation of a Bogasso since it was based on Bablo's work and was made with Louise's consent, in Avery's opinion it is not a Bogasso since it was created by Avery after Bablo's death. Louise became very angry, insisting that since she owns the copyright she is entitled to alter and dispose of the work as she sees fit. To demonstrate her rights, she gave Avery a copy of the lease agreement, which Avery had not seen until then.

Having consulted a lawyer, Avery has now written to Alexis asserting ownership of the sculpture. Through Agnosco SPA's lawyer, that claim has been formally denied but Alexis has suggested mediation under the auspices of the ICC. Avery has agreed. Both parties have full settlement authority.

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CAPE WINE INDUSTRIES v. KENYAN SPIRITS

CASE ANALYSIS

This is a relatively straightforward dispute involving a wine producer in South Africa and a wine distributor in Kenya. The second batch of wine was not up to standard and was said to have been contaminated. The parties could spend a lot of time and effort in trying to find out how and why the wine got contaminated. KSM has assumed that this happened in the winery, whereas CWI has assumed that it happened when the wine was bottled. Given the distance between South Africa and Kenya, the wine could well have been contaminated en route.

No one knows the answer to this question and a good mediator will ask the parties to set this issue to one side or, if both parties really feel that it is essential to obtain an answer, suggest that they jointly appoint an independent expert to investigate. In this regard, ICC has Expertise Rules and is able to source competent experts. That would involve postponing the mediation until the expert's report was produced. Many mediations involve reports from experts, but few from truly independent experts. In this case the parties have decided to mediate without knowing why the wine was contaminated and thus it is essential that they do not spend time trying to solve a problem which cannot be answered in the mediation.

What is essential is for the mediator to listen to each party's opening statements and allow the other party to comment, to establish exactly how each party now feels, given the acrimonious telephone exchanges and subsequent correspondence. This might obviate Pat's demand for an apology. The mediator should then try to get the parties to focus on the wider business issues. CWI really needs KSM to distribute its wine in East Africa through its network of established clients and KSM realizes that CWI is a good producer of wine and that it needs CWI in order to diversify its current business away from beer. A good mediator would seek to normalize the emotional reactions of each party and try to get them to feel how they would have reacted had their roles been reversed.

Another problem, which could be put to one side, is whether KSM's claim was brought in time. Was the trigger for the dispute the telephone conversation between Pat and Sal, as contended by Pat's lawyer, or was it the written complaint issued sometime later, as contended by KSM. This is again another question which cannot be answered in the mediation and it is to some extent irrelevant as the parties have agreed to mediate this dispute and not engage in litigation.

One of the difficulties in settlement in the case is the monetary demand made by KSM, which is to a large extent inflated. The contaminated wine only cost US\$20,000. So how is it possible for KSM to claim US\$170,000? The mediator or Pat should ask for a breakdown of these alleged losses. A sum between US\$40,000 and US\$100,000 has been included by KSM as a loss relating to goodwill and reputation without any real backup. A mediated solution to this problem, where CWI provides good quality wines, which KSM then distribute to their clients, would go a long way to dealing with this alleged loss and to reducing the financial claims to something more reasonable, upon which the parties could settle.

COMMENTARY FOR TRAINING

What to Talk about First?

This mediation is based on a fairly simple conflict over quality in a sales contract, with one party claiming damages on the basis of a breach due to non-conformity. The claim is disputed on two counts. First legally, as the opinions as to the timeliness of the claim differ in that one party's lawyer will argue that the claim was brought too late and will be inadmissible, while the other will argue that it is valid. Secondly, the parties have not yet been able to identify where the quality problem originates, with the producer of the wine in South Africa or with the bottler in Kenya. If they wished to pursue the arguments, considerable time and money would need to be invested in discovery and investigating the cause of the quality fault. This all makes mediation a viable dispute resolution option.

For mediation training, it can be assumed that the parties' lawyers are aware of the reasons why mediation is preferable. It might be worth the mediator attempting to work with the lawyers to calmly reinforce the message, as the case notes suggest that the two company directors are angry and upset. Their previous communication has impulsive elements to it – they may well have quickly jumped to conclusions in seeing the fault with the other side, rather than calmly reviewing the situation. Their unfortunate phone call certainly bears the hallmarks of a somewhat hasty reaction on both sides and it was followed by further escalation of the conflict. The mediator might offer to discuss the phone call and the effects it has had, so each party can get this off his or her chest.

Then a mediation process here can follow a straightforward path from agenda setting to interests to options. The agenda will not be too complex, but will as always raise the question of what to talk about first. Perhaps the most difficult issue will be the sum of damages claimed, which will seem to Cape Wine to be inordinately high – at US\$170,000 for an unusable consignment of wine that was invoiced at US\$20,000. How can this problem be managed in mediation? The mediator can ask the parties exactly this question: what can you do about the disputed claim for damages? Depending on how far the parties have established mutual understanding or even a will to cooperate on a future contract which is in their interests, the answers may vary. One option would be to somehow split the difference, another to look at standard practice, another to identify at least some of the real costs (such as the claim for transportation costs, which can be clearly documented), and another to look at alternative forms of compensation factored into a future deal. The discussion on damages is likely to be easier if the

parties can somehow link it with a future deal. In terms of agenda setting, it might therefore be best for the parties to state their claims and counterclaims on this, and then for the mediator to suggest postponing detailed discussion to a later point during the mediation.

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RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
PART I. RULES OF GENERAL APPLICATION
CHAPTER IV. ADMINISTRATION
RULE 1:40. COMPLEMENTARY DISPUTE RESOLUTION PROGRAMS

Rule 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.

Rule 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.

Rule 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.

Rule 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, 2015 to be effective September 1, 2015; paragraph (b) amended July 28, 2017 to be effective September 1, 2017.

Rule 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 conclusion 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.

Rule 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, 2015.

Rule 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 settlement techniques and as mediators pursuant to R. 1:40-12(b)(6), and other employees and volunteers who have been trained in settlement techniques and as mediators pursuant to R. 1:40-12(b)(1), serve as trained facilitators 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.

Rule 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) clearly demonstrated psychological or emotional disability of a party, (4) incidents involving the same persons who are already parties to a Superior Court action between them, (5) matters arising under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.), or (6) a violation of the New Jersey Motor Vehicle Code (Title 39), or (7) matters involving penalty enforcement actions.

(b) 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.

Rule 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).

Rule 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.

Rule 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.

Rule 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, Superior Court judges, and Administrative Law judges, evidence of completed mediation or co-mediation of a minimum of two civil, general equity or probate cases within the last year. Applicants who had the required training over five years prior to their application to the roster must complete the six-hour family or civil supplemental mediation course as defined in subparagraph (b)(8) of this rule.

(4) Special Civil Part Mediators/Settlers. In addition to mediators on the civil roster, those judicial law clerks, court staff, and volunteers who have completed a course of mediation training approved by the Administrative Office of the Courts may mediate/settle Small Claims actions. In the discretion of the Assignment Judge, such persons may also mediate/settle landlord-tenant disputes and other Special Civil Part actions, provided that they complete additional substantive and procedural training in landlord-tenant law of at least three and one-half hours for law clerks and attorneys and at least seven hours for all others, 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, child welfare mediators, and staff/law clerk mediators are exempted from the mentoring requirements except as required to do so for remedial reasons. Mediators already serving on the Civil mediator roster prior to September 1, 2015 are exempted from the updated training requirements. Family Roster mediators who wish to serve on the Civil Roster, must complete the six-hour supplemental Civil Mediation training and must comply with the Civil roster mentoring requirement of five hours and two cases in the Civil Part. Judicial law clerks shall have successfully completed 12 classroom hours of basic mediation skills complying with the requirements of subparagraph (b)(6) of this rule.

(2) 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 shall, by lectures, demonstrations, exercises and role plays, teach the skills necessary for mediation practice, including but not limited to conflict management, communication and negotiation skills, the mediation process, and addressing problems encountered in mediation.

(4) Mediation Course Content -- Family Part Actions. The 40-hour classroom course for family action mediators shall include basic mediation skills as well as at least 22 hours of specialized family mediation training, which should cover family and child development, family law, dissolution procedures, family finances, and community resources. In special circumstances and at the request of the Assignment Judge, the Administrative Office of the Courts may temporarily approve for a one-year period an applicant who has not yet completed the specialized family mediation training, provided the applicant has at least three years of experience as a mediator or a combination of mediation experience and service in the Family Part, has co-mediated in a CDR program with an experienced family mediator, and certifies to the intention to complete the specialized training within one year following the temporary approval. Economic mediators in family disputes 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 mediators shall first have completed either a 12-hour training course prescribed by the Administrative Office of the Courts, an approved course conducted by another institution or agency, or other comparable training. Proof of completion of any training other than the prescribed 12-hour course shall be submitted to the Administrative Office of the Courts for a determination of suitability. The Administrative Office of the Courts shall work with other institutions and agencies to encourage their provision of judicial law clerk mediation training and shall either approve or evaluate that training.

(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 and must be annually recommended for inclusion on the approved roster by the local arbitrator selection committee and approved by the Assignment Judge or designee. 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.

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The Red Devil Dog Lease—The Stages of Mediation (Outline)

1. SETTING THE STAGE—SUBMISSIONS AND SCHEDULING
 - a. Order of Referral to Mediation
 - i. Mediator appointment
 - ii. Compensation
 - iii. Substitution
 - iv. Statement of the case
 - v. Telephonic conference
 - b. Parties' Submissions
 - i. Page limitation
 - ii. Attachments
 - iii. Mediator confidential or shared with parties
 - c. Telephonic Conference
 - i. Explain the mediation process
 - ii. Review the ground rules
 - iii. Identify information needs
 - iv. Identify participants and authority
 - v. Schedule the mediation
2. THE MEDIATOR'S OPENING STATEMENT
 - a. Introduction
 - i. Review mediator's background and qualifications
 - ii. Review progress of the dispute to date
 - iii. Define the mediation process
 - iv. Distinguish mediation and other forms of dispute resolution
 - v. Explain the role of the mediator
 - vi. Identify participants and representatives
 - vii. Set the tone and atmosphere for the mediation
 - b. Preview the Mediation Procedures
 - i. Explain joint meetings and private caucus
 - ii. Describe opening statements by parties
 - iii. Discuss timing and scheduling, housekeeping, etc.
 - c. Cover Expectations and Ground Rules

The Red Devil Dog Lease—The Stages of Mediation (Outline)

- i. Confidentiality
 - ii. Open communication
 - iii. Request courtesy and no interruption
 - iv. Encourage participation by counsel and parties
 - d. Establish Understanding and Commitment
 - i. Elicit questions and provide clarification
 - ii. Communicate your desire to resolve the issues
 - iii. Review alternatives and options
 - iv. Reaffirm the parties' authority, intentions and commitment
3. ASSISTING PARTIES IN EXCHANGING INFORMATION
- a. Preparation for Mediation
 - i. Identify information needs
 - ii. Facilitate the exchange of existing information
 - iii. Determine whether lack of information will impair mediation
 - b. Approaches
 - i. Schedule for exchange of existing information
 - ii. Mediator asks parties to answer questions
 - iii. Parties submit written statements
 - 1. Confidential or shared
 - 2. Positions and/or interests
 - iv. Stay of discovery
 - v. Presumptive Mediation Program objectives
 - c. Factors to Consider
 - i. Minimizing cost
 - ii. Targeting "key" information
 - iii. Confidentiality of submissions
 - iv. Sufficiency of information to evaluate position and risks
 - v. Facilitate information exchange outside normal discovery
4. CAUCUSING AND SHUTTLE DIPLOMACY
- a. Initial Private Caucus Session
 - i. Gather information

The Red Devil Dog Lease—The Stages of Mediation (Outline)

1. Elicit sensitive facts, opinions and information
 2. Identify interests (procedural, substantive, psychological) and priorities
 3. Identify obstacles (procedural, substantive, psychological) and priorities
- ii. Develop options (expand the realm)
- b. Mediator's Role (Initial Caucus Section)
- i. Start with issues important to that party
 - ii. Ask open-ended questions
 - iii. Show empathy (but not agreement with party positions)
 - iv. Translate and clarify (establish standards for evaluation)
 - v. Break unproductive patterns and improve opportunity for effective communication in joint sessions
 - vi. Check positions (e.g., "Let me be sure I understand what you would like to see happen.")
 - vii. Identify information that can be shared with other party
- c. Subsequent Caucus Sessions
- i. Move parties towards agreement
 1. Narrow options (fractionate or package and link creatively)
 2. Consider alternatives to agreement
- d. Mediator's Role (Subsequent Caucus Sessions)
- i. More active, use subtle persuasion and be optimistic
 - ii. Educate by transmitting information of other party (authorized only) and change perceptions (e.g., ask why it is in the other party's interest to accept their proposal)
 - iii. Be a catalyst by asking questions about parties' positions, surface assumptions, and be agent of reality
 - iv. Use hypothetical questions to communicate possible settlement (e.g., "What if..." "Would it be possible..." "Would you consider...")
 - v. Ensure that proposed solutions are workable and will not generate new, or rekindle old, disputes

The Red Devil Dog Lease—The Stages of Mediation (Outline)

- vi. If settlement is not possible, identify obstacles, narrow issues, propose partial settlement, explore alternative processes, and leave door open

5. CREATING SETTLEMENT OPTIONS AND GETTING CLOSURE

- a. Developing and Refining Options
 - i. Based on the needs and desires the parties express, help them to identify options
 - ii. Identify whether permission to disclose confidential information will enhance acceptance of particular options
 - iii. Create a prioritized framework for settlement
 - iv. Assist the parties in developing the required elements
- b. Building Consensus
 - i. Effective use of caucus—homework
 - ii. Review and reinforce progress
 - iii. Assist the parties in evaluating options
 - iv. Identify areas where there is consensus and agreement
 - v. Keep parties mindful of the “no-settlement” option
 - vi. Develop mutual buy-in to acceptable options
- c. Closure and Settlement
 - i. The importance of a memorandum
 - ii. Assisting the parties in outlining terms
 - iii. When the decision maker is not present
 - iv. Attorney review and preparing a formal agreement
 - v. Memorializing partial to provisional settlements
 - vi. Enforcement, performance and subsequent disputes

GETTING TO YES” VIDEO – OUTLINE (MAIN POINTS)

SEGMENT ONE: INTERESTS

- Differentiate between positions and interests in negotiation – Look behind position for the underlying interests.
- Use questions to bring out interests, even when the other side is reluctant.
- Put yourself in the other side’s shoes.
- Ask “Why?”
- Ask “Why not? What would be wrong with ...?”

SEGMENT TWO: OPTIONS

- Separate the process of inventing possible options for agreement from the process of deciding among those options:
 - * No criticism
 - * No commitment
- Invent many options:
 - * Invent options that meet the interests of both sides.
 - * Do not evaluate during brainstorming.
- Dovetail differing interests for mutual gain

SEGMENT THREE: STANDARDS

- Use independent standards (e.g., market value, precedent, industry practice, law, competing offers, costs, equal treatment) to resolve conflicting interests. Research standards before you sit down to negotiate: prepare!
- Make the negotiation a joint search for independent standards.
- Use standards as a sword to persuade and a shield to protect. Standards help the other side persuade their constituents, and can be used to persuade both parties that an agreement is fair.
- Distinguish which standards are more appropriate; more relevant to the time, place, or circumstances; more widely accepted; more on point.
- Reason and be open to reason.

SEGMENT FOUR: PEOPLE

- Separate the people from the problem:
 - * Don't try to buy the relationship
 - Use people techniques for people problems:
 - * Emotions
 - * Acknowledge emotions (yours and theirs) without blaming.
 - * Perceptions
 - * Distinguish perceptions from "truth."
 - * Look at how they see it; put yourself in their shoes.
- Communication
- * Speak for yourself. Use "I" and avoid "you."
 - * Avoid attribution; speak about behavior, not intentions.
 - * Listen actively; show them they have been heard before Responding.
 - * Paraphrase their words to show you understand.

**SEGMENT FIVE: ALTERNATIVES
(BATNA – YOUR "BEST ALTERNATIVE TO A NEGOTIATED
AGREEMENT")**

- Know your BATNA: The best alternative that satisfies your interests in the event of no agreement.
 - * Invent and explore a wide range of alternatives
 - * Choose the best.
- Improve your BATNA, if possible.
- Estimate their BATNA.
 - * Is it as good as they think?
 - * Can you legitimately change it?

LISTENING SKILLS

The Critical Element of the Mediator's Tool Box

STOP TALKING

- You can't listen while you're talking

DEMONSTRATE EMPATHY

- Empathy – the ability to see and hear another person and understand him or her from his or her perspective
- Contrasted with Sympathy

Try to put yourself in the speakers' place so you can understand what they're trying to get at

- Do not judge the speaker or the speaker's "issues"
- Ask questions using "neutral" language
- "Loop" the speakers so they know they've been heard
 - * You inquire
 - * The other side responds
 - * You demonstrate your understanding of what they have said and your understanding with the other side
 - * If they confirm your understanding, the loop is complete. If not, go back to the beginning

ASK OPEN-ENDED QUESTIONS

- When you don't understand, when you need further clarification, when you want to show that you are listening
- Don't ask questions that will embarrass a person or show his/her up.

DON'T ARGUE MENTALLY

- When you are trying to understand someone, it is a handicap to argue with that person mentally as he/she is speaking. This sets up a barrier between you and the speaker.

LOOK AT THE OTHER PERSON

- His/her face, eyes, hands will all help that person to communicate with you. This also helps you concentrate on how a person truly feels and demonstrates that you are listening.

SMILE AND NOD APPROPRIATELY

- But don't overdo it.

LEAVE YOUR EMOTIONS BEHIND (if you can)

- Push your worries, your fears, your problems, outside the meeting room. They may prevent you from listening well.
- Control your anger. Try not to get angry at what a person is saying; your anger may prevent you from understanding their words or meaning.

CONCENTRATE ON WHAT A PERSON IS SAYING

- Actively focus your attention on his/her words, ideas, and feelings relating to the subject.

LISTEN FOR WHAT IS NOT SAID

- Sometimes you can learn just as much by determining what the other person leaves out or avoids in his/her talking as you can by listening to what that person says.

LISTEN TO HOW SOMETHING IS SAID

- We frequently concentrate so hard on what is said that we miss the importance of the emotional reactions and attitudes related to what is said. A person's attitude and emotional reactions may be more important than what that person says in so many words.

DON'T GIVE UP TOO SOON

- Don't continuously interrupt disputants; give them time to say what they have to say.

THE MEDIATOR'S OPENING STATEMENT (1)

Setting the Tone and Setting the Table for the mediation Process

- Introduction
 - * Review mediator's background and specifications
 - * Review progress of the dispute to date (sparingly)
 - * Discuss mediation and distinguish mediation from other forms of dispute resolution
 - * Explain the role of the mediator ("I won't be making any decisions here")
 - * Make sure participants and representatives are introduced to one another
 - * Set the tone and atmosphere for the mediation (welcome and empathetic tone)

Mediator's Opening Statement (2)

- Preview the Mediation Procedures
 - * Explain joint meetings and private caucus
 - * Invite parties to provide opening statements describing their dispute and inviting them to talk about whatever is important to them
 - Discuss timing and scheduling, housekeeping, etc.

Mediator's Opening Statement (3)

- Cover Expectations and Ground Rules
 - * Confidentiality (of general session and of caucuses)
 - * Open communication
 - * Request courtesy and no interruption
 - * Encourage participation by counsel and parties

Mediator's Opening Statement (4)

- Establish Understanding and Commitment
 - * Elicit questions and provide clarification
 - * Communicate your desire to resolve the issues (optimum)
 - * Review alternatives and options
 - * Reaffirm the parties' authority, intentions and commitment

ESSENTIAL QUALITIES OF A MEDIATOR

1. Acceptability/Credibility
2. Knowledge of mediation techniques
3. Correctly ASSERTIVE personality/temperament to be a “neutral”
4. Sensitivity/empathy
5. Sense of timing
6. Integrity
7. Patience/calm in the face of tension
8. Ability to communicate
9. Sincerity
10. Impartiality – not an advocate of either side
11. Flexibility re: creative solutions
12. Humility – parties will usually find their own solution
13. Trustworthy

ROLE OF A MEDIATOR

1. Educator of the process
2. Facilitator of discussions and catalyst for change
3. Problem explorer/Position narrower
4. Professional, friendly conciliator
5. Agent of reality
6. Legitimizes/But not of guilt or innocence

7. Clarifier of statements and positions
8. Chairperson of the board, sets the pace for the process
9. Conduit for ventilation
10. Helper/Helps parties to help themselves resolve conflict

OBJECTIVES OF A MEDIATOR

1. Keep parties talking
2. Explore the differences
3. Narrow the gap
4. Serve as sounding board for demands
5. Add impartial perspective
6. Facilitate separate meetings (caucus)
7. Control inappropriate behavior:
 - * Loud or threatening language
 - * Interruptions
 - * Verbal/Physical intimidation
 - * Special pleadings
 - * Excessive venting
8. Determine:
 - * What can be done
 - * What must be done
 - * What must be undone

WAYS TO HELP PARTIES PREPARE FOR NEGOTIATIONS

A. At the Beginning of the Mediation Session

1. Help parties to clearly identify all issues in dispute.
2. Help parties begin to prioritize those issues.

3. Help parties to differentiate between wants and needs.
4. Encourage trade-offs; stress the benefits of compromise.
5. Help parties to know constraints of the “other side.”
6. Help parties to know attitudes of the “other side.”

B. During the Mediation Session

1. Ask Questions
 - a. Is this what you need?
 - b. Is this the most important goal you have?
 - c. Is there anything else you need?
 2. Restate their Positions for Clarification
 - a. You feel “angry, satisfied”
 - b. You need “to resolve this, move on”
 - c. You’ll go along with ...”payment schedule, restitution”
 - d. You agree/disagree with “a proposal; a resolution”
 3. Encourage Clients to be Good Listeners
 - a. “In control” of their emotions: to relax
 - b. Polite – don’t interrupt
 - c. Encourage parties to listen carefully to what the other side is actually saying, and not to selectively hear what they want to hear
 - d. Being truthful
- C. All of the above help in building “trust” – a key factor towards successful mediation sessions.

DO'S AND DON'TS FOR THE MEDIATOR

1. Do listen carefully to each party as they present their respective positions.
2. Don't talk too much!
3. Do allow a party to ventilate, but not to such an extent as to fortify a position from which the party cannot withdraw without losing face.
4. Don't agree privately with both parties on points in dispute between them; it will come back to haunt you?
5. Do advance new ideas in a separate meeting with one side or the other, using language such as, "have you considered ..." "what if ...," "would you be willing ...," etc.
6. Don't make direct proposals using language such as, "Why don't you just ..." or "I think you should ..." etc.
7. Don't assume that people will remember what they told you in confidence in a separate meeting, and what was not in confidence...ask to make sure.
8. Do remember to ask at the end of a separate meeting, "is there any information that you do not want me to share with the other party?"
9. Don't identify personally with a position of either party on any of the issues in dispute. Do be sympathetic with the parties.
10. Don't get down to the narrow core of an issue too soon. Do encourage open discussion to identify all issues and possible solutions to the dispute.
11. Do recognize that your continuing acceptability as a neutral mediator is tenuous.
12. Don't ask questions or make statements in such a way as to imply you have made a judgment on any issue. Don't be argumentative, judgmental, or dogmatic!
13. Do remain neutral: don't become an advocate of either party's position.
14. Don't be passive – Do assertively chair the meeting, enforcing the ground rules and generally maintaining control of the session.
15. Develop a habit of agreement – build an affirmative climate. Ask questions so you can get an affirmative answer whenever possible.

REDUCING DEFENSIVE COMMUNICATION

1. Use descriptive language – “It seems that” “You appear to be . . .”
2. Show empathy and understanding.
3. Treat parties equally – even when a personal bias crops up.
4. Be non-dogmatic.
5. Show confidence.
6. Make eye contact with both parties equally.

HOSTILE CLIENTS

1. Build increased trust in mediator.
2. Clarify – “What I think you are saying is ...”
3. State – “I can see you are angry.” Name the emotion, bring it out in the open.
4. Ask questions – “Exactly why are you angry?” “Why do you feel upset, worried...etc.?”
5. Keep in contact with other party to a minimum, but don’t ignore them. Have the hostile person “deal” through the mediator.
6. “I understand you’re ...,” said by the mediator often calms down a person. This is not saying you agree with or condone the emotion (anger, etc.), just that you understand it.
7. Look at the person often – gauge how well you have handled the problem.
8. Be friendly.
9. Be patient.
10. Be more assertive than usual.

SUSPICIOUS CLIENTS

1. Build increased trust in mediator.

2. Conduct as “relaxed” a session as possible.
3. Take as few notes during the session as possible, none if it’s possible.
4. Carefully explain the mediation process and make sure you ask suspicious person if he/she understands or has any questions.
5. Look at the person often – maintain steady eye contact.
6. Ask the person if he/she understands the purpose of the meeting, suggestions, proposals, etc.
7. State to the person, “You seem to be upset about being here.” Putting feelings up front, out in the open, often “clears the air.”
8. Call the person by his/her name – plus maintain eye contact.

MANIPULATIVE CLIENTS

1. Build increased trust.
2. Catch the manipulative statements and ask the person to restate them. Most people will see that you know their “game.”
3. Ways a manipulator will act.:
 - a. Make well-timed surprise statements
 - b. Bluff
 - c. Act the part of the “innocent.”
 - d. Bribing – of other party or mediator.
 - e. Threatening – sometimes subtly: sometimes not.
 1. Verbally
 2. Physically
 - f. Cry – weep, moan, groan.
 - g. Cry – weep, moan, groan.
 - h. Pretend to be ill.
 - i. Try to get the mediator to “side with them.”

*Be careful not to over-assess these as being manipulative. They may be genuine expressions of human emotion. Use your own common sense in assessing whether the person is genuine or

being manipulative. If you decide the person is trying to manipulate you or the other party, you must stop the person.

STRESSFUL CLIENTS

1. Build increased trust in the mediator.
2. If you notice that one or both parties seems stressed, in the opening statement, state: "I would like everyone to feel comfortable. I understand ;you may be upset, but we can resolve this problem better if everyone is relaxed."
3. Make sure stressful person is given enough opportunity to explain his/her position(s).
4. If necessary, consider use of a separate meeting in case the stress is being caused by the other person's presence.

SPECIAL AND/OR UNIQUE PROBLEMS

NOTE: The suggestions below are options, not required steps.

1. Keep Control: Maintaining control of the framework (not the content) of the session.
 - a. If necessary, be directive, be confident over the fray, stand up!
 - b. When the session is going well, do not take the lead unless the parties need direction. A mediator who is not participating much can be in control.
 - c. Ride out short periods of chaos.
 - d. Ask each person in turn, "Do you want us to continue?" Continue only after a "yes" from everyone present.
 - e. Call separate meetings.
 - f. Stop the mediation: this is a sign of a mediator's good sense, not of personal failure.
2. The Truth: Dealing with the desire for vindication, for establishing fault.
 - a. Repeat any of the following: Mediation is not a search for facts about the past. No one, least of all the mediator(s), can hope to know what "really" happened, "from now on" is more important.

- b. Acknowledge the desire to “get even” or to right a wrong, but be clear that mediation cannot do this. If they persist, tell them that their dispute should be decided by the judge.
 - c. Call separate meetings, emphasize what the parties want to gain from the session.
 - d. If a person brings evidence, let them show it during their Opening Statement or ask at some point during the session, if necessary, if the participants would like to disclose any evidence.
 - e. Lying: When parties accuse each other of lying, state that you cannot be a judge of that accusation and that you are mediating on the assumption that the parties honestly wish to resolve the situation.
3. Extreme Anger or Emotion
- a. Don’t fall apart if someone starts to cry, or to shout.
 - b. Meet with the person alone or let him or her leave the room.
 - c. In separate meeting, ask the angry person if they came intending to work on the problem in good faith.
 - d. Stay calm, keep your voice low, your body posture and gestures easy and not defensive.
4. The Interrupter and the Non-stop Talker
- a. Direct the person back to the task
 - b. Interrupt if the person has had enough time to address the problem, or is breaking in continually on other people.
 - c. Do not let anyone dominate. “We need to hear what everyone thinks about this.” “Ms. . . . has been waiting to say something.”
 - d. Be strongly directive if necessary.
 - e. Take a break and speak with the person.
 - f. Always stay in control of the session.

5. The Underdog: Equalizing the situation when an inarticulate, young, or timid person seems at a disadvantage:
 - a. If possible, arrange for a supportive person (advocate, friend, etc.) to come to the session if agreeable to all parties.
 - b. Offer the option of speaking first.
 - c. Address the problem of inequality directly in the session.
 - d. Use separate meetings.
 - e. Contribute solutions.

6. Person Coming in Bad Faith:
 - a. During your Opening Statement, explain that mediators always hope each person has come in good faith to resolve differences and intends to participate in working towards an agreement.
 - b. Try meeting separately with the person(s), addressing the problem and if necessary, discontinue mediation.

7. Language Problems:
 - a. If needed, arrange for an interpreter in addition to mediator(s). Interpreter should be an impartial party, if possible, and should be briefed before the mediation about her/his role.
 - b. Keep language simple.
 - c. Use drawings or diagrams.
 - d. Remember that some people cannot read or write and may be embarrassed to admit this during a mediation session.
 - e. If the participants speak the same primary language other than English and the mediator speaks their language, it may be possible for the mediator to mediate in the second language. This will be discussed in the LEP presentation.*
 - f. Agreements must be written in English.

SOCIAL SERVICE NEEDS IN MEDIATION

Although social services are not an integral part of the mediation process, mediators will occasionally encounter cases in which service needs may appropriately be addressed. Service needs may often relate to problems about which disputants may be very sensitive, such as marital difficulties, unemployment, emotional instability, drug or alcohol abuse. Therefore, this issue is only an appropriate topic of discussion under certain narrowly defined circumstances.

- Service needs should be raised first by one of the disputants;
- Mediators should plan any discussion of services during a separate meeting and should introduce the subject only in that setting;
- Mediators should present the subject only in the form of a hypothetical situation;
- Mediators should discuss the subject in general terms, leaving specific planning to the preferred service agencies; and
- Mediators should write services into an agreement in general terms, or acknowledge verbally that services may be obtained through the program although they are not being written into the agreement.

Without such controls, a discussion of services may disrupt negotiations and reduce the willingness of a party to discuss the complaint. There may be times when a mediator feels that one or both disputants might benefit from social service assistance, although it is not part of the agreement. In such cases, the mediator might simply inform the disputants at the close of the session that if either of them is interested in any type of social service they should obtain the appropriate information before leaving the office.

As the session is ending and after the agreement has been signed, the mediator **should use justifiable discretion** in deciding whether or not to talk to disputants directly about a perceived social service need. If the mediator feels that directly addressing the issue will in any way upset one of the parties, then the offer for assistance should be kept vague. Whenever social service assistance has been included as a provision of an agreement and the court did not order or recommend the litigants to agree to include social service assistance, the mediator should inform the parties that it is NOT the responsibility of the mediator or the court to follow-up to ascertain compliance.

MEDIATOR'S STYLE

Mediation is an art, not a science; it must be learned by doing! Among many experienced mediators a variety of styles exist. For example, some mediators prefer to meet with parties in separate session or “caucuses” more often than others. This sometimes referred to as “shuttle mediation.” Some mediators rarely utilize the separate session. A mediator’s style depends upon the nature of the conflict, its setting, the experience and resources of the disputants, and the background and training of the mediator. New mediators should therefore:

1. Be themselves and have faith in the mediation process;
2. Develop their personal mediation style;
3. Observe other mediators in action whenever possible; and
4. Encourage feedback among/between other mediators.

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 Mediator 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 provisions 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: _____

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 (h), 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.

CHAPTER 157

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:

C.2A:23C-1 Short title.

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

C.2A:23C-2 Definitions.

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.

C.2A:23C-3 Scope.

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. 2004, c.157 (C.2A:23C-4 through C.2A:23C-6) shall not apply to the mediation or part agreed upon. Sections 4 through 6 of P.L. 2004, c.157 (C.2A:23C-4 through C.2A:23C-6) shall apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

C.2A:23C-4 Privilege against disclosure; admissibility; discovery.

4. Privilege against Disclosure; Admissibility; Discovery.

a. Except as otherwise provided in section 6 of P.L. 2004, c.157 (C.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 (C.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.

C.2A:23C-5 Waiver and preclusion of privilege.

5. Waiver and Preclusion of Privilege.

a. A privilege under section 4 of P.L.2004, c.157 (C.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 (C.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 (C.2A:23C-4).

C.2A:23C-6 Exceptions to privilege.

6. Exceptions to Privilege .

a. There is no privilege under section 4 of P.L.2004, c.157 (C.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 (C.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.

C.2A:23C-7 Prohibited mediator reports.

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.2004, c.157

(C.2A:23C-6)

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

C.2A:23C-8 Confidentiality.

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.

C.2A:23C-9 Mediator's Disclosure of Conflicts of Interest; Background.

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.2004, c.157 (C.2A:23C-4), 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.

C.2A:23C-10 Participation in mediation.

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.

C.2A:23C-11 Relation to Electronic Signatures in Global and National Commerce Act.

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. s.7001 et seq., but this act does not modify, limit, or supersede s.101(c) of that act or authorize electronic delivery of any of the notices described in s.103(b) of that act.

C.2A:23C-12 Uniformity of application and construction.

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.

C.2A:23C-13 Severability clause.

13. Severability clause.

If any provision of P.L.2004, c.157 (C.2A:23C-1 et seq.) 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.

Approved November 22, 2004.

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COMPLEMENTARY DISPUTE RESOLUTION (CDR)

“The New Jersey Judiciary should provide citizens with a full set of options for resolution of disputes, including traditional litigation as well as various complementary forums, so as to continue to fulfill the commitment to provide the highest quality of justice possible.”

Final Report Supreme Court Task Force on Dispute Resolution, 1990

WHAT IS CDR?

The New Jersey Judiciary uses the term “complementary” dispute resolution rather than the more widely known term “alternative” dispute resolution because it views dispute resolution processes as **complements** to the traditional trial processes rather than as **alternatives**.

A complete list of CDR programs with definitions is included in Rule 1:40-2. Some of the primary ones are:

- **settlement proceedings**, in which the parties appear before a neutral third party or panel of such neutrals who assists them in attempting to resolve their dispute by their voluntary agreement, but by giving a suggested settlement;
- **mediation**, in which a neutral third party, without any power to make a decision, facilitates communication between parties in an effort to promote settlement without imposition of the mediator’s own judgment regarding the issues in dispute and;
- **arbitration**, in which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award which may be binding or non-binding, according to statute, rule, or the parties’ prior agreement.

WHAT ARE CDR PROGRAM GOALS?

The Supreme Court has adopted the following goals for CDR programs:

- be as accessible as possible to all disputants and not favor one group or segment;
- protect the legal rights of all participating disputants;
- provide a fair and competent mechanism for resolving disputes;
- encourage the confidence and respect of disputants and the general public in the fairness, integrity, and justness of the methods by which disputes are resolved;
- be an effective forum for the enforcement of law, including formulating outcomes in terms that are conducive to subsequent enforcement when necessary, and;

- be as efficient as possible in terms of the cost and time required of both the system and the disputants.

WHAT CDR PROGRAMS ARE AVAILABLE?

The Supreme Court has approved a variety of CDR programs for use in the Municipal, Family, and Civil courts, including the Special Civil part. Some programs are appropriate for use also in the General Equity Division and Probation. Some programs are mandated by statute, others are required by the Supreme Court for all vicinages, and still others are pilots in selected vicinages or are optional for vicinage Implementation. Depending on the vicinage and the program, complementary dispute resolution services generally are provided by trained citizen volunteers, attorneys, judicial personnel, and community agencies. The major CDR programs are listed below. Those with asterisks are available in every vicinage. To determine the status of a particular program in a vicinage, or to learn more about program operations, consult with the Vicinage CDR Coordinator listed above.

Family Division CDR Programs

- Matrimonial Early Settlement Panels (MESPs)*
- Pilot Programs for Mediation of Economic Matters
- Parenting Mediation*
- Family Mediation/Referee Programs
- Juvenile Probation Violation Programs

Civil Division CDR Programs

- Statutorily Mandated Arbitration of Automobile and Personal Injury Cases*
- Expanded Arbitration
- Mediation*
- Pilot Programs for the Presumptive Early Referral of Civil Cases to Mediation
- Bar Paneling
- Summary Jury Trials
- Early Neutral Evaluation
- Settlement Weeks

Special Civil Part CDR Programs

- **Small Claims Settlement Program***
- **Landlord/Tenant Mediation.**
- **Intermediate Special Civil Part Mediation/Settlement/Arbitration**

Municipal Court CDR Programs

- Mediation of “minor” disputes*

Other CDR Programs

- General Equity and Probate Mediation
- Adult Probation Violation Project

HOW IS CDR OPERATED AT THE STATE LEVEL?

In August 1990, the Supreme Court appointed a Standing Committee on Complementary Dispute Resolution, chaired by Justice Marie L. Garibaldi, to assist the Court in implementing the recommendations of the Task Force on Dispute Resolution. That Committee was charged with preparing proposed rules of court to govern complementary dispute resolution practices in conjunction with the other Supreme Court “Rules” Committees), reviewing these rules as needed, developing standards to guide selecting and training mediators and arbitrators, developing uniform data collection forms, and assessing and evaluating the complementary dispute resolution programs in operation or being planned. Rules governing CDR were established by the Court effective September 1, 1992, and subsequently amended as needed. (See Rules 1:40-1 through 1:40-12). Standards of conduct governing Mediators in Court-connected programs were promulgated February 16, 200 and standards governing CDR were promulgated January 3, 2005. A Manager of CDR Program Operations within the Special Programs Unit of the Programs and Procedures Division, Office of Trial Court Services at the AOC staffs the CDR Committee, provides technical assistance to the vicinages and provides training in dispute resolution techniques for court-connected programs. For further information contact:

Manager, CDR Programs,
 Special Programs Unit, Administrative Office of the Courts
 P.O. Box 988
 Trenton, New Jersey 08625
 (609) 984-2337

Or via e-mail: Kathleen.Gaskill@judiciary.state.nj.us

HOW CAN THE BAR GET INVOLVED?

The Dispute Resolution Section of the New Jersey State Bar Association and the Marie L. Garibaldi ADR Inn of Court provide leadership on behalf of the Bar in both Court-connected CDR and private ADR programs. Members of the Bar serve on the Supreme Court Committee on Complementary Dispute Resolution and on vicinage advisory committees. Attorneys serve as

volunteer mediators and settlement facilitators; as paid arbitrators and mediators; and as counsel to litigants involved in disputes appropriate for CDR, with regard to this last, Rule 1:401 provides that “(a)ttorneys have a responsibility to become familiar with available CDR programs and inform their clients of them.”

As amended through October 20, 2020

Evidence Rule 519 - Mediator Privilege

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

a. Except as otherwise provided in sections 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 sections 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 sections 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 sections 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 sections 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 sections 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 sections 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 sections 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.

N.J. R. Evid. 519

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

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**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

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The Model Standards of Conduct for Mediators September 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 Resolution¹. 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.

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.

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

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

- A. 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.
- B. 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.
- 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.

- D. 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.
- 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 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 use fee arrangements that 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.

Supreme
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Civil Mediation Resources

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Mediation is a dispute resolution process in which an impartial third party - the mediator - facilitates negotiations among the parties to help them reach a mutually acceptable settlement. The major distinction between mediation and arbitration is that, unlike an arbitrator, a mediator does not make a decision about the outcome of the case. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable. The purpose of mediation is not to decide who is right or wrong. Rather, its goal is to give the parties the opportunity to (1) express feelings and diffuse anger, (2) clear up misunderstandings, (3) determine underlying interests or concerns, (4) find areas of agreement, and, ultimately, (5) incorporate these areas into solutions devised by the parties themselves.

Court Rule 1:40-4 & 6 govern the mediation program for Civil, General Equity and Probate Cases. Under R. 1:40-6, the court can refer any civil case to mediation at no charge for two hours.

- [Statewide Mediation \(Non-Foreclosure\) Program Brochure](#)
- [Frequently Asked Questions - Statewide Civil Mediation Program](#)
en español - Preguntas comunes - programa de mediación civil en todo el estado
- [Civil Mediators Search](#)

Surveys have been developed by the Civil Practice Division to track the impact of Statewide Mediation in the settlement of cases. Data from the completed surveys may be used to enhance the Statewide Mediation program in the future. Mediators, attorneys and their clients are requested to complete the surveys found below.

Catalog Number	Form Title	Revision Date	Survey
10524	Statewide Mediation Attorney Questionnaire	September 2011	Survey Monkey
10525	Statewide Mediation Litigant Questionnaire	September 2011	Survey Monkey
10526	Statewide Mediation Case Information Form	September 2011	Survey Monkey

Rules and Guidelines

Mediator's Tool Box: A Case Management Guide for Presumptive Roster Mediators
RULE 1:40. Complementary Dispute Resolution Programs
Guidelines for the Compensation of Mediators (Appendix XXVI)

Related Information

Civil CDR
Mediation Program Forms
Mediator Complaint Review Process
Special Civil Part

Mediator Resources

Civil Mediation Program Mediator Facilitating Committee
CDR Point Persons Roster
Disclosure Concerning Continuation of Mediation and Mediation Preparation Time
Completion of Mediation Form - Updated June 5, 2013
Application for Admission to the Roster of Mediators
Civil Mediator Roster Change/Update Form
Mediator Mentors
Civil Mediation Mentoring Guidelines
Standards of Conduct for Mediators
Civil Mediation Program Resource Materials Version 2
Civil Mediation Program Resource Materials Version 2 Appendices

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For Judges
Quick Site Index

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Statewide Mediation (Non-Foreclosure) Program

Civil, General Equity and Probate Cases



Complementary Dispute Resolution

What Is Mediation?

Mediation is a dispute resolution process in which an impartial third party - the mediator - facilitates negotiations between the parties to help them reach a mutually acceptable settlement. The major distinction of mediation is that a mediator does not make a decision about the outcome of the case. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable.

What Is The Program?

The New Jersey Supreme Court Committee on Complementary Dispute Resolution developed a mediation program for use in Civil, General Equity and Probate cases. It began as a pilot July 1, 1995. Following submission of an evaluation report, the Supreme Court approved the program for permanent status effective September 1, 1998. The mediation program is governed by *Court Rule* 1:40-4. In all counties, the court can require the parties to participate in at least two hours of mediation in any type of Civil, General Equity and Probate case. Moreover, in the Civil Part of Superior Court, the following case types are sent to mediation within 90 days of the first answer:

- Civil Rights (excluding suits filed by prisoners)
- Law Against Discrimination
- Environmental Litigation
- Real Property
- Contract/Commercial Transaction
- Tort
- Other Professional (not Medical Malpractice)
- Employment (other than CEPA or LAD)
- Toxic Tort
- Construction
- Tenancy (not Special Civil Part matters)
- Whistleblower (CEPA)

How Is A Mediator Selected For A Case?

When a case is referred to mediation, the parties have 14 days to select a mediator whom they feel is suitable, whether on the roster or not. If the parties do not timely select a mediator, the court-appointed mediator named in the Order of Referral will serve as the mediator. Court-appointed mediators have been approved for inclusion on a roster after careful screening to ensure that they meet educational, training and mentoring requirements set forth in *Court Rule* 1:40-12.

How Much Does Mediation Cost?

Under *Court Rule* 1:40-4(b), any mediator who is on the roster will provide the first two hours on a case, including an initial one hour session, without charge before a party may opt out of mediation. Thereafter, mediators will generally be paid their market rate fee which is to be shared by the parties in interest. Fees will be waived in any case covered by *Court Rule* 1:13-2(a). Any mediator selected by the parties who is not on the roster may negotiate a fee with the parties from the outset and need not provide the free time.

What Happens In Mediation?

There are certain ground rules the mediator will ask participants to follow. The first, and most important, is that with a few exceptions covered in *Court Rules* 1:40-4(c) and (d), what goes on in mediation is confidential. That is, what is said in mediation cannot be discussed outside of the mediation process unless the parties consent. Prior to mediation, the mediator will usually ask the attorneys to prepare a brief summary of the issues in dispute. Then, at the mediation session, the mediator will ask attorneys and their clients to make brief presentations about the issues from their own perspectives. After that, the mediator will help the parties to explore areas of possible compromise and to develop a solution that meets everyone's interests. Sometimes, the mediator may meet with the parties separately for a private discussion that might help move the parties toward a resolution. If an agreement is reached, a document will be prepared detailing the terms of the agreement. Thereafter, the mediator

will notify the court that the case can be dismissed. If the case is not resolved, the mediator will advise the court, and the case will remain on the docket.

What About Pretrial Discovery?

Generally, pretrial discovery is not stayed while a case is in mediation. The case will be placed on the trial calendar at the end of the discovery period. If, however, the court determines that a stay of discovery is necessary, the court shall only provide for a stay of discovery by court order. Even if formal discovery is stayed, the mediator is authorized to facilitate the informal exchange of information materials needed to enhance the effectiveness of the mediation process.

What Is The Role Of Counsel And Parties In Mediation?

Attorneys and parties are required to make a good faith effort to cooperate with the mediator and engage in constructive dialogue regarding ways to meet client interests in a mutually acceptable settlement. All must participate in mediation with a sense of urgency. Attorneys should prepare their clients prior to mediation by explaining what will happen and what the roles of attorneys and clients are. They should also agree on who will be the principal spokesperson in presenting the party's view early in the mediation session. For example, attorneys may make brief opening summaries of the issues as they see them, but clients also may be given an opportunity to speak. When it comes to discussing terms of settlement, the litigants must play an active part, for it is their case and their settlement. During this process, attorneys should provide counsel on the advisability of settlement options, suggest options, and be available for further consultation with their clients.

How Does A Case Get Into Mediation?

Appropriate cases for referral to mediation can be identified by judges, court staff, or the parties themselves, at any point in the life of a case. Case types noted earlier are automatically referred to mediation within 90 days of the first answer. A form of order for referral is prepared and signed by the judge. Parties desiring their case to be referred to mediation should contact the Civil Division Manager in the county in which the case is pending.

What Kinds Of Cases Could Benefit From Mediation?

Mediation has been used successfully in a broad range of cases such as those in which the parties have an ongoing business or personal relationship or have had a significant past relationship; communication problems exist between the parties; the principal barriers to settlement are personal or emotional; parties want to tailor a solution to meet specific needs or interests; cases involve complex technical or scientific data requiring particular expertise; the parties have an incentive to settle because of time, cost of litigation, or drain on productivity; the parties wish to retain control over the outcome of the case; or the parties seek a more private forum for the resolution of their dispute.

At What Time In The Court Process Should A Case Be Referred To Mediation?

The earlier that a case can be referred to mediation, the greater the likelihood that parties can resolve their dispute at a cost savings to themselves and the court. Parties should feel they have enough information to discuss the dispute, which may mean that some information exchange should be completed. Mediators also can help the parties determine how much informal discovery is needed. Even if discovery has been completed, settlement negotiations have been unsuccessful, or the parties are close to a trial date, the mediation process may still help the parties reach a mutually acceptable agreement.

What If The Case Is Not Resolved In Mediation?

Sometimes the parties are unable to reach agreement or only agree on certain aspects of the dispute. If certain aspects of the dispute remain unresolved, the parties can submit that portion to an expert for an opinion (binding or non-binding) or use some other creative means. The case also can be returned to court and continue on track towards trial. Even in these cases, the mediation process may have helped the parties clarify their positions and also move toward settlement.

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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.

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Guidelines for the Civil Mediation Mentoring Program

1. Following the successful completion of a qualified mediation course of at least forty (40) hours, each applicant for admission to the Roster of Mediators for Civil, General Equity and Probate Cases should attend and observe at least two (2) Superior Court Law Division– Civil Part or Chancery Division–General Equity or Probate Part *R. 1:40-4* and *-6* mediations of at least five (5) hours total duration. In the event that the two (2) mediation sessions were less than five (5) hours in duration, the applicant, in order to fulfill this requirement, would be required to attend additional sessions until the time requirement is met.
2. The mediator mentor shall be an approved mediator on the Roster of Mediators for Civil, General Equity and Probate Cases who shall certify that they have completed at least fifteen (15) mediations under *R. 1:40-4* and *-6* or comparable mediation program. The approved mediator mentors list shall be published on the Judiciary's website.
3. The mediator mentor, in addition to permitting the applicant to fully observe all aspects of the process, shall meet with the applicant to describe the process and approach in advance of the session and to brief the applicant after the session, intending that this process be part of the education. The mediator mentor shall make available the submissions of the parties and include the applicant on the telephonic conference call.
4. The mediator mentor shall, no later than the telephonic conference call, obtain the parties' consent to the applicant's attendance during the mediation process. The applicant shall be firmly bound by the standards of mediator conduct, including without limitation, the confidentiality of the process, the conflict of interest provisions, as well the reasonable expectation of the parties.
5. There shall be no charge to the applicant, nor a fee collected by the applicant, for the sessions.
6. Following completion of the required mentoring sessions, the applicant shall certify his/her compliance to the Civil Practice Division of the Administrative Office of the Courts by providing the name(s) of mentor(s), dates of each session, number of hours of each session, and the case names/docket numbers.

Source: approved by SCAC 5/20/2003; changes to section 1 pursuant to amendment to *R. 1:40-12(b)(1)* effective 9/1/2004; changes to section 1 pursuant to amendments to *R. 1:40-12(b)(1)* effective 9/1/2015.

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STATEWIDE MEDIATION PROGRAM ATTORNEY QUESTIONNAIRE

(To be completed by Attorney)

Name of Mediator	County	The mediator for this case was selected by: <input type="checkbox"/> parties/attorneys <input type="checkbox"/> court/judge				
How are we doing? Please tell us. (Please check one box on each line.)	Strongly Agree	Somewhat Agree	Neither Agree nor Disagree	Somewhat Disagree	Strongly Disagree	No Opinion
	1	2	3	4	5	6
1. The mediator explained the process to my client.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. The mediation was conducted fairly and impartially.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. The mediator gave my client full opportunity to convey his/her positions and interests.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. The mediator was free from bias.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. The mediator understood the issues in my client's case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. My client was not pressured to reach an agreement.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. The mediator explained his/her fee structure to my client.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. I was satisfied with the mediation process.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. The mediation saved time.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. The mediation saved money.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Did you represent the (check one) <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Third Party Defendant?						
12. What impact did mediation have on this case? (Check all that apply.)						
<input type="checkbox"/> Settled the case <input type="checkbox"/> Did not settle the case <input type="checkbox"/> Moved the case significantly toward settlement <input type="checkbox"/> Added unnecessary steps <input type="checkbox"/> Settled some of the issues <input type="checkbox"/> Clarified positions <input type="checkbox"/> Helped our understanding of the case <input type="checkbox"/> Increased tension <input type="checkbox"/> Other:						
13. At what stage in the case did the mediation session take place? (Check all that apply.)						
<input type="checkbox"/> Before any discovery <input type="checkbox"/> Before depositions <input type="checkbox"/> After experts' reports served <input type="checkbox"/> After interrogatories and document production <input type="checkbox"/> After depositions <input type="checkbox"/> After first trial date scheduled						
14. Do you think this case was referred to mediation (check one) <input type="checkbox"/> too early <input type="checkbox"/> at about the right time <input type="checkbox"/> too late.						
15. Please indicate case type that was provided on the CIS.						
16. Any other suggestions for how we can improve?						
<p>This form is available at https://www.surveymonkey.com/s/StatewideMediationAttorneyQuestionnaire and must be completed and submitted on-line.</p>						



STATEWIDE MEDIATION PROGRAM LITIGANT QUESTIONNAIRE

(To be completed by Litigants)

Name of Mediator	County	The mediator for this case was selected by: <input type="checkbox"/> parties/attorneys <input type="checkbox"/> court/judge					
How are we doing? Please tell us. (Please check one box on each line)		Strongly Agree	Somewhat Agree	Neither Agree nor Disagree	Somewhat Disagree	Strongly Disagree	No Opinion
		1	2	3	4	5	6
1. The mediator explained the process to me.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. The mediation was conducted fairly and impartially.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. The mediator gave me full opportunity to convey my positions and interests.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. The mediator was free from bias.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. The mediator understood the issues in my case.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. I was not pressured to reach an agreement.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. The mediator explained his/her fee structure to me.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. I was satisfied with the mediation process.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. The mediation saved me time.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. The mediation saved me money.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. I was a (check one) <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant.							
12. Did your case settle? <input type="checkbox"/> Yes <input type="checkbox"/> No							
13. Any other suggestions for how we can improve?							
<p>This form is available at https://www.surveymonkey.com/s/StatewideMediationLitigantQuestionnaire and must be completed and submitted on-line.</p>							

			
MEDIATION CASE INFORMATION FORM Statewide Civil, General Equity and Probate Mediation Program			
DIRECTIONS: This form is to be completed by the mediator when the mediation is concluded or returned to court.			
CASE DOCKET NUMBER	COUNTY	LAST NAME OF MEDIATOR	FIRST NAME OF MEDIATOR
OUTCOME/NATURE OF AGREEMENT <input type="checkbox"/> mediation held/full agreement on all issues <input type="checkbox"/> mediation held/no agreement <input type="checkbox"/> no mediation held/party failed to attend <input type="checkbox"/> mediation held/some issues pending <input type="checkbox"/> no mediation held/ parties settled case before mediation session <input type="checkbox"/> no mediation held/party attended but failed to participate			
NUMBER OF MEDIATION SESSIONS	NUMBER OF HOURS OF PREPARATION TIME	NUMBER OF HOURS IN SESSIONS	NUMBER OF HOURS BILLED TO THE PARTIES
AT WHAT STAGE IN THE CASE DID THE MEDIATION SESSIONS TAKE PLACE? (note all that are applicable) <input type="checkbox"/> before any discovery <input type="checkbox"/> before depositions <input type="checkbox"/> after depositions <input type="checkbox"/> after interrogatories and document production <input type="checkbox"/> after experts' reports served <input type="checkbox"/> Other: <small>Please Specify:</small>			
WAS THE TIMING OF REFERRAL TO MEDIATION APPROPRIATE? <input type="checkbox"/> too early <input type="checkbox"/> appropriate time <input type="checkbox"/> too late			
IF THE CASE DID NOT SETTLE IN MEDIATION, WHAT WERE THE REASONS? (note all that are applicable) <input type="checkbox"/> the proper parties with authority to settle were not present <input type="checkbox"/> issues were too complex <input type="checkbox"/> one or both parties did not mediate in good faith <input type="checkbox"/> issues were too numerous <input type="checkbox"/> one or both parties too entrenched in their positions <input type="checkbox"/> Other: <small>(Please Specify:)</small>			
RELATIONSHIP OF PARTIES <input type="checkbox"/> formal business relationship (e.g., partnership, corporation) <input type="checkbox"/> family <input type="checkbox"/> performance of service contract <input type="checkbox"/> friends <input type="checkbox"/> employee/employer <input type="checkbox"/> neighbors <input type="checkbox"/> no ongoing relationship			
COMMENTS (Please use this section to note any suggestions, concerns or other comments on the program)			
This form is available at https://www.surveymonkey.com/s/StatewideMediationCaseInformationForm and must be completed and submitted on-line.			



Superior Court of New Jersey
Law Division
DISCLOSURE CONCERNING CONTINUATION OF MEDIATION
AND MEDIATION PREPARATION TIME

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

- 1. As noted in the Order of Referral to Mediation, I must provide two free hours of mediation services. These two free hours shall include up to one hour of preparation time and one hour of mediation time. The one free hour of mediation will end at the time set forth in paragraph 4 below.
2. The parties agree that if they decide to continue with the mediation past today's one free hour of mediation time, then the fees for mediation services will be charged at my market rate as published on the court's Mediator Roster and as set forth in paragraph 4 below.
3. The parties also agree that if they decide to continue with the mediation today past the one free hour, that I may charge them for any additional preparation time spent on this matter that exceeded the one free hour as set forth in paragraph 4 below.

4. Free Mediation will conclude at: ____ : ____

My Hourly Market Rate is: \$_____

of Hours Spent in Preparation Beyond 1 Free Hour ____ x Market Rate = \$_____

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

Name of Case: _____

Mediator: _____ Date: _____

Parties

Plaintiff(s):

Defendant(s):

Name: _____
(Please Print)

Name: _____
(Please Print)

Name: _____
(Please Print)

Name: _____
(Please Print)

_____, Plaintiff

vs.

_____, Defendant

SUPERIOR COURT OF NEW JERSEY
 DIVISION
 COUNTY
DOCKET NO. _____

**CIVIL ACTION
COMPLETION OF MEDIATION
FORM**

Please complete and return to the CDR Point Person immediately after the mediation is concluded or upon returning the case to the court for other reasons. The list of CDR Point Persons with their contact information is posted on njcourts.gov under Civil Mediation Resources.

Mediation Status:

- XM0 Mediation not held – case returned to court
- XM1 Case resolved
- XM2 Case resolved in part
- XM3 Case unresolved
- XM4 Case management order to be forwarded to court by plaintiff *(If you check this box, you also must check either XM2 or XM3.)*
- XM6 Settled prior to mediation
- XM9 Termination of mediation session - mediation is inappropriate
- XTE Term sheet executed *(terms of settlement agreed upon subject to final settlement agreement)*

Date Mediation Completed

Mediator - signature

Mediator - please print or type name

Mediator – ID Number
(found on Civil Mediators Search page on njcourts.gov)

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Application for Admission to Roster of Mediators for Civil, General Equity and Probate Cases

Last Name		First Name		Middle Initial
Firm/Business Name				
Firm/Business Street Address (No PO Box)			City	State
Telephone number	Fax number	E-mail address		

The following information will be used to determine eligibility: (See criteria on page 2)

Highest Degree Attained	Year	Area of Concentration
Name of Institution		Professional License(s) - specify type and when obtained.
Have you ever been disciplined in your profession or are disciplinary proceedings pending? (If yes, attach explanation.) <input type="checkbox"/> Yes <input type="checkbox"/> No		Have you ever been convicted of a crime or are criminal charges pending against you? (If yes, attach explanation.) <input type="checkbox"/> Yes <input type="checkbox"/> No
Year of Admission to Professional Practice	Number of Years of Experience	Bar admission year (if applicable) New Jersey _____ Other States _____

Cases You Mediated Within Last Year (attach additional sheet if necessary.)

Case Name	Docket Number	Date Mediation Completed

Number of Hours of Mediation Training (attach copy of certificate of completion and attach additional sheet if necessary.)

Provider(s)	Course Title	Date(s)	Hours

Are You a Court, State, or Local Government Employee or a Law Enforcement Officer? (If yes, attach explanation.) Yes No

The following information will be included on the roster if you are accepted:

Hourly Fee (to be shared by the parties)	Counties in Which You Can Accept Cases
--	--

Areas of Expertise for Mediation (check all that apply.)

<input type="checkbox"/> 997 Probate	<input type="checkbox"/> 502 Book Account	<input type="checkbox"/> 513 Complex Construction	<input type="checkbox"/> 608 Toxic Tort
<input type="checkbox"/> 998 General Equity	<input type="checkbox"/> 505 Other Insurance Claim (including declaratory judgment actions)	<input type="checkbox"/> 599 Contract/Commercial Transaction	<input type="checkbox"/> 609 Defamation
<input type="checkbox"/> 005 Civil Rights	<input type="checkbox"/> 506 PIP Coverage	<input type="checkbox"/> 602 Assault and Battery	<input type="checkbox"/> 610 Auto Negligence-Property Damage
<input type="checkbox"/> 156 Environmental Coverage Litigation	<input type="checkbox"/> 508 Complex Commercial	<input type="checkbox"/> 603 Auto Negligence-Personal Injury	<input type="checkbox"/> 616 Whistleblower (CEPA)
<input type="checkbox"/> 302 Tenancy	<input type="checkbox"/> 509 Employment (other than CEPA or LAD)	<input type="checkbox"/> 604 Medical Malpractice	<input type="checkbox"/> 618 Law Against Discrimination
<input type="checkbox"/> 303 Mt. Laurel	<input type="checkbox"/> 510 UM or UIM Claim	<input type="checkbox"/> 605 Personal Injury	<input type="checkbox"/> 699 Tort Other
<input type="checkbox"/> 305 Construction	<input type="checkbox"/> 511 Action on a Negotiable Instrument	<input type="checkbox"/> 606 Product Liability	<input type="checkbox"/> 701 Actions in Lieu of Prerogative Writ
<input type="checkbox"/> 399 Real Property	<input type="checkbox"/> 512 Lemon Law*	<input type="checkbox"/> 607 Professional Malpractice	

* Must provide documentation that you have handled, as a practitioner, at least 15 lemon law cases in the past 5 years in order to list this case type.

Descriptive Paragraph (Please provide a maximum of 650 characters about your mediation and other relevant professional experience. This information will be transferred directly to the roster if you are accepted.)

I certify that the foregoing statements made by me are true, that I am in good standing in my profession, and that I will abide by program rules and guidelines.

Date _____ Signature _____

Return this form to: Civil Practice Division, Administrative Office of the Courts, PO Box 981 Trenton, NJ 08625 or Fax to (609) 815-2938

Roster of Mediators for Civil, General Equity and Probate Cases

Criteria for Admission

Mediation Training

All applicants shall have completed a minimum of 40 hours in an approved mediation course as defined under *Rule 1:40-12(b)(5)*. Applicants to the roster who have been trained in a 40-hour out-of-state mediation training or who completed the required 40-hour New Jersey mediation training more than five years prior to their application to the roster must complete the six-hour civil supplemental mediation course as defined under *Rule 1:40-12(b)(8)*.

Mentoring

All applicants shall be mentored in at least two cases in the Law Division-Civil Part or Chancery Division-General Equity or Probate Part of the Superior Court for a minimum of five hours by a Civil Roster mediator mentor who has been approved in accordance with the “Guidelines for the Civil Mediation Mentoring Program” promulgated by the Administrative Office of the Courts. The list of approved mentors and guidelines for mentoring are available on the Judiciary’s website, njcourts.com.

Education/Professional Experience/Mediation Experience (as set forth under *Rule 1:40-12(a)(3)*)

Applicants shall have:

- (1) at least a bachelor’s degree;
- (2) five years of professional experience in the field of expertise in which they will mediate; and
- (3) evidence of completed mediation of a minimum of two Civil, General Equity or Probate Part cases within the last year.

Please submit application for eligibility review prior to starting mentoring process.

Other Requirements

Counties in Which Mediator Can Accept Cases

Mediators are expected to provide facilities at no cost to the parties in each county listed and cannot charge for travel time or expenses during the first two hours at no cost to the parties.

Annual Continuing Mediator Education

Attendance at a minimum of four hours of annual continuing mediation training is required as set forth under *Rule 1:40-12(b)(2)*.

 <p style="font-size: 8px;">New Jersey Courts www.njcourts.gov Independence • Integrity Fairness • Quality Service</p>	<p>New Jersey Judiciary</p> <p>Civil Mediator Roster Change/Update Form</p>		
Name:		Mediator ID #	
<input type="checkbox"/> Permanently Remove From Roster Select Reason for removal:			
<input type="checkbox"/> Temporarily Remove From Roster Inactivate Date: _____ Reactivate Date: _____ <input type="checkbox"/> unknown Reason for temporary removal:			
Additional Changes/Updates Below:			
Firm Name (if applicable):			
Address:			
Street	City	State	Zip
Phone Number	Fax Number	Hourly Fee	
Counties of Practice:			
Add			
Remove			
Areas of Expertise:			
Add			
Remove			
Profile: (maximum 750 characters)			
For internal use only:			
Updated ACMS Record _____		Verified Change On Roster _____	

Email completed form to: CivilArbMed.Mbx@njcourts.gov

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**COVER LETTER TO COUNSEL/*PRO SE* PARTIES
COURT LETTERHEAD**

DATE

Name
Address
City, State, Zip Code

CASE NAME AND DOCKET NUMBER

Dear [Name]:

Enclosed is an Order of Referral to Mediation. Please read the terms of the order carefully. Compliance is required. In accordance with the order, you may designate the *mediator of your choice within 14 days of the entry of this order*. In the event you do not notify the court within 14 days of the entry of the order of your selected mediator, the mediator designated by the court in paragraph 2B will serve. The case may be removed from mediation only upon good cause shown on notice of motion.

This program is in direct response to public concerns that litigation is too often an extremely costly and protracted means to resolve disputes. Although most cases settle, it is only after the expenditure of substantial fees and after long delays. All indications are that early mediation - a process that brings parties together in search of a mutually beneficial resolution, aided by a trained, neutral facilitator – can resolve most cases quickly, fairly, and at reduced costs, producing client satisfaction. Please note that the services of a mediator on the court’s Civil Mediator Roster are at no cost to the litigants for the first two hours, after which the process may be terminated by either party at will. A list of mediators on the Civil Mediator Roster is found at njcourts.com, under Civil Mediation Resources.

The mediator is authorized to allow for a limited amount of informal discovery on an expedited basis if that discovery will enhance the effectiveness of the mediation process. Please inform the mediator promptly if in your view some limited discovery will be an essential prerequisite to mediation.

It is the responsibility of the lead Plaintiff’s attorney to provide the mediator with an initial counsel list and to maintain this list, providing the mediator with any updated information. If you choose a mediator within 14 days of the entry of the referral order, it is the lead Plaintiff’s attorney’s responsibility to forward a copy of the referral order to the party selected mediator. If you are aware of any other attorneys or *pro se* parties who should be part of the mediation process and added to the service list, please contact the court immediately.

Very truly yours,

[name of Civil Presiding Judge]

Enclosure

**COVER LETTER TO COURT DESIGNATED MEDIATORS
COURT LETTERHEAD**

DATE

Name
Address
City, State, Zip Code

CASE NAME AND DOCKET NUMBER

Dear [Name]:

Pursuant to the Order of Referral to Mediation (copy attached), you have been designated as a mediator in the above captioned case in the event that the parties do not select another mediator of their choice within 14 days. If the lead plaintiff in the above matter has not contacted you within 18 days of the entry of the order, you will serve as the mediator in the above matter. If there is a conflict, please notify [name to be filled in by ACMS] at [telephone number to be filled in by ACMS] **immediately**. Please note that pursuant to the attached order, you shall hold a telephonic conference with counsel within 35 days of the date of the enclosed order and on 5 days' advance notice to the parties. In accordance with Appendix XXVI of the Rules of Court, at the beginning of the initial in-person mediation session, you 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 you at your market rate as set forth on the court's Mediator Roster. The writing shall also disclose the amount of preparation time you have spent to that point on the case. If the amount of preparation time by you exceeds one hour and if you intend 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 in that written disclosure you must so advise the parties prior to commencing the initial mediation session. Any such charged additional preparation time will be billed by you at your market rate as set forth on the court's Mediator Roster. The form of the Disclosure is found at njcourts.com under Civil Mediation Resources. Please notify [name to be filled in by ACMS] immediately upon the settlement or upon unsuccessful completion of the mediation of this case and submit a Completion of Mediation form. The form may also be found at njcourts.com, under Civil Mediation Resources.

If you have any questions, please feel free to call the Mediator Facilitating Committee. Information regarding the Mediator Facilitating Committee can be found at njcourts.com, Civil Mediation Resources. Thank you for your willingness to serve in this very important program.

Very truly yours,

[name of Civil Presiding Judge]

Enclosure

SCHUMANN HANLON
MARGULIES LLC ATTORNEYS AT LAW
founded in 1850 as Scudder & Gilchrist and
1923 as Brigadier & Margulies

ROBERT E. MARGULIES
rmargulies@shdlaw.com
Direct dial: 551-256-2417
*Member New York Bar
*Rule 1:40 qualified Mediator
*CEDR Accredited Mediator

30 MONTGOMERY STREET, STE 990
JERSEY CITY, NJ 07302
(201) 451-1400 (PHONE)
(201) 333-1110 (FAX)

Date:

Re:

Docket No.:

Dear Counsel:

This letter will confirm that a conference call is scheduled in the above matter on

The call-in number is:

You should expect that the conference call will take between 15 and 30 minutes. If there is information I should know before the telephone call, please email or fax it to me by .

We will discuss your views of the case on the conference call without anyone being required to present confidential information of any sort and without any party being required to take a settlement position on the telephone. The mediation process will be explained.

I suggest that you take the opportunity to read the mediation order as it clearly sets forth the structure of the process. I also suggest that you consider reviewing *R. 1:40-1 et seq*, which further describes the court annexed mediation process.

If any counsel has a question that cannot wait until the telephonic conference call, please feel free to contact me; otherwise I look forward to meeting with all counsel by telephone on November 19th.

Very truly yours,

SCHUMANN HANLON
MARGULIES LLC ATTORNEYS AT LAW
 founded in 1850 as Scudder & Gilchrist and
 1923 as Brigadier & Margulies

ROBERT E. MARGULIES
 rmargulies@shdlaw.com
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30 MONTGOMERY STREET, STE 990
 JERSEY CITY, NJ 07302
 (201) 451-1400 (PHONE)
 (201) 333-1110 (FAX)

Date:

Re: ~
 Docket No. ~
 Our File No. ~

Dear Counsel:

This will confirm that we have scheduled a mediation session for ~day, ~ at ~ in my office. It is necessary that you appear with your client who is fully authorized to resolve the matter. If there is any information that you presently require in order to resolve the matter, you should also advise me in advance.

My services will be performed free for the first two (2) hours, including a mediation session in person of at least one hour=s duration, following which time you will be charged \$~. an hour, to be divided equally between the parties.

Please call my secretary, ~, on ~, to confirm you and your client’s availability at the mediation.

Very truly yours,

~

cc: ~, Civil CDR Point Person

SCHUMANN HANLON
MARGULIES LLC ATTORNEYS AT LAW
 founded in 1850 as Scudder & Gilchrist and
 1923 as Brigadier & Margulies

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30 MONTGOMERY STREET, STE 990
 JERSEY CITY, NJ 07302
 (201) 451-1400 (PHONE)
 (201) 333-1110 (FAX)

January 13, 2021

MEDIATION AGREEMENT

The Parties whose signatures appear below agree to the terms of this Mediation Agreement.

I. Purpose and Responsibilities

The purpose of the mediation will be to try to arrive cooperatively and informally at an acceptable resolution of the disputes embodied in the matter of _____, Docket No _____. The Parties understand that the role of the Mediator is not to render a decision but to assist the Parties in reaching a mutually acceptable resolution. No agreement shall be enforceable unless it is in writing and signed by the Parties involved.

II. Mediation Process

A. Overview

Robert E. Margulies, Esq. will serve as Mediator. He will review written submissions of the Parties and may conduct private confidential meetings with less than all Parties to discuss the issues and the Parties' interests. Such meetings may be face-to-face or by telephone.

The Mediator will conduct an initial joint mediation session with all parties and counsel on _____ utilizing the Zoom video conference platform as agreed to by the Parties. The joint mediation session shall be attended by counsel and party representatives with settlement authority. When such an individual is not available, other parties shall be notified prior to the

mediation. Representatives of the parties (chosen by them) or the party, at their option, may be expected to give brief presentations of the issues and to react to the positions of other parties. This joint session is not intended to be confrontational, but informational. The presentations will be informal, without cross examination, and the rules of evidence will not apply. The Mediator will have complete authority over all mediation procedures.

After summary presentations, the Mediator will meet separately and together, as necessary, with the parties and their representatives to assist them to resolve the dispute. The Parties agree to defend the Mediator from any subpoenas from outside parties arising out of this agreement or mediation; further agreeing that they will not subpoena the Mediator in any proceeding. If no settlement takes place at the joint sessions, the Mediator may schedule other joint mediation sessions, or may ask for the Parties' consent to continue individual discussions by telephone or in person.

B. Submission to the Mediator of Information

The Parties will submit to the Mediator by _____ such documents as will assist him in gaining an understanding of the merits of their claims, positions and contentions. At the same time, each of the Parties will submit to the Mediator a statement, not to exceed ten pages, setting forth key facts, their claims, and controlling legal principles. Copies of any cases and statutes from jurisdictions outside of New Jersey and articles cited in the statement will be submitted with the statement. The statement may propose possible settlement alternatives. The statement will be considered to be confidential, and will not be shared with other Parties unless all parties agree to exchange them. 45 days after the settlement of the dispute, or the failure of settlement, the Mediator will return to the respective parties only at their specific request or destroy all written or otherwise recorded materials submitted, in order to protect the confidential nature of the mediation process.

III. Conflicts of Interest

The Mediator has made a reasonable effort to learn and has disclosed to the parties: (a) all business or professional relationships the Mediator or the Mediator's firm has had with the Parties or their law firms within the last three years, (b) any financial interest the Mediator has, or had ever had, in any party, (c) any significant social, business, or professional relationship the Mediator has had with an officer or employee or representative of a party, and (4) any other circumstance that may create doubt regarding the Mediator's impartiality in the mediation.

Each Party has made a reasonable effort to learn, and has disclosed, any relationships of a nature described in the preceding paragraph, not previously identified and disclosed by the Mediator.

The Parties and the Mediator are satisfied that any relationship disclosed pursuant to the preceding paragraphs will not affect the Mediator's independence or impartiality, and the Parties have chosen the Mediator to serve, waiving any claims based on such relationships, recognizing that the Mediator is not serving an adjudicative function.

Neither the Mediator nor his firm shall undertake any work for or against a Party regarding the subject matter of the mediation. The Mediator nor his firm shall not work on any matter for or against a party, regardless of subject matter but unrelated to the subject matter of the mediation, until six months have passed after the end of this mediation.

IV Confidentially

The mediation process is a compromise negotiation. All offers, promises, conduct, and statements, oral or written, made in the course of the mediation by any of the parties or their agents, experts and attorneys, and the Mediator, are confidential, and will not be disclosed to the court, third parties, except persons associated with the Parties in the mediation process, and persons or entities to whom a Party has a legal or contractual obligation to report, and are privileged and inadmissible for any purpose, including impeachment, under an applicable rule of evidence, statute or common law

doctrine. However, evidence previously disclosed or known to a party shall not be rendered confidential, inadmissible, or non-discoverable solely as a result of its use in the mediation. Moreover, an expert who participates in the mediation is not disqualified from assisting a party in subsequent litigation on the same subject matter unless the parties specifically so agree. Confidentiality is governed by the Uniform Mediation Act adopted in New Jersey.

V. Settlement Agreement

Any resolution of the dispute shall be reduced to writing and signed by the parties.

VI. Disqualification of Mediator as Witness

Neither the Mediator or any person who assists him, is a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of this dispute. Neither the mediator, or any person who assists him, may be called as a witness, or as an expert in any pending or subsequent litigation or arbitration involving the Parties and relating to this dispute. Moreover, the Mediator and any person who assists him will be disqualified as witnesses or experts in any litigation or arbitration relating to this dispute. When a Party meets alone with the Mediator, he or she will clearly inform the Mediator what statements or documents shall remain confidential, and what may be shared with the other Party(ies).

VII. Legal Advice

There is no attorney/client relationship between the Mediator and any Party herein. For example, the Parties recognize that in the process of reaching agreement, they may choose to forgo a claim or defense, ask the Mediator for his perspective on a particular issue or the case in general, or the Mediator may help prepare a draft settlement agreement. The Parties will consult with their own attorney if they have any questions about their legal rights. The Parties agree that the Mediator is not acting as an attorney and does not provide legal advice.

VIII. Mediation Costs

The mediation costs are set forth in Attachment A, which attachment shall be signed by the parties to the mediation and their counsel.

IX Withdrawal from the Mediation

A Party may withdraw from the mediation at any time by providing written notice to the Mediator and the other Parties, provided, however, that before withdrawing the Party contacts the Mediator to discuss the reasons for the withdrawal. A withdrawing Party is responsible for its allocated share of mediation costs that it was responsible for on the date of the withdrawal, which may include scheduled mediation events in the reasonably near future. Withdrawing Parties remain subject to the confidentiality provisions of Section IV of this agreement.

By counsel for the Parties executing this agreement, the Parties hereby consent to mediation, and agree to be bound by the terms and conditions of this Mediation Agreement. This agreement may be signed in counterparts.

ATTACHMENT A - FEE AGREEMENT

1. Professional Fees

The Mediator shall be compensated for all time spent for this mediation, including but not limited to reading and other preparation time, research, all telephone conferences or meetings with any Party to arrange for mediation, the mediation session, extra session time, and any additional services or work, will be billed at the Mediator’s normal hourly rate. The Professional fee is _____ per hour and will be divided evenly between the parties.

2. Additional Fees

A. Expenses are billed at cost. Food and beverage costs incurred by the Parties at the mediation will be billed at cost.

B. Travel: If travel is required and is not included in a package rate, travel time is billed at the Mediator’s hourly rate. Travel expenses are billed at cost.

3. Payment

A. The Parties agree to pay the mediation fees and expenses upon receipt of an invoice from the Mediator.

B. The Mediator is not bound by agreement between or among the Parties with respect to his fees.

C. Unless otherwise agreed, Parties and counsel are separately liable for the payment of mediation fees.

ZOOM Statement attached as Exhibit A is an addendum relating to use of a ZOOM video conference platform, which we acknowledge and agree to.

AGREED TO:

, Esq.

, Esq.

SCHUMANN HANLON
MARGULIES LLC ATTORNEYS AT LAW
 founded in 1850 as Scudder & Gilchrist and
 1923 as Brigadier & Margulies

ROBERT E. MARGULIES
 rmargulies@shdlaw.com
 Direct dial: 551-256-2417
 *Member New York Bar
 *Rule 1:40 qualified Mediator
 *CEDR Accredited Mediator

30 MONTGOMERY STREET, STE 990
 JERSEY CITY, NJ 07302
 (201) 451-1400 (PHONE)
 (201) 333-1110 (FAX)

Date

Re:
 Docket No.:

Dear Counsel:

Thank you for selecting me to mediate the above referenced matter. This will confirm that we have scheduled the mediation session for _____ at _____ a.m. utilizing the ZOOM video conference platform. It is necessary that you appear with your client who is fully authorized to resolve the matter. If there is any information that you presently require in order to resolve the matter, you should also advise me in advance.

For my services, you will be charged \$____.00 per hour as per the enclosed Mediation Agreement, which I ask all parties to sign and return in advance of the mediation session. The parties have agreed that the mediation fees for preparation and participation in the mediation shall be divided equally.

I request that the parties furnish me with ex parte mediation statements by _____, via e-mail.

I look forward to working with you.

Very truly yours,



Robert E. Margulies

REM:pd
 Enc.

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**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: COUNTY**

vs. Plaintiffs,

Defendants.

DOCKET NO.:

CIVIL ACTION
MEDIATION REFERRAL ORDER
(No Stay of Discovery)

Pursuant to R. 1:40-1 et seq. IT IS on this day _____ of _____, 20__ ORDERED that:

- 1. The parties and attorneys shall participate in mediation in good faith and with a sense of urgency. Failure to do so may result in an assessment of costs or other consequences.

REGARDING THE MEDIATOR SELECTION

2A. **PARTIES MAY SELECT A MEDIATOR WITHIN 14 DAYS.** If the parties designate a “party selected mediator” within 14 days of the entry of this order, lead plaintiff’s counsel shall provide to the CDR Point Person and the individual named in paragraph 2B below, in writing, the name, address, telephone and e-mail address of the selected mediator (fax or e-mail is acceptable). Names and addresses of the CDR Point Person may be found at njcourts.com under Civil Mediation Resources.

2B. _____ is appointed to mediate if parties do not timely designate a party selected mediator. Information regarding the appointed mediator may be obtained at njcourts.com, Civil Mediation Resources, under Civil Mediator Search.

REGARDING THE MEDIATION PROCESS

3A. The mediator shall notify counsel of the date and time for an organizational conference call to be conducted within 35 days of this order. The mediator shall explain the mediation process, set ground rules, facilitate focused information exchange, and identify those persons with negotiating authority needed by each side to participate in the mediation process in order to assist in effectuating a resolution of the case. In consultation with counsel, the mediator shall schedule the mediation session and may require the attendance of the person(s) with authority.

3B. Failure to participate in the conference call or attend the first mediation session may result in an assessment of costs or other consequences, pursuant to R. 1:2-4(a).

3C. Any party may withdraw from the mediation process after the expiration of the initial one-hour in-person mediation session. Withdrawal of one or more parties from the mediation shall not prevent the remaining parties from continuing the mediation.

3D. Lead plaintiff’s counsel shall be responsible for providing the mediator with an updated party/counsel list.

3E. **This referral to mediation DOES NOT STAY DISCOVERY.** Mediation under this order shall be completed by the discovery end date.

REGARDING MEDIATOR COMPENSATION

4. Compensation of party-selected or court-designated mediators shall be handled in accordance with the “Guidelines for the Compensation of Mediators” contained in Appendix XXVI of the Rules of Court. Mediators on the roster, whether party-selected or court-designated, shall serve without compensation for the first two hours, which shall include a mandatory organizational telephone conference with counsel and pro se parties and an in-person mediation session of at least one hour. The parties may select any mediator not on the Roster of Mediators and such non-roster mediator may negotiate a fee with the parties, but is bound by all other terms and conditions of this Order and the court’s mediation procedures.

5. Any inquiry regarding the mediation process or this order shall be resolved by the mediator in collaboration with the Mediator Facilitating Committee identified at:
:http://www.judiciary.state.nj.us/civil/med_ ment_ comm_ list.pdf.

_____, J.S.C.

Copies to:
Court Designated Mediator
All Parties or Counsel

NOTICE TO THE BAR**Review Process for Complaints Against Mediators**

The Supreme Court has approved the attached formal process for the submission of complaints against mediators in court-connected programs and the review process for such complaints. This new review process is effective immediately.

/s/ Philip S. Carchman
Hon. Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts

Dated: August 7, 2007

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 complaint 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 Manger. 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 Manger.

SCREENING GUIDELINES

1. Review the CIS. If the parties indicate that there is or was a relationship (unless it is a book account (503) or action on a negotiable instrument (511) or that counsel fees are sought by the winner from the loser (*i.e.* a fee shifting case), the matter should be considered for referral to the Statewide Civil Mediation Program at first answer. At initial case entry, the CDR indicator should be manually changed to “m” and the case at answer will come up on the weekly Mediation Eligibility Worksheet. If the party noting that attorney’s fees are sought is a *pro se*, staff should review the party’s pleading to determine if the case actually is founded on a fee shifting statute (*e.g.* consumer fraud). A list of fee shifting statutes is attached.
2. If the case type on the CIS is book account (503) or action on a negotiable instrument (511), the matter must be scheduled for arbitration within 60 days from the close of the applicable discovery period unless it previously went to a court-referred mediation, *e.g.*, at the parties’ request. See R. 4:21A-1(a). These case types will come up on the Arbitration “To Be Scheduled List”.
3. LAD (618), Civil Rights (005) and CEPA (616) cases should always be considered for referral to mediation after first answer. They are always fee shifting cases. They will automatically come up on the weekly Mediation Eligibility Worksheet sorted by team and case type.
4. If any of the following factors are present, the case should be considered for referral to the Statewide Mediation Program (or Presumptive Mediation if applicable):
 - The case is contract/commercial transaction (599) complex commercial (508) or complex construction (513);
 - the parties have or have had a significant business or personal relationship;
 - the principal barriers to settlement are personal and/or emotional;
 - resolving the dispute is more important than the legal or moral principles;
 - parties want to tailor a solution that meets their specific needs or interests;
 - multi-faceted settlements (*e.g.*, restructuring the deal are possible);
 - the law governing the dispute is well-established and not challenged;
 - subjective questions of fact (*e.g.*, state of mind, intent) or parties interpretation of objective facts exists;
 - the parties have an incentive to settle because of time, cost of litigation, or other factors;
 - the parties are not represented by attorneys;
 - a private valuation process (such as arbitration) has failed to resolve the case.

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MEDIATION: ANTIDOTE TO LITIGATION?

Robert E. Margulies, Esq.

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, 399 1-96 (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. Quere, 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.

Robert E. Margulies

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**ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
COMMITTEE ON ATTORNEY ADVERTISING**

Appointed by the New Jersey Supreme Court

JOINT OPINION

Opinion 676 - Advisory Committee on Professional Ethics

Opinion 18 - Committee on Attorney Advertising

Alternative Dispute Resolution (Modifies Opinion 657)

This opinion arises from the Committee on Attorney Advertising's consideration of a grievance concerning the advertisements of five attorneys who are engaging in alternative dispute resolution (hereinafter "ADR") as arbitrators or mediators. The grievance alleges that these attorneys are in violation of Opinion 657, 1 *N.J.L.* 129 (February 17, 1992), 130 *N.J.L.J.* 656 (February 24, 1992), in that they are practicing law and engaging in ADR-related activities in the same location, jointly advertising or marketing the two, and making no attempt to avoid any other demonstration of a relationship between them.

After careful consideration of the grievance, the advertisements which appeared in an "Alternative Dispute Resolution Directory" in the *New Jersey Law Journal* on May 17, 1993, and Opinion 657, the Committee raised the issue of whether alternative dispute resolution is ancillary to or part and parcel of the practice of law. Needless to say, the answer to this question would affect not only the Committee's disposition of the grievance, but also the conduct of an ever-growing segment of the Bar in this State. Consequently, the Committee enlisted the assistance of not only the respondents, but also other attorneys and entities with an interest in this matter. Given the number and nature of the responses to its request for assistance, the Committee concluded that it would be better to treat the grievance as an inquiry and issue an advisory opinion. Since the opinion would require interpretation of Opinion 657 and possibly affect its scope, the Committee also enlisted the assistance of the Advisory Committee on Professional Ethics which joins in its issuance.

Alternative Dispute Resolution and Complimentary Dispute Resolution have apparently swept the country. Given the congestion and resultant backlogs of the courts, and the expense of the more traditional adversarial process, state and federal courts have embraced ADR and CDR as providing faster and less expensive resolution of disputes.

In New Jersey, our Supreme Court has amended the *Rules Governing the Courts of the State of New Jersey* to include R. 1:40 - "Complimentary Dispute Resolution Programs." See footnote 1¹ In adopting this rule, which became effective September 1, 1992, the Court implemented the Report of the Supreme Court Committee on Complimentary Dispute Resolution, 130 *N.J.L.J.* 578, 1 *N.J.L.* 170 (1992), expressing the following purpose and goals: Complimentary Dispute Resolution Programs are an integral part of the Superior Court and Municipal Courts. They are intended to enhance the quality and performance of the judicial process. Lawyers should become familiar with available CDR programs and inform their clients of them. R. 1:40-1.

Among other things, the rule requires screening of all custody and visitation matters for referral to mediation, *R. 1:40-5*; allows for mediation of small claims and, in the discretion of the Assignment Judge, landlord-tenant disputes, *R. 1:40-6*; and calls for mandatory mediation of certain municipal court matters, *R. 1:40-7*. Of particular relevance to this opinion is *R. 1:40-9* which, subject to the approval of the Assignment Judge, permits referral of matters to non-court administered dispute resolution programs (ADR).

The emergence of ADR has presented attorneys with new and varied ways in which to serve their clients. No longer are attorneys limited to the traditional role of advocate in civil litigation. They may now represent their clients in ADR proceedings, assist their clients in establishing dispute resolution programs and negotiate contracts requiring ADR. Not surprisingly, they are in ever increasing numbers serving as arbitrators or mediators in ADR programs.

Many lawyers are "natural" arbitrators. Arbitration, which in many cases closely resembles litigation, usually takes place in an adversarial setting, with the parties represented by counsel and the arbitrator(s) rendering a final and binding adjudication. Attorneys, accustomed as they are to appearing before judges, presenting evidence and engaging in oral and written advocacy in an adjudicative forum, come to the arbitrator's task enthusiastically or, as one commentator described it, "like the proverbial duck taking to water." Unquestionably, their educational training and experience make them well-suited if not uniquely qualified to serve as arbitrators.

Similarly, with training and experience beyond that necessary for and obtained through traditional lawyering, many attorneys are able to provide excellent mediation services. Unlike arbitration, which in many cases is contractually agreed upon before a dispute arises, mediation usually arises after the fact and is a voluntary process. In mediation, the parties in dispute, with or without their attorneys, and without prejudice to their rights to proceed with arbitration or litigation if the matter does not settle, meet with a neutral third party in a good-faith effort to achieve a far more economical, prompt and mutually advantageous resolution of all or part of their dispute. Given their experience weighing the merits of a case and exploring the prospects for settlement, attorneys possess qualifications that lend themselves to service as mediators. Attorneys are also conversant with and sensitive to the ethical standards attendant upon service as a mediator or arbitrator. For example, they may not serve as mediator or arbitrator in any case in which they have a conflict of interest. Nor may they participate in ADR as mediator or arbitrator and subsequently represent either of the parties should the mediation not result in a settlement. *R. 1:40-4(b)*. See also Opinion 521, 112 *N.J.L.J.* 394 (1983) (attorney may not participate in private matrimonial mediation service and subsequently represent either spouse in divorce action).

Third party neutrals are also under an obligation not to disclose any confidential information obtained during mediation unless they reasonably believe it is necessary to prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm. *R. 1:40-4(b)*. See *Canon 5D(7)*, Code of Judicial Conduct (information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties). Cf. RPC 1.6(b)(1) (a lawyer shall reveal to the proper authorities confidential information relating to representation of a client as soon as and to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal, illegal or fraudulent act the lawyer reasonably believes is likely to result in death or

substantial bodily harm or substantial injury to the financial interest or property of another). Unlike the situation described in Opinion 657, *supra*, 1 *N.J.L.* 129, 130 *N.J.L.J.* 656, respondents and most of the other commentators do not differentiate between their ADR activities and their legal practices. In their advertising, they hold themselves out as lawyers who, in addition to traditional civil and/or criminal trial work, also provide ADR services, including arbitration and mediation, both as counsel and third party neutrals. None can recall a client ever having expressed confusion or surprise over their provision of ADR services as part and parcel of their law practices. To the contrary, many of their clients retained them precisely because of their familiarity with and willingness to engage in alternative dispute resolution when practicable. Attorneys engaged in ADR activities consider themselves professionals in dispute resolution. They report that their activities, be they negotiating, advocating in mediation, arbitration, or litigation settings, or, when no conflicts of interest arise, serving as third party neutrals, have been of great benefit to their client community. Their experience in ADR has also provided them with a theoretical as well as practical perspective they might not otherwise have gained and has influenced their "traditional" adversarial practice, just as their litigation practice has informed and strengthened their ADR practice.

It is therefore apparent that ADR has become part and parcel of the practice of law and constitutes a tool of equal rank with litigation to achieve, in the proper case, prompt and cost effective dispute resolution. When a lawyer discusses the potential of ADR with a client, participates as an advocate in mediation or arbitration, or serves as a third party neutral, he or she is acting as a lawyer and is not engaging in a separate business. In fact, without exception, the commentators' professional liability insurance policies include their activities as arbitrators, mediators and third party neutrals among the covered conduct.

This is not to say that only lawyers appropriately may provide third party neutral services. There are many trained and experienced lay arbitrators acting under the aegis of the American Arbitration Association and other recognized organizations. In fact, with certain expressed exceptions, no special occupational status or degree is required to be a mediator or receive mediation training in the CDR programs administered by the Court. *R.* 1:40-10, *Guideline* 1.1. Clearly, 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, that might constitute the unauthorized practice of law.

However, the fact that non-lawyers may and do serve as third party neutrals does not mean that attorneys engaged in ADR are rendering non-legal services to their clients. Therefore, unlike ancillary business activities such as the medical-legal consulting service described in Opinion 657, *supra*, 1 *N.J.L.* 129, 130 *N.J.L.J.* 656, ADR services may be rendered in the same location as and jointly marketed or advertised with an attorney's legal practice.

* * *

Footnote: 1 The statutory base for ADR in New Jersey is comprehensive with the New Jersey Alternative Procedure for Dispute Resolution Act, *N.J.S.A.* 2A:23A-1 et seq., and the New Jersey Arbitration Act, *N.J.S.A.* 2A:24-1 et seq.

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3 *N.J.L.* 2459
December 19, 1994

138 *N.J.L.J.* 1558
December 12, 1994

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the New Jersey Supreme Court

OPINION 28

**Out-of-State Attorney Representing
Party Before Panel of the American
Arbitration Association in New Jersey**

The Committee on the Unauthorized Practice of Law has received an inquiry whether an out-of-state attorney may appear before a panel of the American Arbitration Association (hereinafter "AAA") in New Jersey to present evidence and argue questions of substantive law on behalf of a client with a claim against a former employer for breach of an employment contract. It is the Committee's opinion that an out-of-state attorney may represent a party in an arbitration proceeding conducted under the auspices of the AAA in New Jersey.

Rule 22 of the AAA Commercial Arbitration Rules provides that "[a]ny party may be represented by counsel or other authorized representative." Although Rule 22 appears to impart broad discretion to a party regarding the party's choice of representation in a commercial arbitration, the New Jersey legislature has not addressed this issue, in either the New Jersey Alternative Procedure for Dispute Resolution Act, *N.J.S.A. 2A:23A-1, et seq.*, or the New Jersey Arbitration Act, *N.J.S.A. 2A:24-1, et seq.* Moreover, there is no New Jersey case law determining whether representation of a party by an out-of-state attorney in an arbitration proceeding constitutes the unauthorized practice of law. See footnote 1¹

However, New York courts have determined that an out-of-state attorney's representation of a party in a commercial arbitration proceeding does not constitute the unauthorized practice of law. In *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982), a New Jersey law firm sought compensation for legal services rendered in an arbitration proceeding in New York. The defendant claimed that the plaintiff law firm was foreclosed from recovery, as the attorney who performed the bulk of the services in the arbitration proceeding was not admitted to practice in New York. The district court began its analysis by recognizing the differences between arbitration and judicial proceedings, specifically noting that an arbitration proceeding is of "an informal nature." *Id.* at 616. The court explained that "[a]n arbitration tribunal is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys." *Id.*

The court also found "no case precisely on point ... under New York or New Jersey law." *Id.* Therefore, in reaching its conclusion that an out-of-state attorney's representation of a party in a commercial arbitration proceeding does not constitute the unauthorized practice of law, the court relied upon a 1975 report by the Committee on Professional Ethics of the Association of

the Bar of the City of New York. Although the report focused on labor arbitration, the court adopted the committee's ultimate conclusion that "representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law." *Id.* (citing Committee Report, Labor Arbitration and the Unauthorized Practice of Law, *The Record of the Association of the Bar of the City of New York*, Vol. 30, No. 5/6 (1975)). See also *Siegel v. Bidas Sociedad Anonima Petrolera Industrial Y Commercial*, 1991 WL 167979 (S.D.N.Y.).

The Virginia Committee on Legal Ethics and the Unauthorized Practice of Law also determined, although without providing its reasoning, that "[i]t is not the unauthorized practice of law for a non-Virginia-licensed attorney to present evidence and argue matters of law before an arbitration panel of the American Arbitration Association in Virginia..." Va. UPL Op. No. 92 (May 2, 1986).

In August 1991, the Committee on Professional Ethics of the Association of the Bar of the City of New York, revisited this issue, which it had originally addressed in its 1975 report. The committee concluded that "as a matter of New York law and professional ethics, parties to international or interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing, including lawyers not admitted to practice in New York." Committee Report, "Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York," *The Record of the Association of the Bar of the City of New York*, Vol. 49, No. 1 (1991). The Committee found that "this position is consistent with that of the American Bar Association." *Id.* The Committee also determined that "[t]he most prominent organizations in the field of arbitration expressly recognize the parties' right to be represented by whomever they choose." *Id.* See generally Penna, "Issues Regarding Representation," *N.Y.L.J.* (September 1, 1994) ("As for the question of who may represent a party in arbitration, existing precedent and commentary indicates that arbitration is not considered the unauthorized practice of law."). Accordingly, this Committee finds that an out-of-state attorney's representation of a party in an arbitration proceeding conducted under the auspices of the AAA in New Jersey does not constitute the unauthorized practice of law.

* * *

*Footnote: 1*¹ Although New Jersey courts have not expressed an opinion regarding whether a non-New Jersey lawyer's representation of a party in a commercial arbitration proceeding would constitute the unauthorized practice of law, the New Jersey Supreme Court's Advisory Committee on Professional Ethics has confronted other arbitration-related issues. In *Opinion 676*, 136 N.J.L.J. 1298, 3 N.J.L. 650 (1994) the ACPE held that an attorney may jointly market or advertise and render ADR services in the same location as the attorney's legal practice. The ACPE reasoned that "ADR has become part and parcel of the practice of law" but also recognized 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, that might constitute the unauthorized practice of law."

187N.J.L.J. 123
January 8, 2007

16 N.J.L. 191
January 29, 2007

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the New Jersey Supreme Court

OPINION 43 (SUPPLEMENTING OPINION 28) Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey

In Opinion 28 of the Committee on the Unauthorized Practice of Law, 138 *N.J.L.J.* 1558 (December 12, 1994), 3 *N.J.L.* 2459 (December 19, 1994), the Committee considered an inquiry regarding whether an out-of-state attorney may appear before a panel of the American Arbitration Association (hereinafter “AAA”) in New Jersey to present evidence and argue questions of substantive law on behalf of a client with a claim against a former employer for breach of an employment contract. After a review of the AAA Commercial Arbitration Rules and legal precedents, the Committee determined that an out-of-state attorney may represent a party in an arbitration proceeding conducted under the auspices of the AAA in New Jersey if there has not been a complaint filed in New Jersey on the issue and if the attorney is admitted and in good standing in another jurisdiction.

In 2004, the issue of multi-jurisdictional practice was addressed in newly-adopted *Rule of Professional Conduct 5.5*. After review, the Committee concludes that the new provisions of *RPC 5.5* require a modification to Opinion 28.

RPC 5.5(b) provides that a lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

1. the lawyer is admitted to practice *pro hac vice* pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or
2. the lawyer is an in-house counsel and complies with R. 1:27-2; or
3. under any of the following circumstances:
 - i. the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the

- lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
- ii. the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
 - iii. the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or
 - iv. the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

If a lawyer qualifies under one of the above categories to practice in the State of New Jersey, the lawyer must then satisfy the six criteria set forth in *RPC 5.5(c)*:

1. be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;
2. be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;
3. consent to the appointment of the Clerk of the Supreme Court as a agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction;
4. not hold himself or herself out as being admitted to practice in this jurisdiction;
5. maintain a bona fide office in conformance with R. 1:21-1(a), except that, when admitted *pro hac vice*, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B); and
6. annually complies with R. 1:20-1(b) and (c) [Annual Fee and Registration], R. 1:28-2 [payment to Lawyers' Fund for Client Protection], and R. 1:28B-1(e) [payment to Lawyers Assistance Program] during the period of practice.

While *RPC 5.5* does not change the ultimate opinion of the Committee in Opinion 28, *i.e.*, that an out-of-state attorney may appear in an AAA arbitration, *RPC 5.5* does change the prerequisites for this appearance. In Opinion 28 the Committee required that no related action was pending in the attorney's state of admission. This is not a requirement of *RPC 5.5* and so is no longer required by this Committee. Further, *RPC 5.5(c)(1)* through (6) provides additional requirements, the most important of which is that the out-of-state attorney must register with the Clerk of the Supreme Court, authorize the Clerk to accept service of process on the attorney's

behalf, and comply with New Jersey Rules regarding registration and fees. These requirements are therefore added to Opinion 28 in this Supplemental Opinion.

Additionally, the question has been posed whether a multi-jurisdictional practitioner may represent an existing out-of-state client in mediation in New Jersey. The Committee finds that this is akin to arbitration and that an out-of-state attorney may participate in mediation and may prepare an order for the court reflecting a memorandum of understanding/agreement reached in mediation, provided that the out-of-state attorney has satisfied the requirements of *RPC 5.5*.

Lastly, questions have arisen with regard to recovery of attorney fees by out-of-state attorneys. Provided that the out-of-state attorney has complied with the requirements of *RPC 5.5*, it is the opinion of the Committee that the attorney may collect fees for arbitration and/or mediation matters, pursuant to the rules of the dispute resolution forum in which the attorney participates and any applicable New Jersey Statutes and Rules of Court governing the recovery of attorney fees.

As such, the Committee hereby modifies Opinion 28 to require that out-of-state attorneys seeking to practice in alternate dispute resolution settings in New Jersey must comply with all requirements of *RPC 5.5*. Any out-of-state attorney who practices within New Jersey without complying with the provisions of *RPC 5.5* will be engaged in the unauthorized practice of law.

It is understood that this Opinion and the requirement of *RPC 5.5* will be difficult to monitor. As such, it is the recommendation of this Committee that the AAA and other alternate dispute resolution forums require, as part of the initial filing process, that out-of-state attorneys seeking to practice in New Jersey under the multi-jurisdictional practice rule be required to submit proof of compliance with *RPC 5.5*, particularly proof that they have registered with the Clerk of the Supreme Court and have paid the required fees.

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189 N.J.L.J. 253
July 16, 2007

16 N.J.L. 1401
July 23, 2007

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 711

Advisory Committee on Professional Ethics

Divorce Mediation Centers Operated By New Jersey Attorneys

An inquirer questions whether a commercial center for divorce mediation (hereafter “Center”) run by a New Jersey attorney from an out-of-state office under a trade name, “Center for Divorce Mediation, P.C.,” is operating consistent with the New Jersey *Rules of Professional Conduct*.

The attorney responsible for the Center describes its operations as follows: An attorney, who is responsible for guiding our clients through a non-adversarial divorce process, handles each case. As in the litigated divorce process, clients are referred to accountants and therapists to deal with ancillary, non-legal issues. The only difference is that our referral list of professionals includes only those who agree to act as neutral mediators.

All of the attorneys, accountants and therapists affiliated with the Center have their own individual practices. They provide the Center with a calendar of open appointments. Based on the attorney's recommendation, our client coordinators will match clients with the professionals whose services are needed and whose schedules are compatible. The meetings are held in the same office so that clients do not have the inconvenience of finding several different locations.

When a tentative agreement is reached on all outstanding issues, the attorney provides the clients with a draft of a settlement agreement, pro se divorce proceedings and a copy of all supporting documentation. The clients are directed to take these documents to separate litigation attorneys for review.

The Committee reaches the following conclusions:

1. The attorneys affiliated with and taking mediation cases on referral from the Center are practicing law. In effect, they are accepting clients in a form of limited representation,

consistent with *RPC 1.2(c)*, for the sole purpose of serving as a third-party neutral, as contemplated in *RPC 2.4*.

2. All conduct of attorneys practicing law is governed by the *Rules of Professional Conduct*. The Center's website is replete with references to the furnishing of legal advice (e.g., “[Center] attorneys ... help you make the decisions and navigate the necessary legal procedures”; “your attorney-mediator helps you understand your legal rights and obligations”; “your rights under law are explained and you are encouraged to make an agreement that follows the law”). As such, the Center is plainly offering the services of attorneys to provide legal advice.
3. The amounts paid by the client for a lawyer's mediation services are legal fees. They are fixed by and paid to the Center. *RPC 5.4(a)* prevents sharing of legal fees with a non-lawyer (here the Center), and this situation is not within the exceptions listed in the *Rule*.
4. It is possible that a mediated settlement may not be in a client's best interest: imbalance of power, a controlling relationship, lack of sophistication or other factors may make a nominally “voluntary” agreement severely disadvantageous to one party.
5. 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. Furthermore, all of the safeguards contained in ACPE Opinion 699, 182 *N.J.L.J.* 1055 (December 12, 2005), 14 *N.J.L.* 2474 (December 12, 2005), are applicable to this disclosure. As noted in Opinion 699, a lawyer may participate in the collaborative law process only if: (i) based on her knowledge and experience, after being fully informed about the existing relationship between the parties, the lawyer has no reason to believe that there is any significant possibility that the process will fail; and (ii) the lawyer discloses to the clients the potential risks and consequences of the failure of the collaborative law process, including a description of the alternative procedures available with all of their attendant risks and consequences, thereafter receiving informed consent of both clients. None of these safeguards are apparent here. For such mediation representation to be deemed “reasonable” under *RPC 1.2(c)* and consistent with the requirements of *RPC 1.7(a)*, the clients must give informed consent after such disclosure is made.
6. The Center's requirement that an affiliated attorney make other referrals, for therapy and accounting services, only to professionals approved by the Center, violates the duty of independent judgment concerning referrals to other professionals solely in furtherance of

the client's best interests, free from any economic or other incentives that might impinge on the lawyer's judgment. *See RPC 5.4(c)*; ACPE Opinion 694, 174 *N.J.L.J.* 460 (November 3, 2003), 12 *N.J.L.* 2134 (November 3, 2003).

7. “_____ Center for Divorce Mediation, P.C.,” run by a lawyer and involving other “affiliated” lawyers, is not a permissible trade name under *RPC 7.5*.

8. It is unclear whether the Center involves a partnership with any non-attorneys. Since it is practicing law, any such partnership would be a violation of *RPC 5.4(b)*. The Center appears to be a for-profit enterprise, not the kind of not-for-profit entity for education of the public about the benefits of mediation that was examined and conditionally permitted in Opinion 699.

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SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interest of brevity, portions of any opinion may not have been summarized.)

In the Matter of the Letter Decision of the Committee on Attorney Advertising,
Docket No. 47-2007 (A-14-08) (062134)

Argued December 2, 2008—Remanded February 26, 2009—Reargued January 4, 2011—Reargued October 10, 2012—Decided March 14, 2013

LaVECCHIA, J., writing for a unanimous Court.

The issues in this appeal are whether use of the trade name Alpha Center for Divorce Mediation, P.C. (the Center), which consists of lawyers and supportive personnel engaged in divorce mediation services, violates RPC 7.5; whether the policy on law firm names in New Jersey should be broadened by amending RPC 7.5 to permit trade names within certain limits; and whether the Center's trade name is consistent with the current or proposed rules.

In 2007, in response to an anonymous inquiry, the Advisory Committee on Professional Ethics issued Advisory Opinion 711, concluding that "Center for Divorce Mediation, P.C." is not a permissible law firm trade name under RPC 7.5. The Center sought review from the Committee on Attorney Advertising (CAA) on the use of its name "in conjunction with the name of the attorney principally responsible for the office." The Center argued that the restriction on its trade name violated the First Amendment of the United States Constitution. In a letter dated November 28, 2007, the CAA advised the Center that the use of its trade name, even accompanied by an attorney's name, was not permitted. The CAAs stated that the words "Center for Divorce Mediation" describe the nature of the practice; and "Alpha," as the first letter of the Greek alphabet, may be interpreted to mean that it is the "first center for divorce mediation." The CAA determined that because neither described the lawyers in the firm, they are not permissible "additional language" under RPC 7.5(e); "Alpha" may be viewed as improperly comparative under RPC 7.1(a)(3). The CAA further opined that adding the managing attorney's name does not cure the problem. The Court granted the Center's petition for review. 195 N.J. 514 (2008).

After hearing oral argument, the Court remanded the matter to the CAA for recommendations on additional information the Court should permit in law firm names. The CAA filed a report in June 2010, concluding the rules should remain the same and "the name or names of an attorney with a law firm should remain as the sole official designation of a New Jersey law firm." The Court entertained oral argument and thereafter issued a Notice to the Bar in April 2011, seeking comments on proposed changes to RPC 7.5. As proposed, the amendment would allow use of a trade name "so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, unprofessional, or suggestive of the ability to obtain results. Such trade names should be accompanied by the name of the attorney who is responsible for the management of the

organization.” The Court also proposed an official comment to illustrate the rule: “By way of example, ‘Millburn Tax Law Associates, John Smith, Esq.’ would be permissible under the trade name provision of this rule However, neither ‘Best Tax Lawyers’ nor ‘Tax Fixers’ would be permissible, the former being comparative and the latter being unprofessional.” The Court invited the State Bar Association to participate as *amicus curiae*. After receiving public comments, the Court again heard oral argument. This opinion followed.

HELD: RPC 7.5 is amended to permit a law firm trade name so long as it describes the nature of the legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. The name must be accompanied by the name of the attorney responsible for the management of the organization. The term “Alpha” in the Center’s name is impermissible under revised RPC 7.5 and current RPC 7.1. The remainder of the name, coupled with the name of a managing New Jersey attorney, satisfies revised RPC 7.5.

1. Current RPC 7.5 requires firm names to “include the full or last names of one or more of the lawyers in the firm or office”; permits “additional identifying language” “only when such language is accurate and descriptive of the firm”; and requires that “the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places.” RPC 7.1 also applies and states: “(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer’s services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading” or “(3) compares the lawyer’s services with other lawyers’ services.” The Center argues that RPC 7.5 is unconstitutional under the First Amendment and lacks synchronicity with the trend in most other states to allow trade name use. The State Bar Association and the CAA counter that RPC 7.5 is constitutional and no change is necessary. (pp. 8-12)

2. In Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557 (1980), the United States Supreme Court established a four-part analysis for courts to apply in commercial speech cases under the First Amendment:

(1) whether the expression is protected by the First Amendment, that is, whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the asserted interest; and (4) whether the regulation is not more extensive than is necessary to serve that interest. Two United States Courts of Appeals have addressed whether attorney-advertising regulations can survive scrutiny under the Central Hudson test, reaching opposite results. In Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010), the Second Circuit concluded that a prohibition on “trade names or nicknames that imply an ability to get results” was unconstitutional because the evidence relied upon did not support the regulation, and a blanket ban on trade names was more restrictive than necessary to address any potentially misleading commercial speech. In Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board, 632 F.3d 212 (5th Cir. 2011), the Fifth Circuit reviewed rules that prohibited “a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter.” The Fifth Circuit held that Louisiana had asserted two substantial governmental interests for its rules: “protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.” The court determined that

studies conducted by Louisiana's Rules of Professional Conduct Committee provided sufficient reliable evidence to uphold the trade name regulation. The court found it critical that the regulation only prohibited "those mottos or nicknames that state or imply an ability to obtain results." Thus, the Fifth Circuit concluded that the rule was "narrowly drawn to materially advance the substantial government interest in protecting the public from misleading lawyer advertising." (pp. 12-16)

3. Most states now allow use of trade names by law firms without any report of adverse impact to the public. The Court also recognizes the changing and multijurisdictional nature of the legal profession. As a matter of policy and without any need to reach the First Amendment issue under current RPC 7.5, the Court amends RPC 7.5 in recognition that use of trade names can be incorporated in the profession without harm to the public. The new rule provides a balance, permitting use of a trade name—but only when accompanied by an attorney's name—and imposing additional limitations on the descriptive language. A trade name may not be misleading or contain inherently superlative or comparative language. The express prohibitions in revised RPC 7.5 are consistent with RPC 7.1's restrictions on communications concerning a lawyer's service. Together, the rules promote our intent to instill public confidence in the professionalism of attorneys and the dignity entailed in the practice of law in New Jersey. Accordingly, the Court amends RPC 7.5(e) to permit use of a law firm trade name "so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. Such trade names shall be accompanied by the name of the attorney who is responsible for the management of the organization." (pp. 17-21)

4. A committee will be established to address implementation of amended RPC 7.5. (pp. 21-23)

5. Under new RPC 7.5, the Center's use of the term "Alpha" adds no informative content and is confusing and invokes the notion of primacy. It is impermissible under the standards animating revised RPC 7.5 and current RPC 7.1. The rest of the name, with the name of a managing New Jersey attorney, satisfies revised RPC 7.5. (pp. 23-25).

The advisory opinion issued by the Committee on Attorney Advertising is **AFFIRMED AS MODIFIED. CHIEF JUSTICE RABNER; JUSTICES ALBIN, HOENS, and PATTERSON; and JUDGES RODRÍGUEZ and CUFF (both temporarily assigned) join in JUSTICE LaVECCHIA's opinion.**

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SUPREME COURT OF NEW JERSEY
A-14 September Term 2008
062134

IN THE MATTER OF THE LETTER
DECISION OF THE COMMITTEE ON
ATTORNEY ADVERTISING, DOCKET
NO. 47-2007

Argued December 2, 2008 - Remanded February
26, 2009 - Reargued January 4, 2011 -
Reargued October 10, 2012 - Decided March
14, 2013

On petition for review of a decision of the
Supreme Court Committee on Attorney
Advertising.

Robyn M. Hill argued the cause for appellant
Alpha Center for Divorce Mediation.

Kim D. Ringler and Tara Adams Ragone, Deputy
Attorneys General, argued the cause for the
Committee on Attorney Advertising (Jeffrey
S. Chiesa, Attorney General of New Jersey,
attorney; Andrea M. Silkowitz, Assistant
Attorney General, of counsel).

David B. Rubin argued the cause for amicus
curiae New Jersey State Bar Association
(Kevin P. McCann, President, attorney; Susan
A. Feeney, on the letter brief).

JUSTICE LAVECCHIA delivered the opinion of the Court. This
appeal concerns Rule of Professional Conduct (RPC)

7.5, which governs law firm names in New Jersey, and Alpha Center for
Divorce Mediation, P.C. (the Center), an entity that operates in
multiple states and consists of lawyers and supportive personnel
engaged in divorce mediation services. The Center began operating in
New Jersey under the trade name that it uses in other jurisdictions,
and an issue arose over whether the Center's use of its trade name in
New Jersey violated RPC 7.5. Ultimately, the Committee on Attorney

dvertising (CAA), which opines on such questions in the context of attorney advertising, see R. 1:19A-2(a) (granting CAA exclusive jurisdiction to issue advisory opinions on attorney advertising compliance with RPC 7.5), determined that the Center's name violated RPC 7.5, and we granted the Center's petition for review of that advisory opinion. See R. 1:19A-3(d).

In the course of our review, we undertook a re-examination of RPC 7.5 in light of the widespread acceptance of the use of trade names by law firms around the country. As a result of that review, we proposed for comment an amended version of RPC 7.5. After receiving few comments on the proposal, we set this matter down for reargument and requested the participation of the New Jersey State Bar Association (the State Bar Association). Having heard argument and having considered the comments we received on the proposal to amend RPC 7.5, we now conclude that our policy on law firm trade names should be broadened to allow use of trade names within certain limits.

With this opinion, we adopt the proposed changes, with minor revisions, and order the steps to be taken to implement the amended RPC 7.5. To assist with the details of implementing the amendment, there shall be established a committee comprised of a broad array of attorneys, as well as other parties having an interest in promoting the public's need for trade name use to be informative and non-deceptive. A separate order establishing the committee and identifying its assigned agenda will issue following this decision. We also complete our review of the appropriateness of the trade name, Alpha Center for Dispute Resolution, using the revised RPC 7.5.

I.

Review of the legality of the Center's trade name began in the context of an advisory opinion issued by the Advisory Committee on Professional Ethics (ACPE). See R. 1:19-1 to -9 (granting ACPE with general authority to accept inquiries concerning proper conduct by members of legal profession under RPCs, with certain subject matter exclusions). Advisory Opinion 711, which was published on July 23, 2007, addressed the concerns of an anonymous inquirer who asked whether the Center was operating within the bounds of the New Jersey Rules of Professional Conduct (the RPCs). While Opinion 711 covered a number of different ethical considerations, it ultimately concluded that "'__Center for Divorce Mediation, P.C.," run by a

lawyer and involving other 'affiliated' lawyers, is not a permissible trade name under RPC 7.5."¹

The Center, understandably concerned about Opinion 711's impact, sought review of its trade name question from the CAA. The Center indicated that its "trade name would be used in conjunction with the name of the attorney principally responsible for the office." It also argued that the restriction on its trade name violated the First Amendment of the United States Constitution.

In a letter dated November 28, 2007, the CAA advised the Center that the use of its trade name, even accompanied by an attorney's name, was not permitted by RPC 7.5. The CAA explained that "neither 'Alpha' nor 'Center for Divorce Mediation' may be used in the name of a firm that provides legal advice and legal services." It stated:

The words "Center for Divorce Mediation" describe the nature of the practice, not the lawyers in the firm and so this is not permissible "additional language" under RPC 7.5(e) or Opinion 10 "Alpha," of course, is the first letter of the Greek alphabet but also has connotations of being first. Webster's Third New International Dictionary (3rd ed. 1993). In common parlance, the name would be interpreted to mean that it is the "first center for divorce mediation." The word "alpha" does not describe the lawyers in the firm and if it were meant to characterize the services provided by the lawyers it may be viewed as improperly comparative under RPC 7.1(a)(3).

¹ Opinion 711 did not disclose the name of the organization under review. However, as later revealed, that opinion concerned the Center.

The CAA further took the position that “[t]he addition of the managing attorney’s name . . . is merely an addendum to the trade name . . . [and] does not address or cure the problem caused by the trade name itself.” Finally, the CAA declined to address the Center’s constitutional argument, noting that it had no “power to rule on such constitutional questions.” Rather, the CAA advised the Center that its constitutional argument would need to be presented to this Court.

The Center then petitioned this Court for review, and in its petition it argued that RPC 7.5 did permit the use of a trade name for its organization. In the alternative, the Center argued that a prohibition on its trade name would be a violation of the First Amendment. The Attorney General, on behalf of the CAA, opposed the petition; however, we agreed to review the issues raised by the Center. 195 N.J. 514 (2008).

After hearing oral argument on the matter, this Court concluded “that a more developed record [was] necessary for the proper exercise of its regulatory and policy-making role over the practice of law by attorneys in this State.” In re Decision on CAA 47-2007, 209 N.J. 335, 337 (2009). As such, we ordered the following: (1) we remanded the matter to the CAA “to consider and make recommendations on any additional information, or change in format, that this Court should allow in respect of law firm names”; (2) we directed the CAA to consider the risk to the public and the potential for deception arising from trade name use by attorneys; and (3) we instructed the CAA to “include a full explication of the pros and cons of such action.” Id. at 337-38. We further indicated that oral argument may be necessary after the CAA issued its report and recommendations, and we retained jurisdiction. Id. at 338.

The CAA filed a report entitled “Recommendations on Law Firm Names” on June 18, 2010. In preparing the report, the CAA “requested and received written comments and held a public hearing.” The CAA also “reviewed the rules . . . and considered variations on law firm names with additional information or descriptive language.” Further, the CAA “considered whether there should be special rules for legal practices that can be performed by non-lawyers, such as providing arbitration and mediation services.” Ultimately, the CAA concluded that the rules should remain the same and that “the name or names of an attorney with a law firm should remain as the sole official designation of a New Jersey law firm.” (Emphasis added). Additionally, the CAA determined that the rules should apply even to legal practices specializing in arbitration or mediation.

We entertained oral argument after the CAA's report was published and thereafter issued a Notice to the Bar on April 6, 2011, seeking comments on the proposed changes to RPC 7.5 that were developed in the wake of those proceedings. Notice to the Bar, Use of Trade Names - Proposed Amendments to RPC 7.5, 204 N.J.L.J. 139 (Apr. 11, 2011). The Notice stated that

[t]he Supreme Court is seeking comments on proposed amendments to RPC 7.5 ("Firm Names and Letterheads") of the Rules of Professional Conduct relating to the use of trade names. The proposed amendment would be to paragraph [(e)] of RPC 7.5 as follows (with proposed new text shown by underscoring):

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Use of a trade name shall be permissible so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, unprofessional, or suggestive of the ability to obtain results. Such trade names should be accompanied by the name of the attorney who is responsible for the management of the organization. Any firm name containing additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

The amended rule would be accompanied by an official comment in order to provide the bar with illustrative examples, as follows:

Official comment (2011): By way of example, "Millburn Tax Law Associates, John Smith,

Esq.” would be permissible under the trade name provision of this rule, as would “Millburn Personal Injury Group, John Smith, Esq.” However, neither “Best Tax Lawyers” nor “Tax Fixers” would be permissible, the former being comparative and the latter being unprofessional.

We also invited the State Bar Association to participate as amicus curiae. The State Bar Association submitted a letter brief expressing its opposition to any proposed change to RPC 7.5.

After receiving public comments, this Court again heard oral argument on the matter. At issue were the proposed changes to RPC 7.5 and the application of either the current or proposed rule to the Center. This opinion follows our consideration of that final round of argument and comment on the proposed change to our policy on the use of trade names by law firms in New Jersey.

II. A.

The Rules of Professional Conduct stand as the ethical guideposts for lawyers in New Jersey. “The RPCs were initially adopted in 1984 on the advice of a special Supreme Court Committee assigned to study the American Bar Association’s Model Rules of Professional Conduct.” Kevin H. Michels, New Jersey Attorney Ethics § 1:2-1, at 4 (Gann 2012). That committee, known as the Debevoise Committee, prepared a report that “recommended some of the Model Rules for adoption verbatim, while recommending the modification of others.” Ibid. This Court adopted many of the Debevoise Committee recommendations but also added some of our own changes. Ibid. Separately, we adopted the “rules governing attorney advertising, RPCs 7.1 through 7.5.” Id. § 1:2-1, at 5. Those rules were “recommended by an independent special committee on attorney advertising.” Ibid.

Since the initial adoption of the RPCs, revisions have been made from time to time. On certain occasions, reviews of the American Bar Association (ABA) standards for professional conduct have triggered wholesale re-examination and updating of the RPCs. In 2002, the Pollock Commission, chaired by retired Associate Justice Stewart Pollock, made a number of recommended revisions to the RPCs in response to the ABA’s “Ethics 2000” Commission. Ibid. “After a comment period and a public

hearing, [this] Court adopted extensive amendments to the RPCs .

. . ." Ibid. In addition to such examples of comprehensive

reviews of the RPCs prompted by changes to the ABA model standards, our RPCs regularly are reviewed by the Professional Responsibility Rules Committee in its Rules Cycle Reports. This Court follows a fairly standard procedure for reviewing an individual Rule or set of RPCs, even should the need for such a review arise in the course of litigation or as part of regular review of the rules. See, e.g., On Petition for Review of Opinion 475, 89 N.J. 74, 78 (1982) (noting that "[o]ur traditional method of rule evaluation is by reference to Supreme Court Committee, report and recommendation by that committee, and finally, a decision by this Court"), appeal dismissed, sub nom. Jacoby & Meyers v. Supreme Court of N.J., 459 U.S. 962, 103 S. Ct. 285, 74 L. Ed. 2d 272 (1982) [hereinafter "Opinion 475"]. Thus, the history to the RPCs is replete with examples of re-examinations that have led to the addition, deletion, or amendment of the RPCs.

At issue in this case is RPC 7.5, which governs the advertising of law firms in this state. RPC 7.5 provides that

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(e), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other

communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

(c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

. . . .

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

(f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

RPC 7.5 must be read in conjunction with RPC 7.1, which concerns attorney advertising and states that

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional

involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

. . . .

(3) compares the lawyer's services with other lawyers' services

[RPC 7.1.]

The Center, both in its submissions and at oral argument, has argued that RPC 7.5 is unconstitutional under the First Amendment. Moreover, the Center contends that RPC 7.5 lacks synchronicity with the trend in most other states to allow trade name use and urges this Court to adopt the proposed amendment to adapt our RPCs to a changing practice. The State Bar Association counters that RPC 7.5 is constitutional and, accordingly, there is no reason to alter the rule. The CAA agrees, arguing that RPC 7.5 is constitutional and that no change is necessary.

B.

In Friedman v. Rogers, the United States Supreme Court upheld the constitutionality of a Texas law prohibiting "the practice of optometry under a trade name." 440 U.S. 1, 3, 99 S. Ct. 887, 890, 59 L. Ed. 2d 100, 106 (1979). The Court recognized that "there is a significant possibility that trade names will be used to mislead the public." Id. at 13, 99 S. Ct. at 896, 59 L. Ed. 2d at 112. Ultimately, the Court found that the prohibition of trade names was constitutionally permissible because the regulation furthered the "State's interest in protecting the public from the deceptive and misleading use of optometrical trade names." Id. at 15, 99 S. Ct. at 897, 59 L. Ed. 2d at 113. The Court reasoned that "the factual information associated with trade names [could still] be communicated freely and explicitly to the public." Id. at 16, 99 S. Ct. at 897, 59 L. Ed. 2d at 114.

Since Friedman, however, the Supreme Court has established a "four-part analysis" to address regulations in commercial speech cases under the First Amendment. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341, 351 (1980). First, a court "must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading." Ibid. Second, a court must determine "whether the asserted governmental interest is substantial." Ibid. Third, if the speech is protected and the governmental interest, in fact, is substantial, a court "must determine whether the regulation directly advances the governmental interest asserted." Ibid. Fourth, a court must grapple with the question of whether the regulation "is not more extensive than is necessary to serve that [governmental] interest." Ibid.

Of relevance to the matter here, two United States Courts of Appeals have addressed whether attorney-advertising regulations can survive scrutiny under the Central Hudson test, reaching opposite results. The United States Court of Appeals for the Second Circuit faced a challenge to New York "rules prohibiting certain types of attorney advertising and solicitation." Alexander v. Cahill, 598 F.3d 79, 83 (2d Cir.), cert. denied, U.S. ___, 131 S. Ct. 820, 178 L. Ed. 2d 579 (2010). In relevant part, the rules at issue in Cahill barred "trade names or nicknames that imply an ability to get results." Ibid. The Second Circuit concluded that the prohibition on trade names failed to survive scrutiny under Central Hudson

because (1) the evidence relied upon failed to support the regulation and (2) the blanket ban on trade names was more restrictive than necessary to address any potentially misleading commercial speech. Id. at 94-96. While recognizing that Friedman permitted the prohibition of trade names, the Cahill court concluded that "[t]here is doubt as to Friedman's continued vitality. Friedman preceded Central Hudson . . . and did not employ Central Hudson's multi-factor First Amendment analysis." Id. at 95.

The United States Court of Appeals for the Fifth Circuit faced a similar challenge to a state rule prohibiting certain attorney advertising. In Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board, 632 F.3d 212, 219 (5th Cir. 2011), the court applied the Central Hudson test to a set of Louisiana

rules governing attorney advertising. A portion of the rules prohibited "a nickname, moniker, motto or trade name that states or

implies an ability to obtain results in a matter.” Id. at 217. Notably, the Louisiana Association’s Rules of Professional Conduct Committee conducted a series of studies to evaluate the need for the rules. Id. at 216. The Committee conducted a telephone poll of 600 residents, asking each person about their perception of specific attorney advertising techniques. Ibid. The Committee also emailed a questionnaire to 18,000 members of the Bar Association and conducted three focus groups with members of the public. Ibid.

As a threshold issue, the Fifth Circuit found that Louisiana had “asserted at least two substantial government[al] interests [for adopting the advertising rules]: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.” Id. at 220. The court then determined that the Committee’s surveys and focus groups contained sufficient reliable evidence to uphold the trade name regulation. Id. at 225. The court found it critical that the regulation did “not prohibit all nicknames or mottos in every instance”; it only prohibited “those mottos or nicknames that state or imply an ability to obtain results.” Ibid. For that reason, the court concluded that the rule was “narrowly drawn to materially advance the substantial government interest in protecting the public from misleading lawyer advertising.” Id. at 225–26. As such, the court upheld the trade name regulation under the Central Hudson test. Id. at 226.

C.

Here, the tension between maintaining the status quo and adopting a broadening change to RPC 7.5 brings this Court to a crossroad. On the one hand, this Court is mindful that attorney advertising regulations are subject to constitutional scrutiny under the Central Hudson test. Further, we appreciate that legal minds can differ on the constitutional question whether use of trade names by law firms may be prohibited as a form of attorney advertising.

On the other hand, the vast majority of other states have adopted RPCs to allow for the use of trade names by law firms.² See, e.g., Cal. Rules of Prof’l Conduct R. 1-400(A) (2013); Conn.

² Our research leads us to believe that more than forty states have rules of professional conduct that permit trade name use by law firms.

Rules of Prof'l Conduct R. 7.5(a) (2012); Colo. Rules of Prof'l Conduct R. 7.5(a) (2012); Fla. Rules of Prof'l Conduct R. 4-7.9(b) (2013); Ga. Comp. R. & Regs. St. Bar R. 7.5 (2012); Ill. Rules of Prof'l Conduct R. 7.5(a) (2012); Mass. Ann. Laws Sup. Jud. Ct. R. 3.07, Rules of Prof'l Conduct R. 7.5(a) (2013); Pa. Rules of Prof'l Conduct R. 7.5(a) (2012); S.D. Codified Laws § 16-18-app.-7.5(a) (2012); Va. Rules of Prof'l Conduct R. 7.5(a) (2012). Indeed, North Carolina has a rule that is substantially similar to the amendment we proposed for comment earlier in the history of this matter:

A lawyer shall not use a firm name, letterhead of other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not false or misleading in violation of Rule 7.1. Every trade name used by a law firm shall be registered with the North Carolina State Bar for a determination of whether the name is misleading. [N.C. Rules of Prof'l Conduct R. 7.5(a) (2012).]

Plainly, many jurisdictions have perceived a benefit to allowing some use of trade names by law firms.³ We are pointed to no adverse consequences as a result of the steps taken in those states.

³ The ABA Model Rules of Professional Conduct includes a version of Rule 7.5 used in many states, which provides:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

The ABA, in its most recent review of the Model Rules in 2013, has not changed its version of Rule 7.5. See American Bar Association, ABA Commission on Ethics 20/20, http://www.americanbar.org/groups/professional_responsibility/ab_a_commission_on_ethics_20_20.html (last visited Feb. 19, 2013).

Our evaluation of this matter cannot ignore that most states now allow use of trade names by law firms, and we will not disregard their experience. None of the states that permit use of trade names report any adverse impact to the public. We also recognize the changing and more multijurisdictional nature of the legal profession. On balance, we have become convinced that trade names need not be forbidden in New Jersey and that we should align our law firms' naming options more in keeping with our sister states' recognition that use of trade names can be incorporated in the profession without harm to the public. Further, we do not believe that that step should only be allowed if and when required as if if and when required as a matter of constitutional command. For that reason, we need not reach the First Amendment question posed as to the validity of our current RPC 7.5. The abiding concern animating the RPCs governing law firm names and attorney advertising is to ensure that the public is protected from deceptive or misleading communications by attorneys when advertising who they are and the services they provide. The firm's name is undoubtedly part and parcel of the firm's advertising. See Friedman, supra, 440 U.S. at 11, 99 S. Ct. at 895, 59 L. Ed. 2d at 111 (noting that "trade name is used as part of a proposal of a commercial transaction"); Opinion 475, supra, 89 N.J. at 85 (treating trade names as form of commercial speech). That said, the public policy against misleading and deceptive attorney advertising can continue to be advanced notwithstanding the amendment of RPC 7.5 to allow for use of trade names as we have proposed.

We conclude that our RPC governing law firm names as a matter of sound policy should be brought in closer alignment with sister jurisdictions. The proposed amended RPC 7.5 provides a balanced solution. It permits use of a trade name -- but only when accompanied by an attorney's name -- and imposes additional limitations on the selection of descriptive language. The rule allows the use of a trade name that provides an accurate and informative description of an attorney's practice while preventing misleading and unethical attorney advertising. Permissible trade names must adhere to the prohibitions against the use of any inherently superlative or comparative language. The express prohibitions in the revised RPC 7.5 are consistent with RPC 7.1's restrictions on communications concerning a lawyer's service. Thus, the revised RPC 7.5 and RPC 7.1, in complementary fashion, promote our overriding desire and intent to instill public confidence in the professionalism of attorneys and the dignity entailed in the practice of law in New Jersey.

Accordingly, we now hereby adopt the proposed changes to subsection (e) of RPC 7.5, with minor revisions to promote clarity, along with an official commentary to accompany the amended RPC 7.5. The amended RPC 7.5(e) shall read as follows:

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Use of a trade name shall be permissible so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. Such trade names shall be accompanied by the name of the attorney who is responsible for the management of the organization. Any firm name containing additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

The amended rule shall be accompanied by the following official comment in order to provide the bar with illustrative examples:

Official comment (2013): By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Millburn Personal Injury Group, John Smith, Esq." However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results.

III.

As with many significant rule changes, the implementation details concerning execution of the new policy of amended RPC 7.5 are exceedingly important. They also are beyond the scope of this opinion, which addresses chiefly the policy change to be effected by the amendment we adopt today. After careful consideration, we have concluded that a special committee should be established to address the various aspects to the introduction of the use of trade names into our legal community. Thereafter, the CAA will be responsible for day-to-day administration of the new rule's application.⁴

The special committee will comprise attorneys, as well as interested public members who have experience in protecting the public from misleading or deceptive practices. The committee should consider whether registration must be or is advised to be required for use of a trade name, thereby providing a mechanism for acquiring prior approval that a name is not misleading, deceptive, or too similar to another firm's trade name; whether such a registration system feasibly can be established and, related thereto, whether a registration fee would be required to cover the administrative expenses of a registration requirement; whether a law firm that uses only the name or names of deceased and retired members of the firm should be required to register such trade names if registration is to be required; and whether a name can be registered if it is not to be used in an active practice (essentially reserving it from use by other attorneys). Several of these questions suggest themselves from the experience of other states.⁵

⁴ The revised RPC 7.5 will not become effective until after the committee has undertaken its review and this Court acts on the committee's recommendations. However, we nonetheless apply the revised RPC in this dispute over the Center's trade name, as the implementation details have no bearing on the question before us, and the Center is entitled to a resolution of this matter. See infra Part IV.

⁵ The committee is urged to examine the experience of other states in implementing trade name usage by attorneys. It should specifically look at the system adopted in North Carolina, whose rules were considered in the drafting of the amended RPC 7.5.

In sum, the committee's task is not to consider whether trade names should be allowed, but to assist the Court about aspects of implementation of RPC 7.5 that will now allow the use of trade names by law firms. The committee may examine and report back to the Court on any other relevant implementation issues that its study reveals. In that respect, the charge to the committee is nonrestrictive.

IV.

We turn finally to the application of the new RPC 7.5 to the Center whose appeal initiated our review of this subject.

The newly adopted RPC 7.5(e) permits the use of descriptors so long as the word choice is accurate, informative, and not misleading. The new rule expressly prohibits the use of superlative or comparative language.

The Alpha Center for Divorce Mediation, in the course of the dispute over the propriety of its name, agreed to include the name of its managing attorney. Thus, we are left to review the remaining aspects of the trade name. The CAA found the use of the terms "Alpha" and "Center for Divorce Mediation" to be inconsistent with the former rule. After we published our revised draft RPC, the CAA took the position that under the revised RPC, if adopted, "Alpha" is still an impermissible descriptor of a practice because it is misleading. The CAA maintains that "Alpha" conveys no accurate information about the practice. To the extent that it has several meanings, its secondary definition denotes "first" and thereby contravenes the prohibition against superlative descriptors.

The Center, on the other hand, maintains that "Alpha" is not misleading and that because it has multiple meanings it should not be confused with a superlative.

Although the amended RPC 7.5 now allows the use of trade names by law firms operating in New Jersey, it does not water down the prior prohibition against attorney advertising that contains superlative descriptions or suggestive comparative language. In our examination of the use of the term "Alpha" in the trade name title of this law firm's practice, we conclude that the word adds no informative content other than serving the impermissible purpose of invoking the notion of primacy. A canvassing of dictionaries for the common meaning of the word supports the CAA's conclusion that the consistent secondary

definition of "alpha" is "the first" or "something that is first" among others. See, e.g., The American Heritage Dictionary of the English Language 37 (William Morris ed., 1973) (defining "alpha" as "first letter in the Greek alphabet" or "first of anything"); Webster's Seventh New Collegiate Dictionary 25 (7th ed. 1972) (defining "alpha" as "first letter of the Greek alphabet" or "something that is first"); Funk & Wagnalls New Comprehensive International Dictionary of the English Language 41 (Encyclopedic ed. 1978) (defining "alpha" as "first letter and vowel in the Greek alphabet" or "beginning or first of anything"). The CAA correctly labeled the term as confusing to say the least and, ultimately, impermissible under the standards animating revised RPC 7.5 and the current RPC 7.1. We concur in that conclusion and hold that the bar we are establishing under our newly adopted RPC 7.5 is transgressed by the use of the term "Alpha" in the Center's trade name.

We further conclude that the remainder of the name, coupled with the inclusion of the name of a managing New Jersey attorney, satisfies the revised RPC 7.5.

v.

The advisory opinion issued by the CAA in this matter is affirmed as modified.

CHIEF JUSTICE RABNER; JUSTICES ALBIN, HOENS, and PATTERSON; and JUDGES RODRÍGUEZ and CUFF (both temporarily assigned) join in JUSTICE LaVECCHIA's opinion.

SUPREME COURT OF NEW JERSEY

NO. A-14

SEPTEMBER TERM 2008

DISPOSITION On petition for review of a decision of the
Committee on Attorney AdvertisingIN THE MATTER OF THE LETTER
DECISION OF THE COMMITTEE ON
ATTORNEY ADVERTISING, DOCKET
NO. 47-2007DECIDED March 14, 2013
Chief Justice Rabner PRESIDING
OPINION BY Justice LaVecchia

CONCURRING OPINION BY _____

DISSENTING OPINION BY _____

CHECKLIST	AFFIRMED AS MODIFIED	
CHIEF JUSTICE RABNER	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE HOENS	X	
JUSTICE PATTERSON	X	
JUDGE RODRÍGUEZ (t/a)	X	
JUDGE CUFF (t/a)	X	
TOTALS	7	

TYPES OF QUESTIONS

Opening Questioner: Help to get things started.

- What are going to be the major issues in the mediation?

Information Questions: To obtain facts and/or opinions.

Clarifying Questions: To make abstract and general ideas more specific.

- What you mean by.....?

Justifying Questions: To learn more of the reasons one party holds a position

- Why do you think.....?

Hypothetical Questions: To introduce ideas into the discussion.

- Suppose you tried this option, what do you think would happen?

Leading Questions: To suggest an idea within the questions.

Stimulating Questions: To encourage new ideas.

- Are there other ways to solve this problem?

Participation Questions: To encourage the expression of ideas and/or needs.

- What do you think about that.....?

Processing Questions: To bring the parties back to core issues.

- How does this relate to the issue of?

Alternative Questions: To compare two or more alternatives.

- Which of these two options do you consider the best?

Closure Questions: To encourage making the decision.

- Have we spent enough time on this issue?

Evaluation Questions: To help parties assess their progress.

- What will happen if you do this?

PERSONAL QUALIFICATIONS OF A MEDIATOR WITH STYLE

The Mediator with style:

1. Maintains a process perspective to disputes, which allows one to get beyond right or wrong, good or bad. When parties come into the room, the Mediator is not mediating two people, she is guiding parties through a problem solving process.
2. Maintains a perspective that goes beyond simple problem solving toward one of compassion and healing. There is a sense of the spiritual, i.e. connectiveness.
3. Is a proactive believer in process and does not go into it tentatively.
4. Is comfortable with handling and managing conflict. This should be natural.
5. Can tolerate and contain ambiguity and unpredictability. This is especially hard for lawyers who tend to be linear thinkers.
6. Is capable of remaining calm and poised in the face of flying allegations.
7. Can find the good in all people. Even a tiny bit of good.
8. Maintains balance between the parties.
9. Has strong ability for empathy. Has good listening skills and high emotional intelligence. *"A good people person"*.
10. Is patient and trustworthy. The Mediator shows up on time, is organized and focused and gets the work out when she says she will.
11. Masters reframing skills.
12. Is comfortable thinking and intervening strategically.
13. Maintains an eclectic flexibility so as to optimize rapid and responsive shifts of conceptual gears (depending on the situation, the Mediator can react quickly with whatever happens and generate on her feet something new to do when it is needed)
14. How does the Mediator on some level understand what is really going on? The Mediator uses *gut instinct*. This is how we connect at a very human level.

MEDIATION MALPRACTICE INSURANCE

If you require malpractice insurance NJAPM (New Jersey Association of Professional Mediators) provides a captive carrier with very reasonable rates for coverage. Remember, malpractice insurance covers providing defense counsel and payment of any settlement or judgment up to the limits of the policy.

Be aware that defending a malpractice claim is expensive so that the insurance carrier providing you a defense counsel even if there is questionable liability, may be worth it.

See, <http://www.njapm.org/content/professional-mediators-liability-insurance>

.

LEGAL MALPRACTICE INSURANCE

If you have coverage for either individually or your firm check the defense of professional legal services. If mediation and/or arbitration and/or ADR is not defined as being covered, if you request an endorsement for mediation, arbitration or ADR carriers provide that at no additional cost.

Many insurance carriers have defined professional legal services as follows:

“Most legal services and activities performed for others is:

- a. A lawyer
- b. A notary public
- c. An arbitrator
- d. A mediator, etc.

Under this definition you would be covered and provide both a legal defense and indemnity; in other words, payment for settlement or judgment.

FEE ARBITRATION NOTICE

At least two District Fee Arbitration Committees, Hudson (District VI) and Somerset and Warren (District XIII) have ruled that a fee arbitration notice to a mediation participant pursuant to Court *Rule* 1:20 A-2a is not required to collect mediation fees and that the Fee Arbitration Committee cannot consider participation in that program. The reason is that jurisdiction to arbitrate fee disputes is between clients and attorneys. Essentially, there is no attorney/client relationship between a mediator and the mediation parties.

In order to collect a mediator's fee on the civil side, you must sue in Small Claims or Special Civil part (or the Superior Court if greater than \$15,000.00); whereas on the family mediation side, the Court will issue an order to show cause and help collect the fee.

CONDUCTING COMPLEX/MULTI-PARTY MEDIATIONS

Hon. William A. Dreier, P.J.A.D. (Ret.)

(Materials adapted and expanded from notes of
Richard H. Steen, Esq.)

I. Preliminary Thoughts For All Mediations:

A. Study all materials beforehand

1. Mediation memoranda
 - (a) Review both fully-exchanged portions and confidential riders or addenda
 - (b) Review and mark up all appendices
 - (c) READEVERYTHING

2. Review governing law to be prepared to discuss with counsel

B. Listen

C. Assess parties actual goals and forward-looking interests

D. Be a teacher

E. Earn parties' trust and respect early in proceedings

II. Attributes of a Complex Mediation

- A. Multiple parties and complicated relationships
- B. Numerous and/or highly technical issues
- C. High stakes
- D. Ongoing relationships
- E. Involved or protracted litigation history
- F. Difficult counsel

III. **Conducting a Complex Mediation**

G. Setting the stage

1. **The agreement to mediate**

- (a) Alignment of parties: Is everyone to be there? If not, can we compensate for absence?
- (b) Division of responsibility, including paying you.
- (c) Decision maker must be there! (unless . . .)

2. **Scheduling the sessions**

- (a) When? Where?

3. **Determining the amount of time necessary**

- (a) Extensions if needed – hours, days, etc.

4. **Exchanging information**

- (a) Can you act as discovery master/case manager?

5. **Initial sessions with selected parties**

- (a) If needed, FULL DISCLOSURE; no one should feel left out.

H. **Organizing the participants**

1. **Party representatives**

(a) **Executive/decision makers**

- (i) On paper; in actuality; as developed at session; missing decision makers – on call, if you have to

(b) **Persons with substantive knowledge**

- (i) There? On call? reports; at adjourned session; consult between dates

(c) Responsible employees

- (i) CYA problem?
- (ii) Old friends?
- (iii) Write off – “I told you so” (no help) types
- (iv) Former employee’s separate agendas.

(d) In-house experts

- (i) Can be good (credibility) or bad for settlements, if they caused the problem

(e) Risk managers

- (i) Watch out for the bean counters; may have vastly different goals. (Don’t charge the loss to me!)

2. Independent experts

- (a) Can save cases – assess trust; can you appoint?

3. Counsel (in-house, outside, special)

- (a) This may be a “performance” or even “audition.” Watch out!

I. Understanding the issues and relationships**1. Party submissions – READ everything****2. Advance preparation and planning**

- (a) Where is case going?
- (b) Where is mediation going?

3. Assuring common understanding

- (a) This sometimes comes very late

4. **Identifying the relationships among the participants** – same

J. **Alignment of parties and interests**

1. **Defining and developing sub-groups**

- (a) Advance conference may help
- (b) Classes and subclasses (but don't get lost)

2. **Developing mutual interests**

- (a) Good technique – but these may shift

3. **Effective use of spokespersons**

- (a) Be sure not self-appointed
- (b) Does he/she actually speak for others?
- (c) May be hidden until private sessions.

4. **Mini-mediations**

- (a) Issue by issue
- (b) Party by party
- (c) Classes of claims
- (d) Parties with common targets
- (e) Breakout sessions from breakout sessions – don't be afraid of “unusual” alliances

K. **Maintaining focus and momentum**

1. **Power, authority and control** – Keep your eyes and ears open

2. **Achieving commitment and buy-in**

- (a) Foster those who want to settle

(b) Goal of all is to conclude matter; think of BATNA/WATNA

(c) Willing to increase/reduce offer/demand to get there

(d) Outside of box ideas – yours or theirs

3. **Scheduling and timing of participation**

(a) Separate sessions at different times/ days?

(b) “Leaders” at private sessions; give deference, give stake in process

(c) Then grouping of smaller players

(d) When all there, try to limit active participation

4. **Confidentiality and confidence**

(a) Problems with plaintiffs vs. defendants. Also between groupings within each category. All must respect your integrity NEVER violate confidences.

5. **Educating the parties and reality testing**

(a) This is where your credibility is tested. Some prior expectations may need to be shattered.

(b) This may be the whole purpose of the mediation.

6. **Dealing with the holdout(s)**

(a) This is the hardest part to deal with: Is an equally -liable party getting a free ride, or holding up a comprehensive settlement? If need be, isolate, and show the action can remain open as to this party only, sometimes works with claims assigned.

L. **Prioritizing issue development and decision making**

1. **Partial settlements/creating momentum**

(a) As these proceed, the snowball starts to roll. Sometimes, this is all you can get until additional discovery or later internal conferences. Don't give up; you always can reschedule. Be a pest!

2. Reinforcing programs and achievements

- (a) Keep up pressure;
- (b) Let all see that allegations are on path to full resolution.

3. Using experts effectively

- (a) Testing of theories, or even arbitration of technical issues (parties can settle by agreeing to be bound), with your supervision of the process, and resolve difficulties between experts.

4. Fact finding/consensus

- (a) Continue with neutral fact finding with either prior consent or reconvening to discuss.

5. Individual and sub-group caucus, and full sessions

- (a) Covered above.

M. Agreement and Closure

1. Techniques to close the deal – Impasse resolution

- (a) Legal and factual analysis, aided by mediator: face reality
- (b) BATNA/WATNA
- (c) Discussion of pitfalls in judicial resolution: judges and juries
- (d) Damage estimations
 - i. Transactional costs
 - ii. Item-by-item damage assessment
 - iii. Tax implications
 - iv. Resort to accepted outside standards
 - v. Verdict research services
- (e) Focus on forward-looking interests, not history or positions
- (f) Deal with fears of precedent

- (g) Abandonment of principles, “bad guy” winning
- (h) Split difference, only if close
- (i) “I have a number” (can backfire)
- (j) “If I could get ---, would you take/pay it if it settled the case?”
- (k) “If I can get them up/down to ---, would you make a significant change?”
- (l) Outside the box offers/demands of goods, services, future business
- (m) Probability analysis/gambling analogy

2. Performance issues

- (a) Monitors; escrows; using you as arbitrator in post-mediation arbitrations (Med/Arb)

IV. Settlement Agreements

A. Memoranda of Understanding

- 1. May (should) be binding, but with non-vital details to be filled in later
- 2. May have you settle minor issues with counsel in a mini-arbitration, if there is a problem.

B. Actual Settlement Agreement

- 1. You can help prepare; but have attorneys make changes to make it their own

C. Have something signed before parties leave.

D. Enforcement

- 1. Court.
- 2. Arbitrate
- 3. Liquidated damages clauses; escrows; letters of credit; confessions of judgments, etc.

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IMPROVING LAWYER JUDGMENT

BY REDUCING THE IMPACT OF
“CLIENT-THINK”

BY LAURA A. KASTER

The very nature of the lawyer-client relationship serves to increase the unconscious biases that impede the client/lawyer team's ability to see all the information before them and to evaluate its impact. “Client-think” is a real phenomenon and is reflected in the statistics that establish a very high rate of lawyer error in valuing cases for mediation and settlement. But the means to improve judgment is available; but first lawyers and clients have to accept the need to do so and establish methods and habits that reduce the impact of client-think.

The author, an arbitrator and mediator in Princeton, N.J., works in the greater New York metropolitan area, chairs the New Jersey State Bar Association Dispute Resolution Section, and is co-editor in chief of the NYSBA's Dispute Resolution Lawyer. She is a member of the executive committee of the Marie Garibaldi Inn of Court and teaches dispute resolution processes at Seton Hall Law School. Before establishing her practice as a neutral, she was chief litigation counsel for AT&T and prior to that a partner at Jenner & Block. For more information, see her Web site at www.AppropriateDisputeSolutions.com.

LAWYERING requires making judgments about the possible choices clients face. Indeed, Rule 2.1 of the American Bar Association (ABA) Model Rules of Professional Conduct (which have been adopted in 51 jurisdictions) mandates the exercise of judgment:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

However, law schools, law firms, and the profession in general have paid scant attention to the elements of judgment and how to systematically improve legal decision making. Lawyers may be fascinated by the new insights of neuroscience, but we have largely ignored more than 30 years of work by Nobel-winning psychologists who, even before pictures of the living brain could be seen in Functional Magnetic Resonance Imaging (fMRI), debunked the notion of a hypothetical “economic man,” who could simply elect to make rational choices. These scientists described a multitude of unconscious biases that impair rational evaluation. Daniel Kahneman¹ and Amos Tversky established that instinctive unconscious reactions often

trump rational decision making and deceive us into believing we have made a rational decision. Richard Thaler and Cass Sunstein applied many of these insights to public policy decisions.² Popular culture is receptive to these ideas. We lawyers need to examine them, learn from them, and incorporate protective processes into our approach to making decisions in order to improve outcomes. Without a method for guarding against the forces of the unconscious mind, and of group decision making, and then of calibrating the accuracy of our decisions, we have no hope of improving our own judgment.

Does Lawyer Judgment Need Improvement?

Perhaps we ignore the available information on decision making because we believe that close analysis of facts and law exempts us from the effect of unconscious bias. But concrete evidence establishes that we have no such exemption. In fact, it appears from the information now available that the very nature of client representation and loyalty exacerbates and concentrates known cognitive impediments to create what I call “client-think” (a take-off on “groupthink”³). Client-think impairs our ability to see critical facts, and even if we see them, to weigh them appropriately. The resulting selective perception is reinforced by the adversarial relationship with the opposition. Client-think makes us literally blind to visible and knowable risk. The result is mis-assessments of cases and their risk adjusted value.

In a series of works that analyze lawyer judgments about the value of cases that is at the core

of negotiation, mediation, and settlement, Randall Kiser and his colleagues have clearly established that despite high settlement rates, lawyers are routinely turning down settlements only to obtain a less satisfactory result at trial. They are not assessing the BATNA correctly.⁴ It is often when the two sides of the dispute have very different valuations of the likely outcome that mediation reaches an impasse, or settlement discussions fail. In 2008, Kiser along with Martin Asher and Blakely McShane published a study entitled “*Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*.”⁵ The authors analyzed over 2,000

California state court cases in which a rejected settlement

offer could be compared to the damages actually recovered at trial. They found that more than 60% of plaintiffs received less at trial than was offered in settlement.⁶

Thus, in over 60% of the cases studied, the plaintiffs’ counsel made a “decision error” (as defined by Kiser *et al.*), turning down a settlement and obtaining the same amount or less at trial. The rate of decision error for defendants’ counsel (turning down a settlement only to pay the same amount or more at trial) was much lower—

only 24%, which was a surprise. Thus, just under 25% of the defendants in the study sample faced a verdict higher than the rejected settlement offer. However, the impact (or magnitude) of decision error was very different. The “mean” cost of defendants’ mistakes was \$1.1 million (much higher than that of plaintiffs—only \$43,000).

Although the first study focused on California cases, Kiser followed up with studies in New York that reached substantially similar findings with a similarly large body of data.⁷ The magnitude of New York defendants’ mean cost of error was approximately 19 times the magnitude of the plaintiffs’ mistakes. And in larger cases the dollar amounts become startling. For all the cases studied, where the claim was \$1-\$50 million, the mean cost of decision error for plaintiffs was approximately \$327,000, and the mean cost for defendants’ decision error was \$5.326 million.⁸

Kiser was so impressed by these findings that he decided to study the thought process of a small group of lawyers who routinely make good valuations. Kiser interviewed the members of this

*“Client-think”
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group to learn their methods in order to teach others to improve their odds.⁹

Studies on failed decision making can teach us how to avoid some of the worst unconscious problems. But first, we have to accept the proposition that we badly need correction when it comes to case valuation; we need to establish and then follow a better methodology. However, most lawyers are not even aware of the problem; but even if they are, they are not convinced that we need to take action.

What Is Client-Think and How Does It Misguide Us?

Lawyers are invariably put into a situation that constitutes a perfect storm of unconscious influences calculated to impair their judgment. These influences (known as biases and cognitive barriers in the psychological literature) are well documented in general. Kahneman's current bestseller provides a valuable general introduction to cognitive biases and why they impair everyone's judgment. These biases coalesce in the lawyer-client relationship, magnifying the potential for mis-evaluation. The lawyer and the client immediately constitute a group of two people. In large cases, the lead (i.e., first chair) lawyer may have others working with him or her (partners, associates, investigators, paralegals, and experts). Their task is to find ways to support the client's case—and uncover weaknesses in the adversary's case. Unconsciously, they have taken a side from the outset. Once the parties file their pleadings, submit their motions, and engage in discovery, which usually leads to disputes, the table has been set for client-think.

Groupthink, the term invented by Irving Janis, describes the kind of impaired group decision making that led to the Bay of Pigs Invasion. Janis identified the following symptoms of group-think:

1. The group feels it cannot fail.
2. The group rationalizes away disconfirming data and discounts warnings.
3. The people in the group believe they are inherently better than their rivals; the opposition is demonized or stereotyped.
4. Dissent is discouraged, overtly or covertly.
5. The group comes to the belief that it unanimously supports a particular proposal without necessarily asking what each individual believes (a process of polling that Kahneman thinks should be done in writing and before discussion).
6. Individuals self censor. Few or no alternatives are discussed and people do not sur-

face risks or seek outside expertise that has no vested interest.¹⁰

Having worked with large teams of trial lawyers for many years, I see a parallel structure in the legal team.

In the case of the planning for the Bay of Pigs, the individuals in the White House Cabinet Room who knew most of the facts were at the bottom of the hierarchy. When someone asked what would happen if the invasion failed, the answer was that the 1,400 CIA-trained Cuban exiles who carried out the invasion would simply melt invisibly into the hills. No one checked to see where those hills were located. In fact, they were 40 miles or more away from the landing point for the invasion, known as the Bay of Pigs. After the fiasco, President John F. Kennedy asked former President Dwight Eisenhower if there was any strategy that could have made the effort successful. Eisenhower declined to discuss strategy, insisting that he wanted to focus on the decision-making process that got them to the point of invasion. Kennedy did learn from his mistakes and significantly reorganized his decision-making process to encourage dissent and critical evaluations among his team. He took the group out of the Cabinet room, asked for multiple proposals, and had the proponent of any proposal oppose it and develop support for approaches suggested by others.¹¹

Other unconscious barriers to good decision making can exacerbate client-think. An example is the process known as anchoring. Kahneman (who worked closely with Tversky before the latter's death) identified two separate influences at work in anchoring. The first is that, from a known fact, we adjust to reach our conclusion, but our adjustment is not sufficient. At the same time, says Kahneman, the anchor has an "unconscious priming effect—a suggestion to the mind that becomes associated with the matter at issue." So the process begins with a possibly irrelevant fact that, in our mind, becomes associated with the thing we are evaluating. Then, that fact is adjusted. The problem is that our adjustments are always insufficient. So, for example, if I live in Chicago, I will estimate Milwaukee's population based on Chicago's, but I will overestimate because I am anchored in too high a number. If I live in Green Bay, my estimate will be too low because I am anchored in a low number.

A lawyer might fall into the trap of anchoring if he or she unconsciously anchors on the number the client, an expert, or a newspaper, suggests is fair, without specific reference to the case at hand. Even actual damages may serve as an inappropriate anchor because the value of a case is

never the same as the damages range and the plaintiff never has a 100% chance of winning. Also, that value must take into account the costs of trial, expert fees, time, and attorney fees.

Now, let's do a little experiment on the unconscious impact of an irrelevant number. First, write down the last three digits of your telephone number. Now, guess whether the date that Attila the Hun was defeated was before or after that number and write down that date. (This won't work if you know the date.) Now guess the actual date. In extensive experiments with this problem, on average, people with phone numbers lower than 300 selected a date between 500-800 years earlier than the date chosen by people with a phone number over 600. This is in a situation where it is ab-

solutely clear to the conscious mind that the phone number has no bearing whatsoever on the answer to the question. And incidentally, to avoid a flood of "Googling," the date is 451 CE.

Kahneman says that negotiators can counter the impact of anchoring by consciously focusing on the anchor and searching for arguments against it ("thinking the opposite").¹² Lawyers should seek to avoid anchoring and they should involve their

clients in this process. However, if the client insists on hearing only positive information, the lawyer will have a difficult time communicating unbiased valuations to the client.

Another unconscious barrier that contributes to client-think is lawyer overconfidence about the ability to accurately predict outcomes. Several studies have revealed that more than 80% of lawyers believe they are in the top 10% when it comes to judging outcomes.¹³ Overconfidence makes accurate prediction less likely, and ensures that measures will not be used to improve the accuracy of case outcomes and calibrate estimates.

Then there is the client's "sunk-cost bias," which causes clients to feel the investment justifies going forward with the case, rather than settling. But these past costs are irrelevant: only future costs are relevant to deciding whether and how to proceed.

A powerful description of sunk-cost bias in another context is found in John Krakauer's book *Into Thin Air*, where, despite well-established rules about descending Everest before the weather could defeat them, the climbers and even some guides violated these rules because they had put

three months and \$65,000 in the effort. As a result, six climbers lost their lives.

Framing the issue is another component of client-think for both plaintiffs and defendants and their counsel. Kahneman and Tversky have clearly established that the perception of the issue changes our response to risk. We are willing to accept less if it is a sure thing when we are seeking a gain and we are gamblers when we face a potential loss.¹⁴

What happens when these and other unconscious influences coalesce in client-think? It is called "attention blindness." In looking to support our client's position, we literally fail to see damaging evidence or disconfirming information that would directly impact risk assessment. I know of no better way to convince you of this than to direct you to the YouTube presentation called the "Monkey Business Illusion." You should take a moment to Google it on your computer to experience it.

How Can We Improve Our Risk Assessments?

If you have been persuaded that our brains can get in the way of making reasonable judgments, that unconscious biases

and heuristics (i.e., here unconscious strategies or short cuts for solving problems) have an impact on everyone's judgments, then there are some steps that lawyers can take to improve the quality of their judgments about liability risk and damages:

1. *The devil's advocate.* The first step is to organize your team and your collection of information for better absorption of the information, avoidance of attention blindness, and to ensure better risk assessment. For example, once a team of lawyers is assigned to work on a case, assign one member of the team to play the role of devil's advocate (i.e., assume the perspective of the adversary). This person will examine all the evidence (from the beginning) in that light, and bring damaging evidence directly to the lead lawyer and the client without gloss.

I once suggested a devil's advocate to a lawyer, who said, "Yes, and then we kill him." It was a great rejoinder and a real example of the problem itself. The use of a devil's advocate should not await the mock trial or jury study.

2. *Keep communications open.* To avoid attention blindness, it is vital for the team to keep talking to the other side, trying to learn how it views the

There are steps that lawyers can take to improve the quality of their judgments about liability risk and damages.

issues, the witnesses (its and yours), the arbitrators or judge, and the evidence.

3. *Involve the client.* One way is to probe the client for information about the adversary's views of the facts and other aspects of the case. It can be useful to ask the client how he or she can explain what the adversary experienced, what it wants, and how it might interpret key evidence.

4. *Do pre-mortems.* Kahneman suggests doing pre-mortems. It involves having the team imagine, well before the trial, that it lost the case. Then have the team discuss the reasons for the loss. This will bring up troubling evidence or issues of law. Having this information will enhance the reliability of the team's risk assessment.

5. *Record each team member's views on each issue.* Kahneman also suggests that before undertaking a group risk analysis, each member of the team should write down his or her views on each issue. This can also avoid the trap of groupthink.

This suggestion is especially useful in firms where teams are hierarchical because it encourages lawyers who are lower down in the hierarchy to speak up, and thereby make a real contribution to the assessment process.

6. *Budget going forward.* Be sure to budget and account for costs and fees going forward in assessing the value of a case for settlement.

7. *Describe the case to others.* Another technique is to describe your case to others (without breaching confidentiality) who have no interest in the outcome, and do not know or care what side you are on. Don't even tell them. Then ask how they see the case, and what do they think are the risks?

8. *Use jury studies.* Undertake jury studies if the

case warrants the expense or use online jury research.

9. *Going forward.* Keep records of your case valuations, liability assessments, and budgeting costs and fees in order to evaluate them at the end of the trial, or after a settlement, to calibrate them against actual results. By recording the settlement analysis for comparison to the eventual result at trial, arbitration, or mediation, you will be able to discern your errors or their patterns.

Law firms and corporate law departments could help their attorneys refine their judgment skills by requiring them to keep a file of their risk assessments and budget estimates at various stages, and to have other firm lawyers comment on them, and then actually compare them to the final award or settlement.

Conclusion

The unconscious mind is both an ally and foe, but we can help ourselves avoid attention blindness and improve our risk assessment skills if we admit they need improvement and commit to an evolving but methodical process. We need to keep better records to help us with these assessments. We should make a habit of keeping information on budgets and ultimate costs, settlement offers, and ultimate results. We should also ask for (and give) feedback on risk assessments and on settlement offers or demands before making them.

There are good reasons to take these steps. Biases will sabotage our efforts if we don't create and follow a method for decision making. Therefore, we should establish checklists and routine procedures to facilitate a more reliable risk assessment process that will help us all avoid error and improve our judgment. ■

ENDNOTES

¹ Author of the bestseller *Thinking Fast and Slow* (Farrar Straus 2011).

² Authors of *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale Univ. Press 2010).

³ This term was invented by Irving Janis, *Victims of Groupthink* (2d ed. Houghton Mifflin 1982).

⁴ BATNA (Best Alternative to a Negotiated Agreement) is a term invented by Roger Fisher and William Ury in *Getting To Yes* (Penguin 1981). In the context of this discussion, it means the present value of the likely outcome at trial less costs, for plaintiffs, and with the costs added for defendants.

⁵ In *5 J. Empirical Legal Stud.* 551

(2008).

⁶ Their analysis did not typically include litigation costs and attorney fees because that information was not available. If it had been, the rate and cost of valuation errors would have increased.

⁷ See Randal Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (Springer 2010).

⁸ Randall Kiser, "Judgments: How We Reach Them and How We Can Improve Them" speaking at the NJSBA Dispute Resolution Section, Jan. 24, 2012.

⁹ His findings are in the book *How Leading Lawyers Think* (Springer 2010).

¹⁰ See Janis, *supra* n. 3.

¹¹ Irving L. Janis, "Groupthink," *Psychology Today* 5: 6 (November 1971), 43-44, 46. 74-76; See also *Victims of Groupthink*, *supra* n. 3.

¹² Kahneman, *supra* n. 1, at 122-28.

¹³ Jane Goodman-Delahunty *et al.*, "Insightful or Wishful: Lawyer Ability to Predict Case Outcomes," *Psychology, Public Policy and Law* (May 2010) (finding that litigators—particularly male litigators—are overly optimistic in the predictions of trial outcomes and the higher the level of confidence in their predictive capacities, the more likely they were to fall short of their goals.)

¹⁴ Kahneman, *Thinking Fast and Slow*, *supra* n.1, at 271-77.

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CHAPTER EIGHT

BLOWING OFF STEAM: VENTING AS A CATALYST OR IMPEDIMENT TO RESOLUTION

Terri Roth Reicher, Esq.*

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* I am indebted to my family for their constant support and helpful comments to earlier drafts. I wish to thank the Librarians at William Paterson University, Cotsakos College of Business, Wayne, N.J., for their assistance. I also extend my heartfelt appreciation to numerous mediation colleagues who were freely willing to share their “venting” experiences.

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Two brothers, Sam and Jack, sold a family business they inherited from their father. After the sale, they became embroiled in a bitter dispute with Bill, the purchaser. The parties executed a standard buy-sell agreement that provided that the brothers remain as consultants to the new owner for a short period of time. It also contained a buyout provision that combined fixed payments plus a percentage of sales for a five-year period. The brothers sued Bill for monies owed, challenging the accounting that was provided. Bill counterclaimed, accusing the brothers of overstating the original sales figures upon which the buyout was based.

Both parties were represented by experienced counsel and all came to the court-ordered mediation to participate “in good faith and with a sense of urgency,” which was the standard required by the court. The venue was ideal for settlement—a bright conference room with adequate nearby caucus space, a large table, lovely views and in a location convenient for everybody. A smorgasbord of food and drink was available in the room for everyone’s comfort. The mediator began with an opening statement, followed by each of the lawyers’ brief assessments of their cases. Emotions in the room were high. Once the clients had an opportunity to speak, the anger surfaced rather quickly. The accusations, subtle digs and name calling began. The air was heavy with animus and the venting was pronounced. Deadlock seemed inevitable. The foundation for ultimate impasse was established.

The focus of this chapter supports the notion that venting, contrary to popular belief, is an impediment and not a catalyst to resolution. This chapter explores the historical context of venting and examines mediation strategies which foster the free flow of information without engaging in uncontrolled venting of anger. Venting is discussed within the context of facilitative and evaluative mediation styles and does not reference transformative mediation. Venting in joint session is distinguished from its use in caucus sessions. Vignettes are utilized to relate psychological anger theory to actual mediation practice. The focus is to present information to the practitioner to avoid pitfalls associated with venting. The goal is the avoidance of premature impasse.

[8.0] I. OVERVIEW OF VENTING

Venting is described as giving expression or utterance to anger. Traditional mediation teachings such as those posited by Ury and Fisher¹ advocate the use of venting. Venting is seen as a way to release emotions. The

¹ Roger Fisher & William L. Ury, *Getting to YES* 2d ed. (Penguin Books 1991).

utility of venting has maintained its rightful place within the pedagogy of mediation process. However, this theory is not supported in much of the psychological literature. Psychological research has shown little corroboration for the beneficial effects of venting and instead suggests that venting increases the likelihood of anger expression, aggression, hostility and its negative consequences.

The root of the word vent comes from the Anglo-French “aventer” meaning to air. The origins of the term “venting” are traced to the teachings of Freud and his hydraulic model of anger, in which he theorized that expressing hostility was better than repressing it. Freud analogized human anger to a pipe full of hot water; if the steam is not properly “vented” it will explode. The concept of “letting off steam” has gained acceptance both within popular culture and among many conflict resolution theorists. There are numerous venting analogies that have become popularized when focusing on anger and its release. Lohr² notes that commonly used expressions for venting anger include “get it off their chest,” “blow off steam,” and “let it all out.” He notes that people can be compared to pressure cookers and their anger is akin to the steam vapor trapped inside the pot.

The historical basis for anger expression comes from the catharsis model, which provides that an individual who acts in a hostile manner will subsequently reduce angry and aggressive feelings. Catharsis is first attributed to the teachings of Aristotle in which he hypothesizes that watching tragic plays allows viewers to have a release from negative emotions. Catharsis theory is harmful because it justifies and perpetuates the myth that anger is good, despite much of the available scientific evidence indicating that venting anger increases aggression and violence. Catharsis is a means of relieving the pressure that anger creates. This theory embraces the concept that it is better to release the anger in increments rather than repressing it. If repressed, the anger will build to the point that a dangerous explosion occurs. The eruption thus described can be detrimental to the mediation process.

² J.M. Lohr et al., *The Psychology of Anger Venting and Empirically Supported Alternatives That Do No Harm*, *Sci. Rev. Mental Health Prac.* (2007) pp. 53–64.

**[8.1] II. “CONTROLLED VENTING”
AT THE JOINT SESSION**

At the outset of the mediation, it is imperative that the mediator highlight the unique opportunity the participants have before them. Parties can tell their stories in informal and uninterrupted ways, not constrained by rules of evidence and other formalities that may be implemented in arbitration or litigation. If parties are assured that they will be heard without the need to resort to rancor, blaming language or histrionics, the potential for reaching impasse is greatly lessened.

Often, venting behavior is exhibited early in the joint session, soon after the mediator’s opening statement is concluded. A participant who is prone to invoke the technique of venting is more apt to be the party who has had all his emotions contained and cannot wait to confront the offender. Face-to-face discussions with a moderating force in the room present a significant deterrent to control negative behaviors. However, if information is presented in an angry, contentious, or hostile manner, it is possible that the new information is not fully heard, appreciated, or processed. Because venting has long been advocated as an intervention to be used during the mediation process, it is not uncommon for a lawyer to have advised the client (prior to arriving at the mediation) to “get it off his chest” at this stage. Unfortunately, the process of recounting the grievances may “add fuel to the fire.” This may require the mediator to work harder to undo the damage caused by “reliving the wrong.” Anger is disruptive to the resolution of the dispute.

[8.2] A. Strategies

The mediator’s role is often analogized to that of a “circus ringmaster.” However, if an environment can be established in which the venting communication uses less blaming language, the anger will not be reinforced and may produce an opening for dialogue. In order to achieve beneficial exchange of information, the venting must be “controlled.” The mediator is encouraged to adopt anger-control strategies.

A few simple techniques such as encouraging the participants to describe the offending incident in terms of “I,” not “you,” are helpful. For instance, in an employment dispute, a statement such as “I felt like you were ignoring the good work I am doing for the corporation” as opposed to “You never gave me credit for the work I produced” shares the same information yet uses a diametrically different tone. A level of venting can be achieved without creating a situation where the perceived offender is

so alienated that meaningful negotiations could not proceed. This expression of anger communicates that the issue under consideration is very important to the person and he or she is stalwart in that position. It is critical that if the mediator allows the venting to proceed, the mediator must be cognizant of its duration and be vigilant not to allow the expression to linger. If the venting can be channeled and perhaps limited in time and scope, it may not be detrimental to the process.

However, anger is multifaceted. It is a negative feeling associated with subjective as well as physiological characteristics. Classic physiological characteristics include the increase in heart rate and blood pressure. Such physiological manifestations are not conducive to the free exchange of information or productive communication, which are the tenets of a successful mediation. These characteristics create an “internal venting” which also can be harmful to the mediation.

Psychologists study emotions in the context of attribution-appraisal and reappraisal theory. Anger results from attributing a negative event to causes that are internal to, and controllable by, another individual. A person experiences anger by attributing responsibility or blame to an offender in an anger-arousing incident. But that anger can change if one “reappraises” the anger-provoking situation. If appraisals are necessary for generation of emotions, changes in appraisal may be necessary to change emotions. Persons who are willing to reappraise the situation that initially provoked the anger experience less anger than those who are less apt to reappraise. Reappraisal theory and the exchange of new information is critical to a successful mediation.

In the joint session, the goal is to share valuable information to allow the parties to reassess their original position. Controlled venting allows the detailed information exchange, which may not have been readily available or apparent to the participant prior to the mediation. Mediators who can foster an environment in which the parties are encouraged to reappraise the facts as they originally perceived them may avoid laying the seeds of impasse.

Let's return to the sale of the family business. Sam and Jack approached the mediation assuming that they were being cheated by the purchaser; they expressed anger and exhibited open hostility toward the new owner. Once the mediator was able to diffuse the anger, the brothers heard how the recession negatively impacted the business and learned that Bill was experiencing severe pricing pressures from overseas manufacturing competition. Both of these factors greatly contributed to the diminu-

tion in receipts paid to the brothers, not irregularities in accounting methods as originally claimed.

Application of attribution, reattribution and reappraisal can also be seen in a mediation within the health-care arena. For instance, a medical billing service sued a chiropractor client for failure to pay invoices for collection services rendered. The chiropractor counterclaimed and court-ordered mediation ensued. The doctor assumed that the agency was not giving proper attention to his accounts but, during joint session, after much blaming of and accusations directed toward the female owner of the collection agency, the chiropractor learned that his new office manager lacked a basic expertise in medical computing and coding. The errors were coming from the doctor's office and not attributable to the actions of his billing service.

New information changed the belief in the offender's culpability. These ameliorating factors exhibited in a controlled venting situation provided a satisfactory explanation to the circumstances, prevented impasse at this juncture and allowed the mediation to continue.

[8.3] B. Venting and Its Role in Caucus

The role of the mediator is to assure a safe working environment in which the parties are encouraged to attempt to resolve their disputes. If the venting manifests itself in the form of verbal attacks or threats, the mediator must intervene immediately. Nonverbal sources of venting are equally harmful. Such common displays of anger may include pounding the table, shoving a chair, throwing a book or file, or dramatically ripping up a document. Physical venting tends to escalate the anger rather than dissipate it. One of the most damaging behaviors a mediator may witness is the combination of a pointed animated finger accompanied by loud, yelling speech.

The mediator has several options when faced with this unproductive hostile behavior. A mediator may call for a break in the proceedings, the suspension of the mediation, or most commonly, a move from joint session into caucus. Research revealed that venting to third parties tends to escalate the anger and is not conducive to a conciliatory tone. In a recent study, Parlamis³ observed that venting to a third party resulted in greater anger than not venting, whereas venting to the offender directly did not show a significant difference from not venting at all.

³ See appendix at the end of this chapter.

It is not uncommon to hear in caucus, especially when the complainant is highly suspicious of the offender, an animated discussion of the underlying distrust of the other party's motives. For instance, in a conflict that involves a builder and a homeowner, the homeowner may ascribe negative motives to the behavior of a contractor. Often an angry homeowner accuses the worker of wanting to finish the job quickly, paying no attention to detail, and freely substituting inferior materials for the ones expected. New research suggests that it is more advantageous to the success of the mediation process if the homeowner would express these concerns directly to the builder in joint session rather than repressing these thoughts and waiting to share them with the mediator in caucus.

The dispute involving Sam, Jack and Bill serves to demonstrate this concept. During the joint session, Sam appeared to be angrier than Jack. Once the parties proceeded to caucus, the mediator opted to meet first with Jack and his attorney. The mediator learned that the interests of the brothers were quite divergent. Jack is entrepreneurial, has invested in an overseas business, and is excited about his new venture. He is anxious to receive the remaining monies owed to him from his former business. He seeks closure. Sam has not moved on. He has taken the money from the sale of the business and is relaxing during retirement. Sam has plenty of time to devote to this ongoing conflict. Sam is "married to the dispute" and does not appear to value finality. Armed with that information, the mediator enters the caucus to meet with Sam and his counsel. The mediator anticipates that Sam will want to engage in protracted venting. The neutral also realizes that venting to a third party rather than the offender will tend to be detrimental to the process. Those like Sam who are highly invested in the sustenance of the dispute present a difficult circumstance for the mediator. The mediator must engage in a delicate balance. He wants to encourage Sam to present his side without rehashing his many grievances and eliciting the negative emotion that his venting will produce while at the same time encouraging Sam to share his concerns with Bill when they return to joint session. The mediator may also need to critically examine Sam's position to motivate him to reappraise the situation and attribute a higher value to resolution of the dispute.

However, venting to the offender has its limits. In an Equal Employment Opportunity Commission (EEOC) mediation in which an employee files a charge complaining of sexual harassment against a supervisor, it is not advisable to have the parties in the same room. In lieu of confronting the offender, it is recommended that a knowledgeable representative from

Human Resources or the supervisor's supervisor be present in case any venting is unleashed by the charging party.

Economic disputes have been used to illustrate venting strategies. However, the information presented is applicable in other types of mediations. Many jurisdictions provide for community mediation. In this forum, neighbors are encouraged to meet to settle noise or property disputes such as barking dogs, loud music from aspiring teenage performers, boundaries and unkempt yards. During these mediations, the parties are generally unrepresented. Emotions run high, time is very limited, and the participants are usually unfamiliar with this method of conflict resolution. One can characterize the process as "guerilla mediation." The complainant is given an opportunity to confront the offender, which we know may have beneficial effects such as a reduction in anger. But the mediator must exercise some restraint upon the parties. Controlled venting is paramount because of the ongoing relationship that must endure once the parties leave the mediation.

A similar situation is present in a dispute involving divorced parents with joint custody. They come to the mediation to resolve a parenting issue, such as who gets the children for the Thanksgiving holiday. Representation may not be present, the subject matter is emotionally charged, but, most importantly, the disputants must maintain a continued relationship with each other as they jointly share the responsibility of raising their children. Encouraging the parties to explode with emotion will be counterproductive for this conflict and damaging to resolving their future disputes.

In elder mediations, a different set of concerns exist, yet, again, the utility of venting is questioned. For instance, if Mom is in the nursing home, the family is often faced with difficult end-of-life treatment options. The circumstances tend to be quite stressful. A longstanding relationship is in its final stages where old wounds and petty jealousies often surface. Adult children embroiled in a parent/child dispute are cognizant that angry venting toward the senior can be particularly hurtful and they may not have the opportunity to undo the damage from hostile exchanges. The power difference between the generations is often palpable. Furthermore, adult children who are engaged in a conflict with their siblings concerning the finances or the care of the elder may be prone to unproductive venting, too. Once the elder has passed, they will want to maintain a cordial relationship with their siblings. Therefore, during this difficult period, the mediator may want to encourage moderation in their expression of anger.

[8.4] C. Venting and Other Considerations

Thus far, the historical context of venting and its relevant applicable psychological theories have been examined. Despite knowing that each mediation takes on its own character and rhythm, the mediation process is generally viewed as a structured activity which proceeds in distinctive stages often starting in joint session and moving to caucus when appropriate. Mediator behavior must be fluid and respond to the use of venting in each stage. In addition to distinguishing venting strategies from a temporal perspective, there are other factors that may come into play when assessing the impact of venting within a mediation.

[8.5] 1. Status

Parlomis found that offender status is also a contributing factor in the assessment of the impact of venting in its expression of anger. Higher status individuals have greater freedom to express anger, whereas individuals dependent upon higher status offenders for rewards (e.g., job, bonus, and good assignments) might be inhibited to engage in venting of anger for fear of reprisal. An individual engaged in an expression of anger at a higher status offender would tend to do so in a tempered way, using less blaming language and fewer responsibility attributions. In a workplace dispute where an employee denied a promotion is claiming employment discrimination, one would anticipate inhibited expressions of anger if the employee is currently employed by this company.

Status also played a role in our chiropractor dispute. The older well-established doctor was hostile to the process, resentful of wasting his time, and angry that he was being sued by the seemingly less educated owner of the agency. He engaged in arrogant posturing, which was escalated by the behavior of his attorney. The young owner of the billing service exhibited tremendous poise and responded to the physician's venting by the constant introduction of technical information that clearly contradicted the doctor's assertions. She never resorted to emotion in her responses. She and her lawyer ignored the physician's anger and used each outburst as an opportunity to further present her position, thereby capitalizing on the chiropractor's venting and turning it to their advantage.

[8.6] 2. Balance of Power

A corollary to the impact of status on the mediation is seen in Friedman's⁴ study of electronically mediated disputes involving eBay in which researchers observed that the expression of anger led to a higher rate of resolution when the recipient of anger is in a weaker position. They noted that, generally, anger reduces the likelihood of settlement because such expression causes people to focus less on their own interests and more on retaliating against the other party. However, the recipients of anger will respond in a more conciliatory manner only if they have more to lose in the event of impasse. This study highlights the role that power imbalance may play in assessing the value of venting.

[8.7] 3. Gender

Gender may also play a role in the impact of venting in the mediation process. According to Domagalski,⁵ earlier studies of gender and anger revealed that females, not surprisingly, tend to cry when angry and enlist the use of avoidance and suppression techniques. She noted that females are more comfortable with the use of calm discussion than their male counterparts. Conversely, males tend to exhibit aggressive displays of anger and make external attributions of blame when angry. Sex differences in anger expression are attributable to gender-specific socialization and cultural norms and should not be ignored in the assessment of venting strategies in conflict resolution.

[8.8] 4. Ethnicity

Anecdotally, many seasoned mediators noted that participants' responses to the use of venting during mediation often varied depending on the country or region of origin of the parties. Although research evidence on this point appears to be lacking, they noticed a different attitude toward the use of and the response of venting based primarily on cultural background. Members of cultures originating in the Mideast or Asia, in which negotiation is a significant part of daily life, will tend to transfer those routine behaviors into a U.S. mediation. In these cultures, one may go to the market and routinely negotiate for food and household basics. Such participants are therefore comfortable with exaggeration and hyperbole. Dramatic expressions of anger are all part of the sport and merely answered with more of the same. Such displays are commonplace; how-

4 See appendix at the end of this chapter.

5 See appendix at the end of this chapter.

ever, they present a dilemma to the mediator if the participants do not all share the same set of behavioral norms. The cultural aspect of venting in conflict resolution requires significantly more research in order to produce meaningful paradigms applicable to mediation.

[8.9] 5. Ripeness

A discussion of venting would not be complete without mention of the concept of “ripeness.” As discussed by Coleman,⁶ ripeness has several definitions. It is described as a readiness to negotiate or the motivation to escape conflict. Others characterize it as a motivation to reach agreement or the commitment to change the direction of a conflict toward de-escalation. However according to Parlamis, venting with less attribution of responsibility may not be sufficient to reduce anger but may create a condition of ripeness. This observation from her study involving several hundred graduate students is consistent with the behavior that is often observed in the context of mediations. Venting, which incorporates a *de minimus* use of angry language, will allow the parties to potentially hear the information being shared and respond to the facts with changed perspectives rather than reacting with negative emotions.

[8.10] III. CONCLUSION

There remains an apparent disconnect between traditional mediation training techniques and the psychological studies dealing with uncontrolled expression of anger. Expressing one’s anger had been perceived as beneficial to the resolution of the conflict. Upon closer examination, however, it appears that venting one’s anger in an attempt to resolve a dispute is detrimental. Anger acts as a barrier to settlement in mediation. Uncontrolled venting is counterproductive to the mediation process and provides the initial seeds of impasse. Caution should be exercised during the mediation when parties want to vent. The mediator should be wary and discourage the tactic of “blowing off steam.”

⁶ See appendix at the end of this chapter.

APPENDIX

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Guidelines and Instructions for Online Mediation

Thank you for agreeing to conduct your mediation session remotely using online video technology. These guidelines and instructions provide you with information on the video platform we will be using. They also cover the ground rules and agreements that are designed to protect the integrity and confidentiality of the process.

Please contact me with any questions or to discuss any concerns.

1. The Technology

The mediation session will be conducted using the Zoom video conference platform. Zoom is a versatile, easy to use conference service. The meetings are encrypted and will provide a secure meeting environment.

The Zoom website – <https://zoom.us> – has a number of video tutorials and training resources that will help you understand how to get started and become familiar with using the meeting functions and features.

Participants should join the meeting early and become familiar with using the technology. We can also arrange a practice Zoom session with counsel only in advance of the mediation date to make sure that everyone is familiar with how the mediation session will proceed.

The recommendations for the equipment that participants use to access the meeting include a laptop or desktop computer; a large screen; a strong secure Wi-Fi or Ethernet connection; and, a good microphone, camera, and speakers/headphone. Each participant should be able to be seen clearly and care should be taken with background and lighting to minimize distractions.

2. Accessing the Meeting

Please provide me with the email address and mobile phone number of each person who will participate in the mediation. This information is necessary to send the meeting invitation and to allow for alternative contact if there are issues or problems with primary meeting technology. I will not share or use the information regarding clients and other participants beyond the needs of the mediation.

Each participant will receive an email invitation with the date and time, instructions on accessing the meeting and a link to the meeting. To access the meeting, click on the link. You may be asked to download a Zoom connection app and will be required to enter the password included in the email invitation.

Invitees have the option of participating by computer/video or by phone. It is important that everyone in the mediation be able to see each other and everyone should join by computer/video unless they do not have access to a computer or other device. If a participant does not have computer audio, there is an option to join with computer for video and audio by phone.

3. Joining the Meeting and Participation

I will set up the meeting as the host and will have overall control several aspects of the meeting. When a participant joins the meeting, they will be in a “virtual waiting room” until the I have them enter the meeting. In order to preserve neutrality, I will admit everyone to the meeting simultaneously unless someone is late. When a participant enters the room, their audio will not be automatically muted. A participant can mute and unmute their audio and the host can mute and unmute (with permission) audio.

Zoom has the option to set up separate “meeting rooms” and during the mediation we may decide to hold separate caucuses. I can assign participants to meeting rooms and the people in each room can have private conversations without the other participants hearing or seeing the meeting.

Zoom features include the ability to share computer screens, share documents and display a white board for making notes. There is also a chat feature to supplement the audio conversations. I control those functions and can allow parties to use these features.

If you have problems or issues with the technology during the mediation first, try to leave the meeting and rejoin. If that is unsuccessful – call or text me at 609 658 3839.

4. Maintaining Confidentiality and Protecting Privilege of Mediation Communications

It is important that counsel and the parties have confidence that the Zoom mediation sessions respect privacy and protect the confidentiality and privilege inherent in the mediation process.

In order to comply with the requirements of the Court Rules and any applicable private mediation agreement regarding confidentiality, and to comply with requirements of the Uniform Mediation Act and the Rules of Evidence regarding maintaining privilege, all participants shall agree to the following:

Participants shall use reasonable means to maintain secure Wi-Fi connections.

All participants shall assure that no one other than individuals who are identified as attending can overhear and/or see the mediation session.

No participant shall record any part of the mediation session.

Participants shall not share any mediation communications with anyone who is not a party representative or participant in the mediation.

In the event that a participant has inadvertently gained access to another party's caucus they shall immediately announce themselves and advise me and the parties in the caucus.

Acknowledged and Agreed:

By: _____

Date: _____

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Virtual Mediation: Key Issues and Considerations

by Theo Cheng, ADR Office of Theo Cheng LLC, with Practical Law Litigation

Status: **Maintained** | Jurisdiction: **United States**

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A Practice Note explaining the principal issues, benefits, and concerns in holding a mediation using a video teleconferencing platform (VTC), including various practical, technical, and strategic considerations.

This document may be particularly relevant in light of the extreme limits on in-person meetings during the 2019 novel coronavirus disease (COVID-19) crisis but may be adapted for other situations in which some or all mediation participants appear remotely.

Participation by remote means in a legal proceeding is nothing new, but certainly before the onset of the pandemic, practitioners, mediators, arbitrators, and judges rarely employed them. Virtual ADR processes are also not wholly new tools for resolving disputes. During the COVID-19 crisis, remote or virtual participation in mediation sessions, arbitration hearings, and even bench trials, whether by using an audio or video teleconferencing (VTC) platform, became increasingly common.

When circumstances do not permit one or more participants to a mediation session to gather together in-person, mediations have traditionally accommodated their remote participation in the process by using the telephone or some VTC platform. During the pandemic, everyone generally participates remotely using either a single platform or a combination of audio and video technologies. Because of this, mediations can be conducted entirely in a virtual format and are not specific to any particular platform, audio or video, which are, to day, driven by underlying software programs.

As with all software-driven platforms, each VTC has its own special features and limitations. The key for the participants is to understand the salient features and limitations of the chosen platform and to become familiar and comfortable enough with the technology to focus on the core of the mediation process, namely, achieving a mutually acceptable resolution of the participants' own making.

The virtual mediation process generally follows the same path as any other mediation (see Stages of a Mediation Checklist). For a collection of resources to assist counsel

with the mediation process, see Mediation Toolkit. For more information about alternative dispute resolution in general, see PracticeNote, ADR Mechanisms in the US: Overview.

Benefits of Virtual Mediations

Virtual mediations offer many benefits, including:

- Enormous savings in travel time and expenses.
- Avoidance of logistical issues related to:
 - coordinating participants' schedules;
 - accounting for unexpected travel delays; and
 - securing a mediation space or participants' lodging.
- Removal of barriers to having additional participants attend who may otherwise have been precluded due to time or cost considerations (such as the ultimate decision maker at the company, the insurance carrier's adjuster, or an interpreter).

Junior attorneys on the matter have oftentimes been unable to attend due to the additional costs that would be imposed upon both the firm and the client. However, especially without the associated travel and lodging costs being minimized or even eliminated, they are able to continue being active on the matter by attending and participating in the proceeding, so long as the firm is willing (if necessary) to write-off the time. In turn, doing so opens the door to both additional on-the-job training and increased opportunities for younger and diverse



Virtual Mediation: Key Issues and Considerations

attorneys to participate in both mediation and arbitration proceedings, which is invaluable to their professional development and will ultimately inure to the firm.

Participants in a virtual mediation must only agree on an available date and time for the session to proceed. Relatedly, because mediation sessions can be scheduled more easily, they may be preferable for disputes that are time-sensitive or otherwise need a faster path to resolution. Even after conditions improve such that in-person mediations can safely resume, participants' recognition of the benefits of holding mediation sessions remotely will likely encourage their continued use.

Basic Prerequisites for a Virtual Mediation

Mediation is particularly conducive to being converted from an in-person format to an online format. For a virtual mediation to be successful, all participants must prepare.

Platform Considerations

The platform merely provides the virtual space in which everyone gathers for the mediation. A platform should permit participants to:

- Access the platform from an electronic device (such as a desktop computer, laptop, tablet, or smartphone).
- See and hear all other participants.
- Interact with all other participants in real-time.
- Engage in joint or private caucus sessions, so that various groupings of participants can meet in a secure environment.

The version of the software application suitable for each device is likely to differ. Therefore, because each participant's experience on and control over the platform may be slightly different depending on the device in question, participants must understand how their devices access the platform.

There are many VTC platforms in the marketplace. Principally due to its feature-rich options, recent and ongoing adoption of security and privacy updates and widespread familiarity and usage, Zoom has become a perennial favorite among many mediators and counsel. However, there are many other VTC platforms, each with their own distinct features, limitations, and security and privacy issues, such as (in alphabetical order):

- Apple FaceTime.
- BlueJeans.

- Cisco WebEx
- Google Meet (formerly Hangouts Meet).
- GoToMeeting.
- Highfive.
- Immediation.
- Legaler.
- Microsoft Teams.
- Modron.
- Sonexis.

When selecting a platform, participants should consider their anticipated needs, available technical and financial resources, and experience with various platforms.

Platform security and privacy enhancements vary tremendously and are constantly changing and being updated. For further guidance, see the ICCA-NYC Bar-CPA's Protocol on Cybersecurity in International Arbitrations, the AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy, and the New York State Bar Association's Cybersecurity Alert: Tips for Working Securely While Working Remotely. Some law firms and organizations also subscribe to enterprise versions of VTC platforms that they selected for security or privacy reasons. These preexisting arrangements may dictate the choice of platform for a mediation session.

Internet Connection

Participants should participate in the mediation from a location with secure, reliable, high-speed internet. They should test their respective internet speeds by searching "internet speed test" in the web browser. The minimum Mbps download and upload speeds needed for the platform depends on several factors, including the expected number of participants and the number of locations from where they are connecting to the platform.

If a participant's internet connection is unstable, weak, or prone to outages, the participant may attempt to remedy the situation by:

- Using a Wi-Fi booster.
- Installing a mesh network.
- Using a smartphone's hotspot.
- Hardwiring to the internet by using an ethernet connection.
- Installing a T1 connection.

Virtual Mediation: Key Issues and Considerations

Microphone, Speaker, and Camera

Participants should have a functional microphone and speaker to transmit and receive audio. If using the built-in microphone and speaker in their devices creates feedback issues or otherwise produces less than desirable audio quality, a participant may use a separate headset or headphones that contains a microphone. This alternative also often reduces or completely blocks ambient noise, which allows the participant to hear and transmit audio more clearly. Sound clarity is especially important for participants working from home with other people or pets present or when appliances (such as air conditioners) may generate significant ambient noise.

If participants are using a VTC platform, each participant should also either:

- Confirm that the device the participant is using to connect to the platform has a built-in camera that sufficiently transmits and receives video images.
- Obtain a separate webcam that the participant can connect to the participant's device and use to transmit and receive video images.

Document Sharing

When evaluating VTCs, consider whether participants anticipate needing to simultaneously view a document in real time, such as:

- PDF documents.
- Photographs.
- Video clips.
- E-mail communications.
- PowerPoint presentations.
- Internet websites.

Some VTC platforms permit users to share their screens, so that all participants can view any document or file that a participant opens on the participant's own device.

Collaboration

Some VTC platforms permit users to collaborate by editing a document within the platform. For example, when mediation results in a resolution, participants may view and edit a draft term sheet, memorandum of understanding (MOU), or settlement agreement (see *Memorializing the Settlement Agreement*).

Pre-Mediation Conference

At a pre-mediation conference, the mediator and counsel discuss logistics and housekeeping matters in preparation for the mediation session. Clients and client representatives also may attend the pre-mediation conference. This conference may occur via telephone or on a VTC platform.

Whether in-person or remote, the participants in a pre-mediation conference should:

- Discuss the dispute's procedural posture, including whether:
 - the parties are currently in a litigation or arbitration proceeding;
 - the judge or arbitrator ordered mediation;
 - the parties have engaged in any discovery or other exchange of information or documents.
- Discuss whether a limited, informal exchange of documents and information may lead to a more productive mediation and, if so, establish a framework for that exchange, including appropriate timeframes for the exchange.
- Identify the attendees to the mediation session and clarify the participants' respective roles, including:
 - which participants have the authority to resolve the dispute; and
 - whether anyone with possible influence over the decision maker should also attend.
- Determine the contents, scheduling, and parameters for the exchange of any pre-mediation submissions requested by the mediator.
- Set the date and start time of the mediation session.
- Identify the locations from which each participant is attending the mediation.
- Review the VTC platform features and protocols to which the participants must adhere during the virtual mediation session (see *Platform Considerations*).

Other Pre-Mediation Session Considerations

Joining the Mediation Session

Some platforms offer a separate room into which participants first enter (sometimes called a "waiting

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room” or “lobby”), and the mediator then transfers them into the main room. This process:

- Allows the mediator to ascertain that everyone scheduled to attend the session is present before allowing them all to appear in the main meeting room simultaneously, rather than having them appear one at a time.
- Preserves some sense of neutrality by not creating the impression that impartiality may have been compromised because the mediator, for example, was spending time with one or more participants before the other participants logged into the platform.

A time limit can also be agreed-on in advance before everyone is admitted into the main session room to manage the participants’ expectations. However, if participants desire an experience more akin to an in-person session, a mediator may forego this feature.

After all participants are in the main room, the mediator may close or lock the main room to prevent anyone else from entering the session. However, if the mediator uses this feature, a participant disconnecting from the platform (voluntarily or involuntarily) cannot rejoin the session unless the mediator takes steps to unlock the main room and transfer the participant into the room (see *Disconnected Participants*).

The mediator may remind participants to agree that no one else is to be present with a participant unless previously disclosed to all the other participants. Doing so prevents any unwanted or unintended eavesdropping and assists in preserving mediation confidentiality, as well as the confidentiality of any attorney-client privileged communications.

Once all participants are present in the main room and the mediator issues any final reminders or instructions, a virtual mediation session proceeds in similar fashion to an in-person session in a single conference room. Specifically, the mediator convenes the session by beginning with greetings and introductions, followed by welcoming remarks and the setting of ground rules. The other participants may take advantage of having all participants gathered in a single (virtual) room to provide their own opening remarks, share their particular perspectives, and otherwise engage in a typical joint session. As the discussion progresses as facilitated by the mediator, the discourse is not likely to be that much different than if all the participants were in the same physical room. With virtual conference calls so ubiquitous, most participants are likely to find this setting quite familiar.

Recording the Session

With the possible exception of memorializing any resolution that is achieved at the session (see *Memorializing the Settlement Agreement*), because mediation is intended to be a confidential process, most participants likely presume that no one intends to record the mediation session. However, given the technological interface being used and the inability to have any visibility beyond the small view provided by the camera, the mediator should take steps to ensure that there is to be no recording of any kind, such as:

- A video streaming capture software program pre-loaded on a participant’s device.
- An otherwise hidden, disguised, or off-screen audio or video recorder (including the voice memo feature on some smartphones).
- The recording feature available on some VTC platforms. (Mediators hosting the session should disable that feature.)

Should the participants choose to record some or all of the session using the VTC platform’s built-in recording feature, various issues regarding that recording should be discussed, including:

- Which participants should have recording privileges.
- Whether the recording should be stored:
 - locally; or
 - in the cloud.
- Which parties should be given access to the recording.
- Who maintains the recording.
- Whether the recording is to be stored or deleted after the mediation ends.

Inadvertent Access to Confidential Communications

Like any software, a VTC platform is susceptible to technical bugs or glitches. Although rare, participants on a VTC platform may inadvertently overhear or see something that they were not intended to see. The mediator and participants should discuss how to respond should this occur. For example, the participants may agree that the participant receiving the inadvertent communication must immediately:

- Stop and refrain from further listening or viewing and inform the affected participants (that is, essentially

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creating a default procedure akin to the inadvertent receipt of privileged documents in an other party's production).

- Inform the mediator so that the mediator may take further steps.

Private Caucuses

As in many mediations, there may be a need for the participants to confer privately in various configurations of participants, with or without the mediator, in a room that is separate from the main mediation session room (see PracticeNote, Complex US Mediation: Key Issues and Considerations: Private Caucuses). Different platforms refer to separate caucus rooms by different names, such as breakout rooms (Zoom) or breakout sessions (WebEx). In platforms that offer caucusing, the mediator can virtually place or assign participants so that they can communicate privately and in confidence with each other. In essence, it is no different than had the mediator assigned individuals to physical rooms across or down the hall in the in-person context.

The participants can also establish some kind of protocol to permit the mediator's entry into the caucus rooms to help discussion within and among the various participant groupings, preserve attorney-client privileged communications, and ensure confidentiality.

However, most VTC platforms do not have a virtual knock or chime feature to announce when someone is about to enter a caucus room. Having the mediator suddenly appear in a caucus room can not only be jarring and rude, but also potentially breach a confidential communication (perhaps even one protected under the attorney-client privilege) occurring in the room. To minimize the risk of an unexpected intrusion, the mediator and participants should agree on how the mediator is to announce that the mediator is ready to enter a caucus room. For example, mediators may:

- Announce their intention to enter a caucus room using a broadcast chat feature (like that available on Zoom) which, once participants are separated into their own rooms, allows mediators to send a message to all participants.
- Call, text, or e-mail in advance one or more of the participants in a caucus room (typically counsel) to indicate the participant's intention to enter the room.

If the selected platform does not offer the ability to place participants in separate rooms, while a little cumbersome, participants can simply disconnect and reconnect to

the platform in various configurations to accommodate the need for private caucusing. Traditional telephone mediations have operated in this manner for decades and, in fact, at least one VTC platform (Sonexis) has a pure audio conferencing version that provides for the creation of caucus rooms. With a little advance planning, participants can develop protocols for mirroring caucus rooms in the virtual world.

Disconnected Participants

Platform issues, internet instability, and human error can all cause participants to become disconnected from the platform during the session. The participants should develop clear guidelines for how to respond if this occurs. For example, the participants may agree that the disconnected participant should:

- Try to reconnect to the platform (this often resolves the problem if the mediator did not lock the session).
- Contact the mediator (and possibly others) via e-mail or text message to alert the mediator of the connection issue.
- Use provided dial-in instructions to connect by telephone.

In a serious case where the participant cannot reconnect, suspension of the mediation may be necessary, and the mediator should shepherd that process. (The parties should have already exchanged e-mail addresses and phone numbers to help off-platform communications.)

On Zoom, if a participant becomes disconnected from a breakout room, reconnecting to the session places that participant back in the main session room, not the breakout room. (The analogy in the in-person context is as if the participant had left the building entirely when the participant left the caucus room.) In that case, once reconnected, the mediator must return to the main session room and reassign that participant to the appropriate breakout room.

Memorializing the Settlement Agreement

At some point during the mediation session, the participants may need to memorialize any or all portions of the discussion (see, for example, *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 262-63 (2013) (holding that all settlement agreements reached resulting from mediation in New Jersey state courts must be reduced to a signed writing or ascribed to in an audio or video recording)).

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Participants may circulate drafts of documents via e-mail or use some kind of external collaboration tool, such as Google Docs or a shared Dropbox file. However, if the parties anticipate wanting to memorialize any agreement they reach and select a VTC platform with this capability, they should take advantage of this feature to draft and edit a term sheet or settlement agreement at the conclusion of the virtual mediation (see Collaboration).

Some VTC platforms offer related features that participants may use to:

- Affix a signature or other mark on a shared document, which the participants may then screenshot or download.
- “Whiteboard” freehand drawings or writings.

Other platforms allow users to incorporate third-party software applications to meet these needs, such as DocuSign or RightSignature.

If a platform does not offer the above features but does afford recording capability, the mediator may memorialize the resolution on video by:

- Orally reading the terms and conditions of any term sheet, MOU, or agreement in the presence of all the participants.
- Obtaining individual assent to the document from the participants.

Connecting to the Mediation Session

Well in advance of the mediation, each participant should:

- Download the platform software application, even if the platform permits access simply by using an internet browser, because the participant’s experience on the platform and the features and options that may be available to the participant may differ if the full software application is not available on the device.
- Choose a location that offers an adequate internet connection, quiet, and privacy. If a private space is not available, select a location that minimizes foot traffic. Turn off any unnecessary appliances that may provide audio or visual distraction.
- If desired, arrange to have two screens available so that they can view other participants and documents at the same time.
- Participate in any available platform orientation sessions.

- Spend as much time as they need to become familiar and comfortable with the chosen VTC platform, how it operates, and the available features.
- Conduct a dry run of the platform and their individual set-ups during which they test and receive feedback on a variety of different aspects, including:
 - microphones;
 - speakers;
 - headsets;
 - sound (including feedback and background noise);
 - lighting (avoiding backlighting and facing cameras away from windows);
 - dresswear; and
 - camera angles and eye contact (positioning cameras at eye level or above (a laptop can be placed on a stack of books to achieve this)).

The mediator should also schedule the mediation within the platform. When setting up the session, the mediator should:

- Name the session using only the case number or some other innocuous name so as not to reveal the parties’ names.
- Password-protect the session and creating a two-factor authentication requirement by:
 - not embedding the password in the link; and
 - conveying the link and the password by using separate mediums (for example, emailing the link and sending the password by text message).
- Caution participants not to share the conference link in any kind of public forum to increase the likelihood of unwanted attendees accessing the session, a phenomenon that has now come to be called “Zoombombing.” (Zoombombing principally arose from compromised meeting links resulting from user error in releasing the link information publicly or having the Personal Meeting ID otherwise compromised, or both. Although there were many articles written on this subject during the early weeks of the pandemic, best practices for using Zoom, including enabling waiting rooms, password-protecting meetings, and exercising the host’s removal powers, have largely eliminated this problem.)

When ready to join the mediation session, each participant should close unnecessary tabs and applications on the device to prevent battery drain and internet bandwidth usage. Turning off e-mail, calendar reminder, and other

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notifications, as well as silencing phones, also prevents unnecessary disruptions and distractions.

The participants can also discuss the various options for viewing other participants and the propriety and use of virtual backgrounds available in many VTC platforms. Participants should generally avoid virtual backgrounds because they mask the presence of others in the room and require additional bandwidth.

Concerns with Virtual Mediations

Virtual mediation brings unique challenges, including:

- Participants' inability to fully gauge credibility and read body language.
- The lack of control that some participants feel by being assigned and shuttled into different rooms by the mediator.
- Difficulties preserving the confidentiality and security of the proceeding.
- Inevitable technical glitches, bugs, and outages that accompany any software-driven platform dependent on the internet.

While most of these concerns can be overcome by using training, education, and continued practice and use of the chosen VTC platform, there are other concerns that relate to the psychological and neurological effects of communicating using VTC platforms. For example:

- The distortions and delays inherent in video communications:
 - confound the receipt of information and muddle well accepted subtle social cues to which participants are accustomed; and
 - create gaps in the participants' perception of reality.
- Participants fill in those reality gaps in ways that leave them feeling disturbed, uneasy, tired, isolated, anxious, and disconnected.

- Participants may struggle to concentrate or have difficulty developing empathy, rapport, credibility, and trust, all of which are generally critical to a successful session.

(See *Why Zoom is Terrible*, New York Times April 29, 2020 and Liz Foss Lien and Mollie West Duffy, *How to Combat Zoom Fatigue*, Harvard Business Review, Apr. 29 2020.)

If participants experience platform fatigue, they may benefit from:

- Refraining from multi-tasking while engaged in the session.
- Reducing on-screen stimuli from other sources (such as e-mail notifications, calendar reminders, and so on).
- Building-in regular breaks from the screen.
- Stopping a mediation session earlier than anticipated to prevent poor decision making by the participants due to platform fatigue and possible coercion by one participant on another, including the mediator.
- Switching to a different medium, such as using the telephone.

A mediator may explain the general principles of platform fatigue during the pre-mediation conference and schedule multiple session days in advance with the participants to account for this possibility.

Despite the foregoing, the experience of most participants with conducting mediations on VTC platforms has been overwhelmingly positive. Although there will undoubtedly be some desire to schedule in-person sessions as the pandemic conditions improve and there is more widespread vaccination, participants have found the comparatively large time and costs savings to outweigh the need to gather together in-person. Moreover, the resolution rates of mediations conducted on VTC platforms do not appear to be appreciably different from in-person sessions, and, in many areas, may anecdotally have improved under the virtual model. Virtual mediation appears to have become a mainstay in modern ADR practice.

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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.
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Model Standards of Practice for Family and Divorce Mediation

The Standards incorporate much of the best of the previous standards, and update them to include topics such as domestic violence and child abuse. In addition, the Standards address the issue of the best interests of the children and how mediation can help parents to address them in divorce.

The Symposium, which developed the Standards, included representatives from Academy of Family Mediators (AFM), Association of Family Courts and Community Professionals (AFCC), American Bar Association (ABA) Family Section, and other national, state and regional organizations. The Standards represented a consensus of the best suggestions made over a period of two years in which the Symposium met to develop them.

The Standards had previously been adopted by the ABA Family Section and by AFCC, as well as several state mediation organizations. The adoption of these standards by ACR rounds out the trio of major national organizations whose members are family and divorce mediators.

The General Standards

STANDARD I: A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

STANDARD II: A family mediator shall be qualified by education and training to undertake the mediation.

STANDARD III: A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

STANDARD IV: A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

STANDARD V: A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

STANDARD VI: A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

STANDARD VII: A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

STANDARD VIII: A family mediator shall assist participants in determining how to promote the best interests of children.

STANDARD IX: A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

STANDARD X: A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.

STANDARD XI: A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason.

STANDARD XII: A family mediator shall be truthful in the advertisement and solicitation for mediation.

STANDARD XIII: A family mediator shall acquire and maintain professional competence in mediation.

Overview and Definitions

Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. However, experience has established that family mediation is a valuable option for many families because it can:

- . increase the self-determination of participants and their ability to communicate;
- . promote the best interests of children; and
- . reduce the economic and emotional costs associated with the resolution of family disputes.

Effective mediation requires that the family mediator be qualified by training, experience and temperament; that the mediator be impartial; that the participants reach their decisions voluntarily; that their decisions be based on sufficient factual data; that the mediator be aware of the impact of culture and diversity; and that the best interests of children be taken into account. Further, the mediator should also be prepared to identify families whose history includes domestic abuse or child abuse.

These Model Standards of Practice for Family and Divorce Mediation ("Model Standards") aim to perform three major functions:

1. to serve as a guide for the conduct of family mediators;
2. to inform the mediating participants of what they can expect; and
3. to promote public confidence in mediation as a process for resolving family disputes.

The Model Standards are aspirational in character. They describe good practices for family mediators. They are not intended to create legal rules or standards of liability.

The Model Standards include different levels of guidance:

. Use of the term "may" in a Standard is the lowest strength of guidance and indicates a practice that the family mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.

. Most of the Standards employ the term "should" which indicates that the practice described in the Standard is highly desirable and should be departed from only with very strong reason.

. The rarer use of the term "shall" in a Standard is a higher level of guidance to the family mediator, indicating that the mediator should not have discretion to depart from the practice described.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.

B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.

C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.

D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.

E. The family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

A. To perform the family mediator's role, a mediator should:

1. have knowledge of family law;
2. have knowledge of and training in the impact of family conflict on parents, children and other participants, including knowledge of child development, domestic abuse and child abuse and neglect;
3. have education and training specific to the process of mediation;
4. be able to recognize the impact of culture and diversity.

B. Family mediators should provide information to the participants about the mediator's relevant training, education and expertise.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including:

1. informing the participants that reaching an agreement in family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties;

2. distinguishing family mediation from other processes designed to address family issues and disputes;

3. informing the participants that any agreements reached will be reviewed by the court when court approval is required;

4. informing the participants that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process;

5. advising the participants, in appropriate cases, that they can seek the advice of religious figures, elders or other significant persons in their community whose opinions they value;

6. discussing, if applicable, the issue of separate sessions with the participants, a description of the circumstances in which the mediator may meet alone with any of the participants, or with any third party and the conditions of confidentiality concerning these separate sessions;

7. informing the participants that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history or threat of violence or other serious coercive activity by a participant.

8. describing the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any exceptions to confidentiality;

9. advising the participants of the circumstances under which the mediator may suspend or terminate the mediation process and that a participant has a right to suspend or terminate mediation at any time.

B. The participants should sign a written agreement to mediate their dispute and the terms and conditions thereof within a reasonable time after first consulting the family mediator.

C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

D. Family mediators should not accept a dispute for mediation if they cannot satisfy the expectations of the participants concerning the timing of the process.

Standard IV

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the

mediator shall withdraw regardless of the express agreement of the participants.

- A. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
- B. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.
- C. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- D. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- E. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty
- F. A family mediator should guard against bias or partiality based on the participants' personal characteristics, background or performance at the mediation.
- G. A family mediator should avoid conflicts of interest in recommending the services of other professionals.
- H. A family mediator shall not use information about participants obtained in a mediation for personal gain or advantage.
- I. A family mediator should withdraw pursuant to Standard XI, sub.A(7) if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

- A. The participants should be provided with sufficient information about fees at the outset of mediation to determine if they wish to retain the services of the mediator.
- B. The participants' written agreement to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement that is contingent upon the results of the mediation or the amount of the settlement.
- D. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.
- E. Upon termination of mediation a mediator should return any unearned fee to the participants.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.
- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.
- C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
- D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
- E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the participants' expectations of confidentiality with them prior to undertaking the mediation. The written agreement to mediate should include provisions concerning confidentiality.
- B. Prior to undertaking the mediation the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting.
- C. As permitted by law, the mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions.
- E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. The mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should encourage the participants to explore the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits.

Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:

1. information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
2. problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
3. development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
4. the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
5. encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan.

B. The mediator should be sensitive to the impact of culture and religion on parenting philosophy and other decisions.

C. The mediator shall inform any court-appointed representative for the children of the mediation. If a representative for the children participates, the mediator should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of the mediation with the participants. Whether the representative of the children participates or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the children.

D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative.

E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.

F. The mediator should inform all concerned about the available options for the children's participation (which may include personal participation, an interview with a mental health professional, the mediator interviewing the child and reporting to the parents, or a videotaped statement by the child) and discuss the costs and benefits of each with the participants.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly

A. As used in these Standards, child abuse or neglect is defined by applicable state law.

B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without appropriate and adequate training.

C. If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.

1. The mediator should encourage the participants to explore appropriate services for the

family.

2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.

A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.

B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.

C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.

D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:

1. establishing appropriate security arrangements;
2. holding separate sessions with the participants even without the agreement of all participants;
3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
5. referring the participants to appropriate community resources;
6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.

E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and their children.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason.

A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:

1. the safety of a participant or well-being of a child is threatened;
 2. a participant has or is threatening to abduct a child;
 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
 4. the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
 5. a participant is using the mediation to further illegal conduct;
 6. a participant is using the mediation process to gain an unfair advantage;
 7. if the mediator believes the mediator's impartiality has been compromised in accordance with Standard IV.
- B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result.

Standard XII

- A family mediator shall be truthful in the advertisement and solicitation for mediation.
- A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- B. Mediators should accurately represent their qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national or private organizational qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

Standard XIII

A family mediator shall acquire and maintain professional competence in mediation.

- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in self-assessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

Appendix

Special Policy Considerations for State Regulation of Family Mediators and Court Affiliated Programs
The Model Standards recognize the National Standards for Court Connected Dispute Resolution Programs (1992). There are also state and local regulations governing such programs and family mediators. The following principles of organization and practice, however, are especially important for regulation of mediators and court-connected family mediation programs. They are worthy of separate mention.

A. Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.

B. When family mediators are appointed by a court or other institution, the appointing agency should make reasonable efforts to insure that each mediator is qualified for the appointment. If a list of family mediators qualified for court appointment exists, the requirements for being included on the list should be made public and available to all interested persons.

C. Confidentiality should not be construed to limit or prohibit the effective monitoring, research or evaluation of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.

Only the Model Standards, not the Commentary, were approved by the American Bar Association in February 2001.

STANDARDS OF PRACTICE

ALL OTHER CONFLICT RESOLUTION PROFESSIONALS

Ethical Standards of Professional Responsibility

By: SPIDR Ethics Committee

Date: June 2, 1986

*These standards were adopted by SPIDR in June of 1986. The Standards are currently being reviewed by the ACR Standards Committee for the Association for Conflict Resolution.

The Society of Professionals in Dispute Resolution (SPIDR) was established in 1972 to promote the peaceful resolution of disputes. Members of the Society believe that Resolving disputes through negotiation, mediation, arbitration and other neutral interventions can be of great benefit to disputing parties and to society. In 1983, the SPIDR Board of Directors charged the SPIDR Ethics Committee with the task of developing ethical standards of professional responsibility. The Committee membership represented all the various sectors and disciplines within SPIDR. This document, adopted by the Board

on June 2, 1986, is the result of that charge.

The purpose of this document is to promote among SPIDR Members and Associates ethical conduct and a high level of competency, including honesty, integrity, impartiality and the exercise of good judgment in their dispute resolution efforts. It is hoped that this document also will help to (1) define the profession of dispute resolution, (2) educate the public, and (3) inform users of dispute resolution services.

Application of Standards

Adherence to these ethical standards by SPIDR Members and Associates is basic to professional responsibility. SPIDR Members and Associates commit themselves to be guided in their professional conduct by these standards. The SPIDR Board of Directors or its designee is available to advise Members and Associates about the interpretation of these standards. Other neutral practitioners and organizations are welcome to follow these standards.

Scope

It is recognized that SPIDR Members and Associates resolve disputes in various sectors within the disciplines of dispute resolution and have their own codes of professional conduct. These standards have been developed as general guidelines of practice for neutral disciplines represented in the SPIDR membership. Ethical considerations relevant to some, but not to all, of these disciplines are not covered by these standards.

General Responsibilities

Neutrals have a duty to the parties, to the professions, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties'.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias towards individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

Responsibilities to the Parties

1. Impartiality. The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

2. Informed Consent. The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

3. Confidentiality. Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all

attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.

4. Conflict of Interest. The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstances that may reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation throughout the process.

5. Promptness. The neutral shall exert every reasonable effort to expedite the process.

6. The Settlement and its Consequences. The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3, Confidentiality, of these standards.

Neutral Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of parties dictate to assure that such interests have been considered by the principal parties.

Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

Background and Qualifications

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

Disclosure of Fees

It is the duty of the neutral to explain to the parties at the outset of the process the basis of compensation, fees, and charges, if any.

Support of the Profession

The experienced neutral should participate in the development of new practitioners in the field and

engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide pro bono services, where appropriate.

Responsibilities of Neutrals Working on the Same Case

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitations are inappropriate and in some conflict resolution disciplines, such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises, which imply favor of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

Please browse the following resources for more information on this field:

<http://www.peacemakers.ca/bibliography>

About ACR's Quality Assurance Initiatives

ACR's focus on Quality Assurance Initiatives fulfills some of the commitments that its predecessor organizations made when they voted for merger in 2000. By taking a firm stand on difficult issues, ACR seeks to improve the quality of dispute resolution practice, increase respect for the ADR field and meet the professional needs and aspirations of its members.

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Therefore, in an effort to shape the future of conflict resolution practice in ways that enhance its value, ACR is currently working on four quality assurance initiatives:

- **Certification Task Force.** The ACR Board has concluded that the field has developed to the point where there is need for entry-level certification that documents and acknowledges that a mediator has completed a minimum level of training and experience. Whatever its precise contours, ACR certification will require more training and experience than traditional 40-hour minimum training programs.
- **Joint Committee on Model Standards of Conduct for Mediators.** If the public is to continue to have confidence in mediation, it is important that practitioners and disputants have a clear understanding of what constitutes appropriate and inappropriate mediator conduct. For that reason, ACR, the AAA and the ABA Section of Dispute Resolution have convened the Joint Committee on Model Standards of Conduct for Mediators to review, revise and update the standards of conduct established by the three

organizations in 1994. Former SPIDR president Sharon Press and former CREnet president Terry Wheeler are ACR's representatives to the Committee.

- **Ethics Committee.** ACR's Ethics Committee is closely related to the Model Standards of Conduct, for one cannot aspire to follow the standards of conduct without first embracing the core ethics that underlie the practice of alternative dispute resolution. The Board has now established operating procedures for the Ethics Committee, which is the capstone of the Ethics Initiative. While the Ethics Committee does serve in a disciplinary capacity—reviewing and addressing ethics complaints brought against ACR members—its primary function is to educate members and the public about the values held by ADR practitioners and by ACR.
- **Advanced Practitioner Workgroup Report.** ACR's Advanced Practitioner Workgroup has developed the basic framework for conflict resolution practice areas, with the anticipation that individual ACR Sections will then be able to refine the requirements in ways that make the most sense for their practice area.

COMMITTEE CHAIRS:

Paula Trout

ACR ETHICS POINT PERSONS:

Each individual Section is required by ACR policy to have an Ethics point person.

Commercial - Will Miller (adrwill@comcast.net)

Consumer - Natalie Fleury (nfleur2001@yahoo.com)

Crisis Negotiation - Jerry Bagnell (jbagnell@ix.netcom.com)

Education - Ken Dunham (kdunham@faulkner.edu)

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Ethics Scenarios

INSTRUCTIONS:

1. Read each of the five (5) scenarios. Discuss each one and answer the associated questions.
2. You have 15 minutes.

A. Scenario #1 – “The Magic Bullet”

The mediation has gone quite well until the last hour during which the parties showed no interest in any additional movement. The mediator tells both sides that they are about done, but before they quit and go home he says they can each reveal to him privately a “bottom line” which he says he would not disclose. He then tells the parties that once he has the two numbers he will decide whether it is worth continuing the mediation.

After receiving the numbers from each party (\$50K from Plaintiff; \$55K from Defendant), the mediator sees that they overlap and proceeds to split the difference between the numbers and advises the parties, in a joint session, that the mediation is over if they agree to settle at \$52,250.00.

Questions

- Is this technique, sometimes referred to as the “Magic Bullet,” ethically acceptable?
- If so, what ethical concerns, if any, should the mediator keep in mind when using it?

B. Scenario #2 – Rejected Settlement Offer

After six hours of mediation, a party rejects an offer that the mediator believes is the best offer the party could possibly expect to receive. The mediator further believes that the reason the offer has been rejected is that the rejecting party does not fully appreciate how the offer positively affects that party’s legal rights and obligations.

Questions

- Should the mediator remain silent and let the party walk away or work to influence the party to reconsider the offer?
- If the latter, in what ways might the mediator ethically work to have the party reconsider his rejection?

- Would the mediator's actions be any different if the scenario was that the party affirmatively states that he understands and wants to sign a settlement agreement, but the mediator believes that the party neither understands the agreement's terms nor appreciates how the agreement may adversely affect legal rights or obligations and the mediator also believes that the agreement is the worst possible outcome for that party?

C. Scenario #3 – Mediator's Suggestion

At the end of two long and difficult days of mediation, the mediator—in a joint session—suggests, with specificity, possible settlement alternatives. The elements of the various settlement alternatives were not raised by either of the parties.

Questions

- Is this an acceptable exercise of mediator influence? If so, how so? If not, why not?
- Does the manner of the mediator's suggestion make a difference? If so, how so? If not, why not?

D. Scenario #4 – Misconduct in the Mediation Process

During opening remarks at the joint session, the employer representative proffered that, when the employee-plaintiff complained to the Human Resources Department about her supervisor sexually harassing her, the Department promptly conducted an investigation and determined that her allegations were meritless. However, in the employer's confidential pre-mediation submission to the mediator, the employer stated unequivocally that no such investigation had been conducted.

Questions

- What, if anything, should the mediator do at the moment when the employer representative makes that statement? Should the mediator ever address this discrepancy? If so, in whose presence?
- By taking any action in response to this situation, under what circumstances has the mediator committed misconduct if s/he is also an attorney?
- Has the attorney committed misconduct? Is either the mediator or attorney obligated to report any misconduct?

E. Scenario #5 – Mediator Drafting the Settlement Agreement

A pro se individual brought suit against her former employer for unlawful termination, alleging race discrimination. After participating in the court's mandatory mediation program, the parties reached an agreement involving the payment of a sum certain by the employer to the individual, along with some other terms and conditions, such as a termination code change and a neutral letter of reference. The plaintiff then turns to the mediator and says that, because he is neither a lawyer nor skilled in drafting legal documents, he would appreciate the mediator assisting him in putting together the settlement agreement.

Questions

- Should the mediator agree to do as the plaintiff requests?
- Does it matter if the employer consents?

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ADR OFFICE OF
THEO CHENG

Remote Mediations Using Zoom

Conducting Mediations on a Video Conferencing Platform

TheoCheng
theo@theocheng.com

Benefits of Remote Mediations



- Enormous savings in travel time and expenses
- Avoidance of logistical issues relating to participant calendars, travel, lodging, etc.
- Removal of barriers to additional participants (e.g., ultimate decision maker, carrier's adjuster, interpreter, etc.)
- Increased opportunities for younger and diverse team members
- Comparable settlement rates (NADN 2021 survey)

→ *More than likely to be the dominant modality*

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Basic Pre-Requisites

- **Platform considerations**
 - Features (waiting room, breakout rooms, etc.)
 - Security
 - Document sharing
 - Collaboration
- **Proper equipment**
 - Microphone Camera (built-in, webcam, etc.)
 - Speaker Lighting (ring, LED panel, etc.)
 - Headset/Headphones

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3

The Critical Pre-Requisite

- Secure, reliable, high-speed internet
- If encountering issues, consider:
 - Using a Wi-Fi booster
 - Installing a mesh network
 - Using an external hotspot (e.g., smartphone)
 - Hardwiring to the internet using an ethernet connection
 - Installing a T1 connection



Pre-Mediation Conference

- Review platform features and protocols to which participants must adhere:
 - Who may attend/be present and whether the room will be “locked” thereafter
 - Whether recording of any kind will be permitted
 - What to do if able to hear/see a confidential communication
 - How the mediator will alert participants when entering a breakout room
 - What to do if become disconnected or cannot see/hear for some reason
 - Exchange cell phone numbers and other contact information

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Memorializing Any Resolution or Next Steps

- Circulate drafts via e-mail, use Google Docs or a shared Dropbox file
- Collaborate and edit within the platform
- Affix signatures on a shared document, then screenshot or download
- “Whiteboard” freehand drawings or writings
- Incorporate *DocuSign* or *RightSignature*
- Memorialize via video recording

🔗 [Take a look at SDNY's "Finalizing Agreements"](#)





Concerns About Remote Mediations

- Participants' inability to fully gauge credibility and read body language
- Lack of control some participants feel by being assigned and shuttled into different rooms by the mediator
- Difficulties preserving the confidentiality and security of the session
- Inevitable technical glitches, bugs, and outages that accompany any software-driven platform dependent on the internet
- Platform fatigue

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What To Do About Platform Fatigue

- Refrain from multi-tasking while engaged in the session
- Reduce on-screen stimuli from other sources (such as e-mail notifications, calendar reminders, etc.)
- Build-in regular breaks from the screen
- Stop session earlier than anticipated to prevent poor decision making and possible coercion by one participant on another, including the mediator
- Switch to a different medium, such as using the telephone

→ *Raise during pre-mediation conference
and schedule accordingly*



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8

Thank you!

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**IRS SETTLEMENT TAXABILITY
PROCEDURES**

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Chapter 1 Introduction and Issues

Introduction

This guide focuses on the treatment of lawsuit, settlements and awards proceeds received after August 21, 1996, the date of enactment of the Small Business Job Protection Act of 1996 (SBJPA) which revised IRC § 104(a)(2). Additional research may be warranted for issues involving proceeds received prior to August 21, 1996 or received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995.

Because a business entity cannot suffer a personal injury within the meaning of IRC § 104(a)(2), *P & X Markets, Inc. v. Commissioner*, 106 T.C. 441 (1996), *aff'd in unpublished order*, *P & X Markets, Inc. v. Commissioner*, 139 F. 3d 907 (9th Cir. 1988), this guide applies to recoveries by individuals only.

IRC § 61 states all income from whatever source derived is taxable, unless specifically excluded by another Code section. IRC § 104 is the exclusion from taxable income provision with respect to lawsuits, settlements, and awards.

The 1996 amendment added to IRC § 104(a)(2) the word physical to the clause “on account of personal physical injuries or physical sickness.” Therefore, in order for damages to be excludible from income, the judgment or settlement must be derived from personal physical injuries or physical sickness. Prior to the 1996 amendment, IRC § 104(a)(2) was extensively litigated with respect to what was personal injuries.

In addition, the 1996 amendment added to the flush language of IRC § 104(a): “For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care ... attributable to emotional distress.” Thus, IRC § 104(a)(2) now provides that, in cases of non-physical injury, such as discrimination, fraud, etc., amounts excludable for emotional distress are limited to actual “out of pocket” medical costs. A footnote in the Conference Committee Report to the 1996 Act states that the term emotional distress includes physical symptoms, such as insomnia, headaches, and stomach disorders, which may result from emotional distress.

The 1996 amendment also clearly provides that punitive damages are not excludible under IRC § 104(a)(2), regardless of whether received in connection with a physical or non-physical injury. However, the 1996 amendment has raised the issue whether punitive damages received in connection with a wrongful death action are excludable from gross income. This question is discussed in detail in a subsequent section.

In certain situations an amount of a lawsuit settlement might be paid to reimburse a taxpayer for losses, and no gain would have to be recognized under IRC § 1001 because the amount paid did not exceed the taxpayer’s basis (return of capital).

This guide will provide suggestions on conducting the examination, detail of issues, explanations of applicable terminology, synopses of several related court cases, etc.

Issues

The following determinations should be made when reviewing lawsuit verdicts and settlements received after August 20, 1996.

- Determine if any taxable lawsuit, award or settlement proceeds are unreported.
- Determine if proper amounts were allocated between compensatory and punitive damages. This is especially important for out of court settlements. Because many cases are settled to avoid the imposition of punitive damages, it is anticipated that some taxpayers may erroneously allocate amounts between excludable and punitive damages in these cases. This allocation may also have an impact on the deductibility of attorneys' fees and court costs since IRC § 265 expressly denies any deduction for expenses related to tax-exempt income.
- Determine if any of the lawsuit, award or settlement proceeds constituted punitive damages. All punitive damages are taxable whether received in relation to a physical or non-physical injury or sickness. (Caution: See IRC §104(c) exception when applicable State law provides only punitive damages may be awarded in wrongful death actions, i.e., Alabama.)
- Determine if any of the settlement proceeds are designated as interest, and if so, such interest is reported as income.
- Verify that amounts excluded from income were received in a case of *physical* injury or *physical* sickness. Damages for emotional distress on account of physical injuries or sickness are excludable by IRC § 104(a)(2). However, costs incurred to treat emotional distress, even those due to physical injury, are taxable if they were previously deducted as a medical expense in a prior year.
- Verify the amount of out of pocket expense excluded for emotional distress in non-physical injury cases (e.g., discrimination, fraud, etc.). Damages for emotional distress in these cases are only excluded to the extent of paid medical expenses.
- Verify that the taxpayer reported taxable amounts at gross rather than reporting them net of legal and other fees paid.
- Determine if allowable legal fees were deducted properly. They should be deducted on Schedule A as miscellaneous itemized deductions, unless the origin of the claim litigated is related to a Schedule C or a capital transaction. **This guide does not address the proper treatment of legal fees paid and deducted in taxable years prior to the year of recovery.**
- Verify that expenses were paid on or after October 24, 2004 in cases involving IRC § 62(a)(20) (relating to costs involving discrimination suits). For cases involving IRC § 62(a)(21) (relating to the deductibility of attorney fees paid in connection to a whistleblower's award), verify the information provided as part of the claim had been provided on or after December 20, 2006. In both instances, verify total deductions have been limited to the amount includible in the taxpayer's gross income on account of the underlying discrimination suit or whistleblower award. These sections allow above the line deduction of legal costs.

- Verify that for a non-corporate taxpayer, legal fees deducted as a Schedule A miscellaneous itemized deduction are not allowed for purposes of computing the alternative minimum tax (AMT).
- Verify that for purposes of the AMT Credit, legal fees that are disallowed for purposes of calculating the AMT do not contribute to the amount of the credit. They are "exclusion" items.

Chapter 2 Taxability of Lawsuit Payments

General rule relative to taxability of amounts received from lawsuit settlements is IRC §61 that states that all income is taxable from whatever source derived, unless exempted by another section of the Code.

Terminology/Definitions

Types of Claims

Tort:

- A civil wrong, not involving breach of contract, for which a remedy may be obtained;
- A wrongful act committed by one person against another person or his/her property;
- The breach of a legal duty imposed by law, other than by contract;
- May cause or constitute, but is not necessarily, a personal injury.

A tort award may be received from litigation or settlement of a claim for physical injury or illness, mental pain and suffering, interference with economic relations, and/or property damage.

Example 1

X punches Y, thus committing the tort of battery.

Example 2

X sets foot on Y's property, thus committing the tort of trespass, but causing no personal injury.

Contractual:

- Claims based on rights given by contract.
- A remedy provided specifically by the contractual agreement or as interpreted by a court.
- Whether damages based on a contractual claim are taxable usually depends on the underlying claim.

Example 3

COURT COMPLETION OF MEDIATION FORM



Settlements—Taxability

If you receive proceeds from settlement of a lawsuit, you may have questions about whether you must include the proceeds in your income. This publication provides information about whether you must include the proceeds of certain kinds of settlements in your income. Whether you must include the settlement proceeds in your income depends on all the facts and circumstances in your case.

A settlement payment may consist of multiple elements that have been allocated by the parties. For example, an agreement may include allocations to back pay, emotional distress, and attorneys' fees. Generally, the IRS will not disturb an allocation if it is consistent with the substance of the settled claims.

Personal physical injuries or physical sickness

- If you receive a settlement for personal physical injuries or physical sickness and did not take an itemized deduction for medical expenses related to the injury or sickness in prior years, the full amount is non-taxable. Do not include the settlement proceeds in your income.

-BUT-

- If you receive a settlement for personal physical injuries or physical sickness, you must include in income that portion of the settlement that is for medical expenses you deducted in any prior year(s) to the extent the deduction(s) provided a tax benefit. If part of the proceeds is for medical expenses you paid in more than one year, you must allocate on a pro rata basis the part of the proceeds for medical expenses to each of the years you paid medical expenses. See Recoveries in **Publication 525** for details on how to calculate the amount to report. The tax benefit amount should be reported as "Other Income" on line 8z of Form 1040, Schedule 1.

Emotional distress or mental anguish

- The proceeds you receive for emotional distress or mental anguish attributable to a personal physical injury or physical sickness are treated the same as proceeds received for Personal physical injuries or physical sickness above.

-BUT-

- If the proceeds you receive for emotional distress or mental anguish do not originate from a personal physical injury or physical sickness, you must include them in your income. However, the amount you must include is reduced by: **(1)** amounts paid for medical expenses attributable to emotional distress or mental anguish not previously deducted and **(2)** previously deducted medical expenses for such distress and anguish that did not provide a tax benefit. Attach to your return a statement showing the entire settlement amount less related medical costs not previously deducted and medical costs deducted for which there was no tax benefit. The net taxable amount should be reported as "Other Income" on line 8z of Form 1040, Schedule 1.

Lost wages or lost profits

- If you receive a settlement in an employment-related lawsuit; for example, for unlawful discrimination or involuntary termination, the portion of the proceeds that is for lost wages (i.e., severance pay, back pay, front pay) is taxable wages and subject to the social security wage base and social security and Medicare tax rates in effect in the year paid. These proceeds are subject to employment tax withholding by the payor and should be reported by you as “Wages, salaries, tips, etc.” on line 1 of **Form 1040**.
- If you receive a settlement for lost profits from your trade or business, the portion of the proceeds attributable to the carrying on of your trade or business is net earnings subject to self-employment tax. These proceeds are taxable and should be included in your “Business income” reported on line 3 of Form 1040, Schedule 1. These proceeds are also included on line 2 of Schedule SE (**Form 1040**) when figuring self-employment tax. For more information about reporting self-employment income and paying self-employment tax, see **Publication 334**, Tax Guide for Small Business (For Individuals Who Use Schedule C or C-EZ).

Loss-in-value of property

- Property settlements for loss in value of property that are less than the adjusted basis of your property are not taxable and generally do not need to be reported on your tax return. However, you must reduce your basis in the property by the amount of the settlement.
- If the property settlement exceeds your adjusted basis in the property, the excess is income. For more information, see the Instructions for Schedule D, (**Form 1040**) Capital Gains and Losses and the Instructions for **Form 4797**, Sales of Business Property.

Interest: Interest on any settlement is generally taxable as “Interest Income” and should be reported on line 2b of **Form 1040**.

Punitive Damages: Punitive damages are taxable and should be reported as “Other Income” on line 8z of Form 1040, Schedule 1, even if the punitive damages were received in a settlement for personal physical injuries or physical sickness.

Estimated Payments: Some settlement recipients may need to make estimated tax payments if they expect their tax to be \$1,000 or more after subtracting credits & withholding. Information on estimated taxes can be found in IRS **Publication 505**, Tax Withholding and Estimated Tax, and in Form 1040-ES, Estimated Tax for Individuals.

For additional information, see **Publication 525, Taxable and Nontaxable Income**, visit our website at www.irs.gov, or call toll-free at 1-800-829-1040.

Important Note about Health Insurance Coverage. If you, your spouse, or your dependent enrolled in health insurance coverage through the Health Insurance Marketplace and advance payments of the premium tax credit were made to the insurance company, let the Marketplace know if you have a change in circumstances such as a taxable settlement resulting in an increase in your income. Reporting changes allows the Marketplace to adjust the amount of your advance credit payments, which helps prevent large differences between your advance credit payments and the premium tax credit you are allowed. Find out more about the tax-related provisions of the health care law at IRS.gov/aca. See IRS **Publication 5152**, Report changes to the Marketplace as they happen.

All of the forms and publications referenced in this publication are available from the IRS at www.irs.gov. Paper copies can be ordered by calling 1-800-829-3676 (1-800-TAX-FORM).



Tax Implications of Settlements and Judgments

The general rule of taxability for amounts received from settlement of lawsuits and other legal remedies is Internal Revenue Code (IRC) Section 61 that states all income is taxable from whatever source derived, unless exempted by another section of the code. IRC Section 104 provides an exclusion from taxable income with respect to lawsuits, settlements and awards. However, the facts and circumstances surrounding each settlement payment must be considered to determine the purpose for which the money was received because not all amounts received from a settlement are exempt from taxes. The key question to ask is: "What was the settlement (and its corresponding payments) intended to replace?"

IRC Section and Treas. Regulation

IRC Section 61 [↗](#) explains that all amounts from any source are included in gross income unless a specific exception exists. For damages, the two most common exceptions are amounts paid for certain discrimination claims and amounts paid on account of physical injury.

IRC Section 104 [↗](#) explains that gross income does not include damages received on account of personal physical injuries and physical injuries.

IRC Section 104(a)(2) [↗](#) permits a taxpayer to exclude from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or physical sickness

Reg. Section 1.104-1(c) defines damages received on account of personal physical injuries or physical sickness to mean an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution.

Resources (Court Cases, Chief Counsel Advice, Revenue Rulings, Internal Resources)

CC PMTA 2009-035 – October 22, 2008 [PDF](#) Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements

Publication 4345, Settlements – Taxability [PDF](#) This publication will be used to educate taxpayers of tax implications when they receive a settlement check (award) from a class action lawsuit.

Rev. Rul. 85-97 - The entire amount received by an individual in settlement of a suit for personal injuries sustained in an accident, including the portion of the amount allocable to the claim for lost wages, is excludable from the individual's gross income. Rev. Rul. 61-1 amplified.

Rev. Rul. 96-65 - Under current Section 104(a)(2) of the Code, back pay and damages for emotional distress received to satisfy a claim for disparate treatment employment discrimination under Title VII of the 1964 Civil Rights Act are not excludable from gross income. Under former Section 104(a)(2), back pay received to satisfy such a claim was not excludable from gross income, but damages received for emotional distress are excludable. Rev. Rul. 72-342, 84-92, and 93-88 obsolete. Notice 95-45 superseded. Rev. Proc. 96-3 modified.

Analysis

Awards and settlements can be divided into two distinct groups to determine whether the payments are taxable or non-taxable. The first group includes claims relating to physical injuries, and the second group is for claims relating to non-physical injuries. Within these two groups, the claims usually fall into three categories:

1. Actual damages resulting from physical or non-physical injury;
2. Emotional distress damages arising from the actual physical or non-physical injury; and
3. Punitive damages

Prior to August 21, 1996, IRC Section 104(a)(2) did not contain the word "physical" with regard to personal injuries or sickness. The Code was amended (SBJPA, PL 104-188) to exclude from gross income "the amount of any damages (other than punitive) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness". The Service has consistently held that compensatory damages, including lost wages, received on account of a personal physical injury are excludable from gross income with the exception of punitive damages. Rev. Rul. 85-97 and also see *Commissioner v. Schleier*, 515 U.S. 323, 329-30 (1995).

Damages received for non-physical injury such as emotional distress, defamation and humiliation, although generally includable in gross income, are not subject to Federal employment taxes.

Emotional distress recovery must be on account of (attributed to) personal physical injuries or sickness unless the amount is for reimbursement of actual medical expenses related to emotional distress that was not previously deducted under IRC Section 213. See *Emerson v. Comr.*, T.C. Memo 2003-82 & *Witcher v. Comr.*, T.C. Memo 2002-292.

As a result of the amendment in 1996, mental and emotional distress arising from non-physical injuries are only excludable from gross income under IRC Section 104(a)(2) only if received on account of physical injury or physical sickness.

Punitive damages are not excludable from gross income, with one exception. The exception applies to damages awarded for wrongful death, where under state law, the state statute provides only for punitive damages in wrongful death claims. In these cases, refer to IRC Section 104(c) which allows the exclusion of punitive damages. *Burford v. United States*, 642 F. Supp. 635 (N.D. Ala. 1986).

Employment-related lawsuits may arise from wrongful discharge or failure to honor contract obligations. Damages received to compensate for economic loss, for example lost wages, business income and benefits, are not excludable from gross income unless a personal physical injury caused such loss.

Discrimination suits for age, race, gender, religion, or disability can generate compensatory, contractual and punitive awards, none of which are excludible under IRC Section 104(a)(2).

As a general rule, dismissal pay, severance pay, or other payments for involuntary termination of employment are wages for federal employment tax purposes.

The General Instructions for Certain Information Returns provides that for information return reporting purposes, a payment made on behalf of a claimant is considered a distribution to the claimant and is subject to information reporting requirements. Consequently, defendants issuing a settlement payment or insurance companies issuing a settlement payment are required to issue a Form 1099 unless the settlement qualifies for one of the tax exceptions.

In some cases, a tax provision in the settlement agreement characterizing the payment can result in their exclusion from taxable income. The IRS is reluctant to override the intent of the parties. If the settlement agreement is silent as to whether the damages are taxable, the IRS will look to the intent of the payor to characterize the payments and determine the Form 1099 reporting requirements.

Treatment of Payments to Attorneys - IRC 6041 and 6045 state that when a payor makes a payment to an attorney for an award of attorney's fees in a settlement awarding a payment that is includable in the plaintiff income, the payor must report the attorney's fees on separate information returns with the attorney and the plaintiff as payees. Therefore, Forms 1099-MISC and Forms W-2, as appropriate, must be filed and furnished with the plaintiff and the attorney as payee when attorney's fees are paid pursuant to a settlement agreement that provides for payments includable in the claimant's income, even though only one check may be issued for the attorney's fees.

Issue Indicators or Audit Tips

Research public sources that would indicate that the taxpayer has been party to suits or claims.

Interview the taxpayer to determine whether the taxpayer provided any type of settlement payment to any of their employees (past or present).

Review court documents or relevant documents to:

- Determine the nature of the claim and the character of the payment.
- Determine whether the payment, in whole or in part, is INCOME to the recipient.
- Determine whether the payment, in whole or in part, is WAGES.
- Determine whether the taxpayer has a reporting requirement, and if so, whether form required is a 1099 or W-2.

Request documentation of how the taxpayer reported the payment and whether the appropriate employment taxes were paid. Request copies of the original petition, complaint or claim filed showing grounds for the lawsuit and the lawsuit settlement agreement.

Review the original petition, complaint or claim and lawsuit agreement for:

- Clear characterization of payments
- Settlement checks or a schedule of payments
- Documentation showing the amount of legal fees paid, including any written fee agreements
- Disbursement schedule or a clear statement of how the funds were disbursed
- Documentation of letters or statements that address the taxation of the settlement proceeds.

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Lawsuits, Awards, and Settlements Audit Techniques Guide

NOTE: This document is not an official pronouncement of the law or the position of the Service and cannot be used, cited, or relied upon as such. This guide is current through the publication date. Since changes may have occurred after the publication date that would affect the accuracy of this document, no guarantees are made concerning the technical accuracy after the publication date.

Audit Guide Rev. 5/2011

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

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Mediation Skills/Part 1 of 2

Avoiding the Impasse, Closing the Deal

BY WILLIAM A. DREIER

Educated mediators need to be able to analyze barriers to settlement. They need to understand whether the barrier comes from a lack of information, the psychology of one or both of the parties, or mistaken analysis.

That's the common ground in the theory books described in the box on page 7. All provide bases for mediators to correctly interpret manifestations of the barriers, and to

determine the neutrals' interventions that can help break those barriers down and produce a settlement.

This process should be understood before a mediator applies a particular mechanical technique to "close the deal." It is not enough for a mediator to assess what appears to be an unrealistic offer or demand from which a party will not retreat—even when the mediator inwardly labels the party as unwilling to negotiate, or even pigheaded. The refusal to move could be emotional. It could be caused by a different way of life or criteria for evaluating ideas. These differences are probably the hardest to deal with.

But the failure to proceed also could be based on misinformation or different data interpretations. A mediator can be effective in clearing up these problems. Often the difference is caused by mistaken perceptions of self-interest, focusing on the past rather than the future. A party may be holding on to monetary losses or psychological harm which, with deeper analysis, may show that the party feels it will never be fully compensated; or has failed to realize the financial, psychological, and exposure relief that a settlement may afford.

Too often, parties are too in love with their own cases. Their positions have been extolled by their attorneys, friends, and family.

They don't realize how a neutral judge, jury, or arbitrator, without the parties' psychological baggage, might view the matter.

A mediator should help break through these impediments.

All of these factors have effects throughout the mediation process, but come to a head when the parties are at or near what they perceive as their final demands and offers.

There are several effective approaches for defeating impasse, but they cannot just be sprung on the parties individually, or in a series, without the mediator understanding the mindsets of the individuals he or she faces. It is for this reason that the textbooks in the accompanying "Theory on Impasse" box are worth at least one or more close readings, until the mediator understands the techniques and how each applies to the underlying causes of the impasse.

The prototypical personal injury mediation case presents an unequal dynamic. It usually pits an insurance company against a relatively unsophisticated and financially insecure individual.

There are exceptions, of course. The plaintiff may be wealthy. The defendant may



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Mediation Skills

(continued from front page)

be a struggling commercial entity or an individual who is uninsured (or face a case that falls within a policy's deductible).

Usually, however, the insurer or self-insured manufacturer, trucker, etc, calls the shots, because it makes little difference to it whether the case settles or not. Once negotiations reach a reasonable settlement range based on probable results in court, all that is on the line is the transaction costs—that is, the experts, the attorney's fees, and any additional discovery costs.

If the defendant settles all of its cases or tries them, the good results will balance the poor. To such defendants, the savings of costs and assessment of the actual risk are the keys.

Plaintiffs have a completely different dynamic. If the case is lost, the costs, while technically payable by the individual, often are absorbed by counsel for the simple reason that most plaintiffs cannot afford to reimburse counsel for the tens or even hundreds of thousands of dollars invested in the case. And their plaintiff's counsel bears the total risk on fees, except in the rare case where there is hourly compensation.

Most telling is the fact that the plaintiff has this one case and cannot average the good and bad results of thousands of similar matters. Once the settlement offer reaches even a low-reasonable range, the plaintiff's pressure to settle is intense. Added to the plaintiff's concerns is that if a reasonable settlement is rejected, a jury may low-ball or even find for the defense; add to this the pressure from the plaintiff's attorney, whose fee is on the line.

Some counsel may be more in the position of the insurer, because good recoveries can be balanced against bad. Often, however, the plaintiff's counsel is not a regular participant in

personal injury litigation and his or her inventory of cases is too small to invite averaging.

Therefore, whatever bravado may be put forth by a plaintiff, or whatever defense counsel may say, the dynamic is that a reasonable plaintiff usually must take an offer that falls within the reasonable range. This means that the plaintiff must convince the defense that the probable trial result is higher than what the defense originally perceived.

While jury research studies present ranges, the carrier will not be impressed by the high end; averages or the low end are where settlement offers are usually found. One expression and belief is that carriers offer only low-hang-

ing fruit for which plaintiffs can reach. While a verbal description of the risks and benefit usually suffices for personal injury mediations, in more complex cases, a decision tree analysis should be deployed to provide settlement perspective.

These cases must be distinguished from employment cases, business torts or contract mediations, where there are different dynamics. These are often like mini-divorce cases. There are thwarted expectations, accusations of infidelity, and accounting issues as the relationships are untangled. The techniques to be applied in these situations are examined below.

(continued on next page)

The Theory on Impasse

Various texts have focused on the nature of the conflict giving rise to the impasse and the actions—that is, the interventions—that might be initiated by a mediator to resolve the problem.

Prof. Harold I. Abramson of the Touro Law Center, in Central Islip, N.Y., in his book *Mediation, Representation—Advocating in a Problem-Solving Process*, published by the National Institute for Trial Advocacy, (2004) (a new edition was released last year), analyzed several of the academic approaches to impasse resolution. Among these is an earlier edition of the fascinating five-part conflict analysis by Christopher W. Moore, who, in a "Circle of Conflict: Causes and Interventions," breaks the issues into conflict of interests, conflict of structure, conflict of values, conflict of relationships, and conflict of data, each with separate underlying causes, and "interventions" open to a mediator to counter each of these causes. Christopher W. Moore, "The Mediation Process—Practical Solutions for

Resolving Conflicts," 64–65 (3d ed. Jossey-Bass 2003).

Additionally, Prof. Abramson describes a 10-cause impasse analysis. A book by Prof. Dwight Golann at Boston's Suffolk University Law School, divides impasse causes into process obstacles, psychological barriers, and merits conflicts. In *Mediating Legal Disputes* (ABA 2009), Golan adds a discussion of psychological issues to these areas before treating impasse techniques.

Similar approaches can be found in the 2008 book, "The Practice of Mediation—A Video-Integrated Text," by University of Pennsylvania Law School Prof. Douglas N. Frenkel, and University of Connecticut School of Law Prof. James H. Stark.

If an individual mediator has the time and inclination to read and understand these approaches, they provide a foundation for individual case insight and a facility for working with litigants and counsel. ■

—William A. Dreier

Mediation Skills

(continued from previous page)

Put aside for now the structural impasse of a defendant or its representative, such as an insurer, who has absolute but unrealistic dollar or other limits on the offer. The limit may be placed by a person at the table, or more often, by an individual or committee who is not participating in the mediation and is uninfluenced by the realities that have been discussed. A summary may be telephoned back to headquarters, but it often is quickly dismissed.

Of course, there are the equivalent intractable plaintiff's demands set at multiples of the case's fair value. But at least the plaintiff is there. There is a chance that reason can prevail over a jackpot mentality once the mediator identifies a possible misinformation source, such as plaintiff's attorney, family, friends, newspaper articles, etc.

If an impasse is to be broken, it is best that those who have created the impasse be present so they can be dealt with. Sometimes these absent figures can be brought to the mediation via speakerphone or videoconference. Too often the only contact is a telephone relay, and the mediator can only hope that the flavor of the proceedings and progress made is accurately transmitted.

Such a conference is a mediation in name only, and is frustrating to all but the perpetrator, who often thoroughly enjoys thwarting the process.

As often as these structural blocks occur, more often, mediations occur because people and parties want to settle. This article covers techniques to deal with the problems that thwart, temporarily, the better resolutions parties and neutrals seek in mediation, written mostly from a personal injury case perspective, but broadly applicable to commercial cases.

FACE REALITY

A reality check can be used to correct misapprehensions of law or facts. When the mediator notes that one side or the other has an unrealistic view of the law, the mediator should proceed somewhat warily.

The errant lawyer might be privately taken aside for a discussion of the basis for the legal dispute, whether it is an overlooked statute, a case or article, or even an evident foundation

for a question where the attorney had thought none existed. Examples may be the total loss of a plaintiff's rights where his or her responsibility is more than 50%, or the failure to realize that minority and marketability discounts may or may not apply when valuing corporate stock.

Attacking the attorney in front of the client can be counterproductive. A mediator needs the attorneys as allies, not adverse to the process.

Where there are factual mistakes—as opposed to factual disputes—again, the mediator must tread carefully. If a study of the file shows that one side has overlooked or misread

Breaking Through

The issue: Parties + their mediation baggage = impasse.

The blame: The parties' lack of information, psychology, or mistakes. And mediators' inability to deal with the problems.

The assistance: Reality checks, Batna/Watna, and assessing damages better. More impasse-busters next month.

a material fact, it is best for the mediator to feign a lack of understanding and ask for an explanation, bringing in the reference. Often, the mistake will be realized, and the neutral can then compliment the party or attorney for reconsidering a position based not on what was found, but on what the party or attorney has discovered.

In personal injury mediations, defense counsel often are accompanied by annuity specialists. The use of annuities can make lower settlement more appealing. The tax ramifications of a structured settlement depend upon the cause of action settled. Although this author is not a tax specialist—and thus a tax attorney or accountant should be consulted—note that IRS Tax Publication 525 indicates that personal injury and accompanying emotional distress is not taxable, nor is an annuity dependent upon those factors.

But settlements for lost wages are taxable, as are punitive damages and attorneys' fees for any taxable sums received. The benefit of the annuity is that all future payments, which include substantial accrued interest that would have been taxable to the recipient if the award had been paid up front, are also not taxable. The recipient receives far more over the life of the annuity and can even direct up front that lump sum payments be made at times when the recipient expects that there will be monetary demands, such as for future education or other anticipatable costs.

Although an extra \$50,000-\$100,000 may be sought, now, giving up these additional amounts may be far preferable to a possible and devastating downside if a jury returns with a "no cause" verdict.

BATNA/WATNA

This technique's cryptic title adopts "Getting to Yes" terminology. Roger Fisher and William Ury, "Getting to Yes: Negotiating Agreement Without Giving In" (2d Ed. 1991). Batna is the "best alternative to a negotiated agreement." Watna is the "worst alternative to a negotiated agreement." This impasse-defeating technique involves dealing with each of the parties in the caucus sessions and by looking forward (see "Forward-Looking Interests" below), having them recognize what the best and worst situations might be if they do not settle.

This method is usually used when there is a reasonably narrow range separating the parties; but can also be effective earlier in the session when asking a party to take a bigger step toward a settlement.

If there is a bankruptcy threat, or a substantial loss of an interest in a business, or a jury coming back with a "no-cause" verdict, they can be measured against paying slightly more or accepting slightly less than the offer or demand now on the table. Often monetary settlements can be phrased in terms of the good that they will do, such as a child's education, more security in retirement, augmenting income or the like. See the "Gambling Analogy" section below.

ADJUDICATION IS UNPREDICTABLE

Judges, juries and arbitrators are unpredictable. There are no such things as 100% claims

or defenses. If the case were really that strong, then a summary judgment would have entered long ago. The judge, jury or arbitrator likely won't see the case the same as the party or attorney. It can be explained to the party that it has been reinforcing its view of the case over and over since it arose, and the other side has been doing the same. The neutral will have to reconstruct the facts solely from the presentations that are made.

Furthermore, in a mediation the parties have the opportunity to fashion relief in a way that a judge, jury or arbitrator cannot do. It is arguably ADR's greatest strength, along with cost savings. In court, there will be no payment terms or annuities or variable interest rates; there are no side benefits that can be conferred or other possibilities that can be tailored to fit the particular case. A failure to settle cuts off the parties from such useful tools.

Adjudicators also vary tremendously in their innate abilities and personalities. The parties can control the settlement but not a fact-finder who goes astray because the particular testimony was misunderstood or because he or she just did not believe what one party or the other thought was a credible witness. Parties, witnesses and experts may become flustered and not testify as expected. The courtroom can be a very uncertain battleground.

DAMAGE ESTIMATIONS

In personal injury cases and simple breach of contract matters, the parties often are looking to the mediator for validation of their damage estimates. But as soon as an evaluative mediator puts a number on the table, a two-party mediation turns into a three-party process. Each of the parties and the mediator then fight for their own figures.

If the mediator follows a facilitative approach, there will be a gentle nudging of the parties toward settlement, but without a dollar figure being advanced by the mediator often until the very end. There are several factors, however, that the mediator can point out that will affect how the parties look at whatever numbers are demanded or offered.

Transactional Costs: What will the litigation cost the parties in attorney fees, expert fees, deposition costs, lost time for the party's corporate executives and the like? If the matter is being presented to arbitration in the event

of a failure at mediation, there may be sizeable arbitration fees. If the matter goes to verdict or award, there may be extensive interest charges and even the award of the adversary's attorney fees, if warranted by the particular claim. Although the parties may bargain to include some of these fees in a settlement, often settlements are reached with all or most of these costs either reduced or waived.

There are many cases in which the combined fees of both sides end up being greater than the difference between the offer and demand. It makes no sense for such a case to proceed.

These cases, however, still reach impasse, often because the parties have unrealistically viewed the costs as well as the probability of ever fully achieving what they are asserting in their claims or defenses. A good analysis of the transactional costs when dealing with an impasse can be combined with any of the other damage estimation factors to put a settlement back on course.

Item-by-Item Damage Assessment: Often the parties will present a list of damages, and then add them up to justify a demand or offer. When the mediator goes over these lists with the parties, there may be a great difference when a realistic probability is assigned to each item. This is especially true in commercial cases where there may be a wide swing in dealing with discounts or valuations.

By singling out individual elements, the mediator often can bring reality into the situation, especially if there is another way of assessing a particular item, such as an impartial expert, discussed below. Remember, however, that in the final settlement, the parties do not have to agree on each point, only on the total. See "Black Box" Analysis below.

Tax Implications: Often the parties will overlook the tax implications of their offer or demand. The mediator probably won't be a tax specialist—and, if not, should not hold himself or herself out as an expert. Still, there are well-known tax benefits to certain types of settlements. A proper allocation of a settlement to a bodily injury will carry with it a freedom from federal income taxes, but there must be a basis for such a claim.

Accepting an annuity directly from the defendant's insurer radically changes the taxability of these proceeds, which build up within the annuity tax free at reasonable interest rates.

Negotiated or scheduled lump-sum payments can be made at intervals to defray education expenses or other anticipated needs for proceeds. Allocating a commercial settlement to a buy-back of corporate stock may achieve capital gains treatment for what otherwise might have been ordinary income.

But in all of these cases the structure must be understood and advice obtained from a tax attorney or accountant. Sometimes, the expert can be called directly from the session and help resolve a knotty issue. These tax benefits alone may break through an impasse.

Resort to Accepted Outside Standards: This help with estimating damages often is overlooked. In personal injury claims, there are jury verdict research services which can provide guidelines, but the caveat being that each case must be viewed to see how similar it is to the one with which you are dealing. One broken leg can be 100 times more serious than another. There are a tremendous number of variables, but the services are still helpful.

Another outside standard may be an independent accountant, appraiser, engineer or other professional. At times the parties will agree to consider the expert's conclusions. On other occasions, the parties will agree to be bound by the valuation. Often, the expert can be chosen by the parties' own experts, if they can agree, and if not, they may ask the mediator to suggest the independent expert. On still other occasions, when the mediator has been called in early enough, the parties may even use an independent expert in lieu of paying fees for partisan experts.

In the impasse situation, however, the use of an impartial expert allows the parties to save face in that they have not given in. They have only recognized that someone else may have greater expertise to determine a particular point. This, in effect, will have the expert serve as an arbitrator on the particular point.

As an offshoot to this type of resolution, the parties may ask a neutral to make a finding as to the particular element of damages after hearing all of the experts, and they will agree to be bound by this "arbitrated" decision. There is a problem with this type of med-arb in that the mediator should decline if he or she has been told confidential facts that bear upon the particular issue.

If not, and the mediator is going to proceed as an arbitrator for any particular issue

(continued on next page)

Mediation Skills

(continued from previous page)

or even for the entire matter, the neutral must be sure to get a separate agreement where all of the considerations are spelled out in detail, particularly the issue of confidential information that the neutral may have learned. For an examination of same neutral med-arb issues, see Gerald F. Phillips, "The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication Is Mandatory," 26 *Alternatives* 101 (May 2008), and Gerald F. Phillips, "Back to Med-Arb: Survey Indicates Process Concerns Are Decreasing" 26 *Alternatives* 73 (April 2008) (the articles report on a survey of seasoned neutrals' practices and attitudes). See also

Gerald F. Phillips, "It's More than Just 'Med-Arb': The Case for 'Transitional Arbitration,'" 23 *Alternatives* 9 (October 2005) (focusing on the ethical issues of same-neutral med-arb). For insight into the use of same-neutral med-arb with a backup neutral for arbitration decisions in a high-profile case, see "The AIG-Greenberg Neutral on his Settlement Role—Mediation? Or Arbitration? Answer: It's Both," 28 *Alternatives* 8 (January 2010).

FORWARD-LOOKING INTERESTS

This principle again borrows *Getting to Yes* concepts. It also has been recognized in virtually every mediation text. It states, basically, that so long as the parties are looking back over their shoulders at what happened in the past and seeking punishment for their adversary or

vindication for themselves, they will find it difficult to focus on their real future best interests.

The problem manifests itself with an unrealistic focus upon the parties' internal pre-mediation attorney conferences, where they established outlandish bargaining limitations that can be detrimental to settlement. These pre-mediation plans presume that there will be nothing during the mediation process that will change the party's view of the litigation, the underlying dispute, or the party's future interests.

* * *

In Part II next month, author William Dreier provides more than a dozen more impasse techniques, and advice for helping mediation clients close the deal.

(For bulk reprints of this article, please call (201) 748-8789.)

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About the Panelists...

Theodore K. Cheng, ADR Office of Theo Cheng, is an independent, full-time mediator and arbitrator with offices in West Windsor, New Jersey, and New York City. He concentrates his ADR practice in the resolution of commercial, intellectual property, entertainment, technology and employment disputes, and has more than 20 years of experience as an IP and general commercial litigator with a focus in trademarks, copyrights, patents and trade secrets.

Mr. Cheng is admitted to practice in New Jersey, New York and the District of Columbia (inactive); and before the United States District Court for the District of New Jersey, the Southern, Eastern and Northern Districts of New York, and the Western District of Michigan; the United States Court of Appeals for the Second, Third, Sixth, Seventh, Ninth and Federal Circuits; and the United States Supreme Court. Having held the Chartered Life Underwriter (CLU) and Chartered Financial Consultant (ChFC) designations, he has been appointed to the commercial and employment rosters of the American Arbitration Association and the CPR Institute, as well as the American Intellectual Property Law Association's List of Arbitrators and Mediators and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. A Fellow of the College of Commercial Arbitrators, he is also Past Chair of the New York State Bar Association Dispute Resolution Section, a former Treasurer of the Copyright Society and has served on the Council of the American Arbitration Association.

Past President of the Justice Marie L. Garibaldi American Inn of Court for ADR, Mr. Cheng frequently authors articles and essays on ADR and intellectual property issues. He has a regular column called *Resolution Alley* in the *NYSBA Entertainment, Arts and Sports Law Journal*, which addresses the use of ADR in those industries. Mr. Cheng is an Adjunct Professor at New York Law School and was appointed a Practitioner in Residence at the Center for Intellectual Property x Innovation Policy (C-IP²) George Mason University's Anton Scalia Law School. He received the 2020 James B. Boskey ADR Practitioner of the Year Award from the NJSBA Dispute Resolution Section, has been inducted into the National Academy of Distinguished Neutrals and is the recipient of several other honors.

Mr. Chen received his A.B., *cum laude*, from Harvard University and his J.D. from New York University School of Law, where he served as Editor-in-Chief of the Moot Court Board. He was a law clerk to the Honorable Julio M. Fuentes, Third Circuit Court of Appeals, and the Honorable Ronald L. Buckwalter, United States District Court for the Eastern District of Pennsylvania.

Felicia T. Farber, APM, BSEE, Farber Resolutions, LLC in Wayne, New Jersey, is a full-time arbitrator, mediator, workplace investigator and attorney in New Jersey and New York. She has more than 28 years of experience facilitating the resolution of civil, commercial and family disputes through mediation, arbitration and litigation. She serves as an arbitrator for the Financial Industry Regulatory Authority (FINRA), AAA, CPR and New Jersey courts, and is a mediator for the AAA, CPR and federal Courts as well as a New Jersey court-approved Civil Mediator and Mentor.

Admitted to practice in New Jersey and New York, Ms. Farber is a former Vice President of the New Jersey Association of Professional Mediators (NJAPM) and is Accredited as a Business/Commercial Mediator by the organization. Past Chair of the New Jersey State Bar Association's Dispute Resolution Section, she has been a member of the Association's Labor and

Employment Law Section's Executive Committee, a Trustee for the Women in the Profession Section and has served on the Supreme Court Committee on Complementary Dispute Resolution and its Arbitration Advisory Committee and Advisory Committee on Mediator Standards. She has been New Jersey Chair of the American Bar Association's Women in Dispute Resolution Committee and a member of the Eastern District of NY ADR Advisory Council, the Bergen County Bar Association's Construction Law Section and the Editorial Advisory Board of the New Jersey State Bar Foundation publication *Legal Eagle*.

President of the Justice Marie L. Garibaldi American Inn of Court for ADR, Ms. Farber has taught conflict resolution, mediation, negotiation and ADR-related topics at William Paterson University and for ICLE, the New Jersey State and Bergen County Bar Associations, NJAPM and the New Jersey ODS. She has designed and led advanced civil mediation training courses and serves as a Mediator Mentor for New Jersey Civil Roster Applicants. She was the 2019 recipient of the James B. Boskey Award as the ADR Practitioner of the Year bestowed by the New Jersey State Bar Association as well as the 2022 recipient of the Association's Lewis J. Pepperman Distinguished Service Award.

Ms. Farber received her B.S.E.E. in Electrical/Computer Engineering from Tufts University and her J.D. from Benjamin N. Cardozo School of Law.

Laura A. Kaster, Laura A. Kaster LLC in Princeton, New Jersey, has more than 35 years of experience with arbitration, mediation and settlement negotiation in a variety of complex commercial disputes. Formerly Chief Litigation Counsel for AT&T Corporation, she represented AT&T in its patent, trademark and trade secret cases, as well as in other intellectual property matters.

Ms. Kaster is admitted to practice in New Jersey, New York, Massachusetts and Illinois; and before the United States District Court for the Northern District of Illinois; the First, Second, Third, Fourth, Fifth, Seventh, Tenth and Federal Circuit Courts of Appeals; and the United States Supreme Court. She is a Fellow of Chartered Institute of Arbitrators and the College of Commercial Arbitrators, has been a member of the College's Task Force on Mixed Modes, and has served as an arbitrator and mediator for organizations including the American Arbitration Association (AAA), CPR, ICDR, FINRA and the New Jersey and New York Courts. Past Chair of the New York State Bar Association Dispute Resolution Section, Ms. Kaster is a CEDR accredited mediator and has been certified as a mediator by the International Mediation Institute. She is Past Chair of the New Jersey State Bar Association Dispute Resolution Section and has been a member of the Global Panel of the Center on Dispute Resolution (CEDR), the Executive Committee of the National Association of Distinguished Neutrals and the New Jersey Academy of Mediators and Arbitrators. She has also sat on the New Jersey Supreme Court Committees on Complementary Dispute Resolution and Mediator Standards.

Past President of the Garibaldi ADR American Inn of Court, Ms. Kaster has taught Dispute Resolution Processes at Seton Hall Law School as an Adjunct Professor. She is Co-Editor-in-Chief of *Dispute Resolution Lawyer* for the NYSBA Dispute Resolution Section, a co-editor for the College of Commercial Arbitrator's *Guide to Best Practices in Commercial Arbitration* (Fourth Edition, 2017) and has lectured for PLI, the American and New York State Bar Association Dispute Resolution Sections, NJAPM and the New Jersey State Bar Association. She has also been listed in *Who's Who in America* and *Who's Who of American Women*, and is the recipient of the 2018 Richard K. Jeydel Award from the Garibaldi American Inn of Court and

the 2014 Boskey Award as ADR Practitioner of the Year from the NJSBA Dispute Resolution Section.

Ms. Kaster received her B.A. from Tufts University and her J.D., *magna cum laude*, from Boston University, where she was Notes Editor for the *Law Review* and a recipient of the Melville M. Bigelow Award. She was Law Clerk to then Chief Judge Frank M. Coffin, Federal Court of Appeals for the First Circuit.

Robert E. Margulies (12/25) 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.

Suzanne M. McSorley is a Shareholder in Stevens & Lee, P.C. in Lawrenceville, New Jersey, where she concentrates her practice in complex commercial litigation and dispute resolution, and counsels clients in the pharmaceutical, manufacturing, construction, insurance and healthcare industries, with a particular emphasis on construction matters. She represents owners (including pharmaceutical manufacturers, research universities, real estate developers and homeowners), contractors and suppliers in litigation and other dispute resolution

proceedings and processes in every type of construction-related claim including construction defect claims, lien claims and delay and interference claims.

Past President of the Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution, Ms. McSorley has, since 1997, served as a mediation neutral in assisting parties in hundreds of matters to resolve disputes outside of the litigation process. A Charter Member of the National Academy of Distinguished Neutrals, she serves as a mediator on both the National Association of Distinguished Neutrals panel for New Jersey and the roster of mediators for court-annexed mediation in New Jersey. Ms. McSorley has also been active in the ABA Forum on Construction Law for many years, where she has served as Chair of Division 12, Owners and Project Finance. She is Past Chair of the New Jersey State Bar Association Dispute Resolution Section and a former member of the New Jersey Supreme Court Committee on Complementary Dispute Resolution and Advisory Committee on Mediator Standards.

Ms. McSorley has written and lectured widely on topics relating to mediation and construction law, and has also served as an editor of the ABA publication, *Construction Defects*. With extensive experience as a mediation neutral trainer, she has received certificates from the National Institute for Trial Advocacy and the Center for Mediation in Law. Ms. McSorley was named the 2005 James B. Boskey “ADR Practitioner of the Year” by the New Jersey State Bar Association for her contributions to advance the cause of mediation and other forms of alternative dispute resolution in New Jersey. In 2019 she was also the recipient of the William J. Brennan Citation for Justice Award bestowed by the Legal Service of New Jersey and in 2021 was the recipient of the Richard Jeydel Award for Excellence in ADR by the Justice Marie L. Garibaldi American Inn of Court.

Ms. McSorley received her A.B., *cum laude*, from Princeton University and her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar. She was a law clerk to The Honorable Warren W. Eginton, United States District Court for the District of Connecticut.

Terri Roth Reicher is an attorney arbitrator/mediator in Pompton Lakes, New Jersey, and maintains an alternate dispute resolution (ADR) private practice in northern New Jersey. Appointed by the New Jersey Supreme Court as a Fee Arbitrator, she serves on the panel of statewide mediators in Bergen, Essex, Passaic and Morris Counties, and handles a wide range of commercial disputes with an expertise in healthcare matters. She has been a United States Equal Opportunity Commission mediator and is the Bioethics attorney for the Chilton Memorial Hospital.

Admitted to practice in New Jersey and Tennessee, Ms. Reicher is Past President of the Justice Marie L. Garibaldi American Inn of Court for Alternate Dispute Resolution (ADR), continues to serve on the Inn’s Executive Board and is a member of the New Jersey Association of Professional Mediators (NJAPM). She has been a member of the American Bar Association’s Dispute Resolution Section, the Women in Dispute Resolution (WIDR) and the American Health Lawyers Association. She has been Vice Chair of the New Jersey State Bar Association Alternate Dispute Resolution Section; a member of the NJSBA Healthcare, Labor and Employment, and Elder Law Sections; and a member of the American and Passaic County Bar Associations.

Ms. Reicher has been an Adjunct Professor at William Paterson University’s Cotsakos School of Business, where she has taught undergraduate and graduate students Legal Environments of

Business, and is a former adjunct professor at Seton Hall University School of Law and Thomas Jefferson University School of Medicine. She has lectured for ICLE, the NJAPM, the Dispute Resolution Institute and bar associations, and her articles have appeared in the *New Jersey Lawyer* and other professional journals.

Ms. Reicher received her B.S., *magna cum laude*, from the University of Pennsylvania, Wharton School of Business, where she was elected to *Beta Gamma Sigma* and the Senior Women's Honor Society. She received her J.D. from Vanderbilt University, where she was Associate Editor of the *Vanderbilt Journal of Transnational Law*, and her LL.M. in Health Law and Policy from Seton Hall University School of Law. She served a judicial clerkship with the Honorable Ray L. Brock, Tennessee Supreme Court.

Andrew Smith, MBA, M Fin., Andrew Smith Law Group LLC in Somerville, New Jersey, has more than 30 years of experience in business, law and alternative dispute resolution, including experience as a commercial and technology attorney. He is a New Jersey Superior Court-approved civil mediator.

Admitted to practice in New Jersey, New York and Missouri, and before the United States Supreme Court, Mr. Smith is Past President of the New Jersey Association of Professional Mediators (NJAPM) and is accredited in Business and Commercial Mediation by the organization. He is Past Chair of the New Jersey State Bar Association Dispute Resolution Section and has been a member of the Association's Solo & Small Firm, Construction Law, Labor and Employment Law and Minorities in the Profession Law Sections. He has also been a member of the Hunterdon County Bar Association.

Mr. Smith is an Executive Board Member and has been Chair of Strategic Planning for the Marie L Garibaldi American Inn of Court for Alternative Dispute Resolution. He has lectured for ICLE, the New Jersey State Bar Association and other organizations on mediation skills, conflict management, conflict resolution and leadership.

Mr. Smith received his B.S. in Electrical Engineering from the University of Missouri, his M.B.A. from Lindenwood University, his Master of Finance from St. Louis University and his J.D. from Fordham University School of Law.

Richard H. Steen is a Member of Richard H. Steen, LLC, Attorneys at Law, in Princeton, New Jersey. His practice emphasizes the management and resolution of complex construction, commercial and environmental disputes through litigation or alternative dispute resolution techniques. He is an experienced mediator, facilitator and arbitrator, and serves as a neutral for the federal and state courts, the American Arbitration Association and in private proceedings.

Mr. Steen is Past President of the New Jersey State Bar Association and Past Chair of the Association's Construction and Public Contract Law Section, Legislative Committee, Task Force on Medical Malpractice and Special Committee on Dispute Resolution. He was the founding Chair of the NJSBA Dispute Resolution Section and recipient of the Section's 1998-1999 "ADR Practitioner of the Year Award." Mr. Steen has been a member of the New Jersey Supreme Court Advisory Committee on Mediator Standards and Arbitration Advisory Committee, and has chaired the Administration Subcommittee of the Court's Standing Committee on Complementary Dispute Resolution. He has also served as Chair of the American Arbitration Association's New Jersey Construction Advisory Council.

A Master and Past President of the Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution, Mr. Steen is a contributing author to *Partnering in Design and Construction* (McGraw-Hill, Inc., New York, 1995) and *The Construction Dispute Resolution Formbook* (John Wiley & Sons, Inc., New York, 1997), and author of numerous papers and articles on construction law, dispute management and alternative dispute resolution. He lectures extensively on ADR and related topics, and provides training for neutrals in arbitration and mediation techniques. A 2006 recipient of ICLE's Distinguished Service Award, he is also the recipient of the 2012 Professional Lawyer of the Year Award, the 2002 Distinguished Legislative Services Award and the 2007 Legends of ADR Award, all bestowed by the New Jersey State Bar Association.

Mr. Steen is a graduate of Drexel University and Seton Hall University School of Law, where he was a founding Director of the Seton Hall Legislative Bureau and the first Editor-in-Chief of the *Seton Hall Legislative Journal*.