

**ADVOCATES CHECK LIST
FOR RULE 1:40 COURT ORDERED CIVIL MEDIATIONS**

CASE INFORMATION

Case Name:
County:
Docket #:
Mediation Referral Order (MRO) Date:
Discovery End Date:

Date	Done (√)	References
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RECEIPT OF MEDIATION REFERRAL ORDER (MRO)

		1. Contact Client and inform about MRO. Explain the mediation process as needed based on Client's experience. Discuss the confidential nature of the process and mediator's role as a neutral. Emphasize non-adversarial nature: seeking practical non-judicial solution to problem; process can minimize cost; party is entitled to full discovery and litigation rights if mediation unsuccessful. Inform client of pro-rated party responsibility for payment of mediation services post two hours.	R.1:40-2(c) R.1:40-4
		2. Check Assigned Mediator for any conflicts.	R.1:40-4(f)
		3. Check out Assigned Mediator (experience, background, hourly rate, etc.).	
		4. Discuss with client possibility of a Party Selected Mediator, considering experience, background, possible cost difference, etc. (Note that Alternate Roster Mediators must still offer two non-compensated hours.)	R.1:40-4(f)(3)
		5. Consider who you want as the mediator within 14 days. <ul style="list-style-type: none"> • You may contact the mediator to discuss mediation style, experience, the status of the case, etc. • Contact opposing counsel with Party Selected Mediator suggestion, if applicable, and agree before 14-day period expires. 	R.1:40-6(b)
		6. Check for client conflicts with Mediator.	R.1:40-4(f)
		7. If using Party Selected Mediator, <ul style="list-style-type: none"> ▪ Advise Assigned Mediator of your election ▪ FAX Order of Election to CDR coordinator. 	

AFTER CONTACT FROM MEDIATOR RE: ORGANIZATIONAL CALL

		1. Calendar the Call and any proposed dates.	
		2. Assess what information (limited discovery) will be needed from client and/or adversary prior to mediation session.	
		3. Have your own and your client's calendar available during the Call.	
		4. Consider who would be most helpful to have at the mediation representing your client. Person(s) should have full settlement authority and knowledge of critical facts. If not feasible, identify who would have ability to contact ultimate decision maker at all times during mediation. Emphasize to client distinct advantage of having decision-maker personally at mediation in order to hear arguments from both sides.	R.1:40-4(g)
		5. Consider who would be most helpful from opposing party at mediation.	
		6. [Avoid treating mediation like a formal hearing and bringing in witnesses not	

		critical to the negotiating process. However, selectively include persons such as experts if their presence may be essential to achieving resolution.]	
		7. Prior to the Call, prepare a brief description of the case, required information, discovery issues, status of negotiations, and any perceived impediments to resolution.	
		8. Consider ex-parte confidential communications with mediator regarding mediation process suggestions. Note that Mediators partner with each counsel to facilitate resolution and can customize mediation process as appropriate.	
		9. Consider whether you will want to make a confidential submission to Mediator or wish to share Mediation Statements.	

AFTER THE ORGANIZATIONAL CALL

		1. Calendar mediation and due date for Mediation Statement.	
		2. Make certain the client representative has calendared the entire day for the mediation.	

PREPARATION FOR MEDIATION

		1. Interview client regarding needs separate from judicial relief sought in litigation. Also examine client's understanding of the needs of the opposing party. Emphasize seeking practical resolution to problem. Consider non-legal factors such as: potential for continued relationship, significance of timing of any possible payments, timing commitments and cost of continuing litigation, non-monetary issues, etc.	
		2. Prepare a Risk Assessment of the case in order to calculate client's and opposing party's Best Alternative to a Negotiated Agreement (BATNA). Consider: likelihood of success at trial, range of damages, litigation costs, evidence issues, witness issues, non-monetary factors.	
		3. Prepare a budget for litigation costs and fees of going forward from the date of the mediation (not sunk costs). <ul style="list-style-type: none"> • Plaintiff must subtract these costs from the potential recovery • Defendant must add these costs to any potential damages award 	
		4. Discuss Risk Assessment with Client and let Client know that one function of the Mediator is to test the Risk Assessment.	
		5. Discuss process of mediation and get necessary authority for settlement and range.	
		6. Consider preparing terms for potential settlement other than amount, including release and bringing draft to the mediation.	
		7. Prepare Mediation Statement as agreed during Preliminary Call. Include key facts, controlling legal principles and provide copies of significant supporting documents. If submission is confidential, propose possible settlement alternatives.	R.1:40-6(e)

MEDIATION

		1. Remember that mediation is assisted negotiation and the person who must agree is the opposing party. Resist the temptation to show your client how strong your case is; keep the presentation non-accusatory. Client will often rely on counsel, not mediator, for business, as well as legal advice. Object is not to "win" but to arrive at an amicable resolution.	
		2. The process is yours! Ask for a caucus if you need one at any time to get assistance from the Mediator.	

		3. If settlement is reached make sure there is a signed writing at mediation session- at least a Memorandum of Understanding and preferably a Settlement Agreement. Be concise. Highlight the principal terms. Mediator should not act as scrivener.	R.1:40-4(i)
		4. Discuss the process with adversary and the Mediator, and decide who will serve as the scrivener to work out final text of Settlement Agreement within an agreed upon time period after mediation session.	
		5. If no settlement is reached, consider scheduling a 2 nd mediation session and discuss what further discovery may be useful/necessary prior to 2 nd session.	
		6. Utilize mediator for discovery case management and to resolve potential discovery issues. Consider filing a Stipulation of Discovery Schedule/Case Management Consent Order with court	

AFTER MEDIATION

		1. Consider following up with the Mediator. Note that many cases settle shortly after mediation; Mediator's continued assistance may be valuable.	
		2. Debrief with client.	
		3. Finalize/formalize Settlement Agreement if necessary.	
		4. File any motions required by Settlement Agreement and arrange for any payments.	
		5. File necessary Dismissals with Court.	
		6. Complete on-line mediation survey at www.njcourts.com .	
		7. Request clients to complete on-line mediation survey at www.njcourts.com .	
		8. Facilitate prompt payment to Mediator by client.	

Information and resources regarding the Rule 1:40 Civil Mediation Program and contact information for members of the Mediation Facilitating Committee can be found at the State Judiciary Website: www.njcourts.com. PLEASE AVOID CONTACTING COURT STAFF!

This Advocates Check List for Rule 1:40 Mediations is a project of the NJSBA Dispute Resolution Section under Laura A. Kaster, Chair. The List was created by experienced mediator/attorneys as a "Suggested Practice" resource. Acknowledging the subject matter diversity of court ordered mediations, differences in counsel and mediator style, and the complexity of factors unique to each civil matter, we present this resource as a guide only, to be utilized and customized as appropriate.

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