CIVIL MEDIATION PROGRAM RESOURCE MATERIALS

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INTRODUCTION

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.

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 on July 1, 1995. Following submission of an evaluation report, the Supreme Court approved the program for permanent status effective September 1, 1998. The civil mediation program is governed in particular by *Rules* 1:40-4 and 1:40-6. Thus, in all counties, the court can require the parties to participate in at least two hours of mediation, at no charge, in any type of Civil, General Equity or Probate case.

In order to test more widespread use of mediation, the Supreme Court had authorized Cumberland, Gloucester, Hudson, Mercer, Salem, and Union Counties to operate Presumptive Mediation Pilot Programs. In June 2002, following review of an evaluation report, the Supreme Court authorized expansion of this program to at least four additional counties. Since that time, the pilot has been implemented statewide. In this program, specific case types are automatically referred to mediation not later than 90 days from the filing of the first answer. However, professional malpractice cases are referred following a case management conference.

The following case types are referred to presumptive mediation:

005 - Civil Rights (excluding suits filed by prisoners)
618 - Law Against Discrimination
156 - Environmental Litigation
399 - Real Property
599 - Contract/Commercial
699 - Tort
607 - Other Professional (not Medical) Malpractice
509 - Employment
608 - Toxic Tort
305 - Construction
302 - Tenancy (not Special Civil Part matters)

CASES TO WHICH MEDIATION IS SUITED

Mediation has been used successfully in a broad range of cases that exhibit characteristics such as: 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. While there is not any case type that could not potentially benefit from mediation, commercial, construction, employment, environmental and *Law Against Discrimination* (LAD) cases, and certain General Equity and Probate cases are particularly suited to mediation because they tend to exhibit some of the characteristics described above. The Screening Guidelines and New Jersey Fee Shifting Statutes used by vicinage Civil CDR staff appear in the appendix.

LEMON LAW CASES

The Supreme Court has approved a statewide program that allows counsel and *pro se* parties in "Lemon Law" cases (*N.J.S.A.* 56:12-29 *et seq*.) filed in Superior Court to choose the complementary dispute resolution (CDR) modality to be used for the particular case. This program started as a pilot statewide on January 1, 2006 and applied to all Superior Court "Lemon Law" cases answered subsequent to that date. On July 9, 2009, the Supreme Court approved this initiative as a permanent program.

Under the program, following the filing of the first answer, all counsel and *pro se* parties will be sent a notice providing them the opportunity to select whether the case should go to mediation pursuant to *Rules* 1:40-4 and 1:40-6, non-binding arbitration pursuant to *R.* 4:21A *et seq.*, or voluntary binding arbitration pursuant to guidelines approved by the Supreme Court and posted on the Judiciary's Internet website at www.njcourts.com. Failure to affirmatively choose a CDR modality will result in the case being scheduled for arbitration at the close of discovery unless otherwise provided by order of the court.

MEDICAL AND PROFESSIONAL (NON-MEDICAL) MALPRACTICE CASES

In *Ferreira v. Rancocas Orthopedic Associates*, 178 *N.J.* 144 (2003) and *Knorr v. Smeal*, 178 *N.J.* 169 (2003), the Supreme Court directed that a case management conference be held within 90 days of the service of an answer in all malpractice actions. Because of these requirements, professional malpractice cases should not be sent to mediation until after the conference is held or waived.

TIME FOR MEDIATION REFERRAL

The earlier that a case can be referred to mediation, the greater the likelihood that parties can resolve their dispute at 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 before the mediation session(s). Mediators can also help the parties to determine just how much informal discovery is needed. Even if full 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.

MEDIATION PROCESS

A copy of the court rules relating to mediation appears in the appendix. Copies of the cover letters to court-designated mediators and counsel/pro se parties, as well as the Order of Referral to Mediation, also appear in the appendix. Parties and their attorneys in cases referred to mediation are required to participate with a sense of urgency and in good faith in two hours of mediation before any party may opt out. See *R.* 1:40-4(g). The failure to do so may result in an assessment of costs or other consequences, pursuant to *R.*1:2-4(a). The two hours include preparation time, an organizational telephonic conference and a mediation session lasting at least one hour. The purpose of this is to expose attorneys and their clients to the mediation process and educate them regarding how it works. In the Presumptive Mediation Program discovery is not stayed and cases are sent to mediation for a period not to exceed 90 days.

Within 35 days of the date of the Order of Referral to Mediation and on five days' advance notice from the mediator to the parties, the party-selected or court-designated mediator shall hold an organizational telephonic conference. The purpose of the conference is to explain the mediation process, set ground rules, identify any potential conflicts and those persons with negotiating authority needed to participate in the mediation process in order to bring about a resolution of the case and schedule the mediation session(s). The mediator should facilitate the informal and focused exchange of materials needed by the parties so that all sides are comfortable proceeding to the mediation table.

Following the telephonic conference with the mediator, each party must submit to the mediator a brief statement of the case not exceeding ten typed pages in length. See *R.* 1:40-6(e). At the direction of the mediator, this statement of the case may, but need not, be served upon the other parties to the case. All documents prepared for mediation shall be confidential.

The mediation session is then held and is conducted in accordance with *R.* 1:40-4(g). The fact that one or more parties have withdrawn from mediation after the first two hours need not prevent the mediation from continuing among the remaining parties.

Unless otherwise agreed to by the parties and the mediator, the only public record of a mediation session shall be signed agreements incorporated into consent judgments or any settlements placed on the record. The mediator shall decide the degree of participation of additional persons deemed necessary to facilitate the mediation process. Counsel and the parties, including individuals with complete settlement authority, must attend mediation unless specifically excused by the mediator. When mediation is concluded, the mediator must submit a completion of mediation form to the court.

SELECTION OF MEDIATOR

When a case is referred to mediation, the parties have 14 days to select a mediator. If the parties do not timely select a mediator, the individual designated by the court in the Mediation Referral Order will serve as the mediator. Court designated mediators have been approved for inclusion on the Roster of Mediators for Civil, General Equity and Probate Cases. The Civil Mediator Roster Search is accessible on the Judiciary's Internet home page at njcourts.com. All mediators on the court's roster as well as those not on the roster, whether party selected or court designated, shall comply with the terms and conditions set forth in the Mediation Referral Order; however, non-roster mediators may negotiate a fee with the parties from the outset.

SEARCHING THE CIVIL MEDIATOR ROSTER ON THE INTERNET AND INFONET

The New Jersey Roster of Mediators for Civil, General Equity and Probate Cases is located on the Judiciary's web site www.njcourts.com. in a searchable format under the Civil Mediator Search link on the home page. For example, if an attorney has a construction case in Union County and wants to know about the individuals who handle those cases in that county, the attorney can click on the mediator roster search, enter Union County and the area of expertise, click on "submit" and a list of qualified individuals will appear. If additional information, such as contact information, on a particular individual is needed, the attorney can click on "profile". Suppose instead that the attorney's case has been referred to mediation by the court pursuant to *R.* 1:40-4, the Order of Referral to Mediation provides that counsel have 14 days from the entry of the Order within which to select a mediator.

Accordingly, counsel may wish to search the roster to see which mediators handle their particular type of case in the county of venue. Suppose further that their clients collectively can only afford to pay an hourly rate no greater than $300 per hour after the first two free hours of the mediator's service. The roster also can be searched for rate information. For example, suppose the particular case is a *Law Against Discrimination* case and is venued in Atlantic County and the attorneys want to select a mediator whose hourly rate is between $150 and $300. By inserting the appropriate search criteria, a list of only those individuals who have expertise in *Law Against Discrimination* cases who handle cases in Atlantic County and charge an hourly rate between $150 and $300 will be produced. For judges and court staff, the Judiciary's internal system, the InfoNet, has this same functionality.

UPDATING ROSTER INFORMATION

Whenever a mediator wants to change or update the information on the automated roster, he or she must send a written request to the AOC. A form that can be faxed to the AOC appears in the appendix and is posted on the Judiciary's web site at njcourts.com under Civil Mediation Resources.

MEDIATION BY RETIRED JUDGES

A retired judge may not accept fee-generating court-initiated appointments, including appointments to serve as a mediator except as set forth below.

A retired judge may accept fee-generating court-initiated appointments as a mediator in the Statewide Civil Mediation Program and in the Presumptive Mediation Program, provided that the retired judge meets the experiential and training requirements set forth in *Rules* 1:40-12(a), 1:40-4(e)(1) and 1:40-12(b) and provided that the retired judge agrees to be subject to the same conditions that are applicable to all other mediators in the program, *e.g.*, providing the first two hours of mediation at no cost to the litigants pursuant to *R.*1:40-4(b) and the Court-approved Mediator Compensation Guidelines. See AOC Directive #05-08, a copy of which appears in the appendix.

This is not intended to preclude a retired judge from accepting a fee-generating position as a mediator where the parties to the case initiate the appointment, select the retired judge who is to be appointed and establish the fee arrangement. The court's only

participation is to memorialize their agreement in an appropriate order. Such memorialization shall be approved and signed by the Assignment Judge or designee.

Retired judges interested in being added to the Judiciary's roster of mediators for Civil, General Equity and Probate cases should submit a completed application to the AOC's Civil Practice Division, P.O. Box 981, Trenton, NJ 08625. In the application, the retired judge must indicate in which counties he or she would be available to serve as a mediator and in what subject areas. The retired judge's name would then be included on the appropriate on-line subrosters, listed alphabetically. A trial judge may not go through the roster/subroster to select a particular mediator out of alphabetical order, nor may he or she go through the list to pick a retired judge/mediator out of turn. See AOC Directive #05-08.

MEDIATOR CONFLICT OF INTEREST

R. 1:40-4(f) provides that before accepting a case for mediation, a person who is requested to serve as a mediator shall:

- 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 a foreseeable participant in the mediation; and
- disclose any such known fact to the mediation parties as soon as is practicable before accepting mediation.

Similarly, if after accepting the case for mediation, a mediator learns any of the facts previously described, the mediator must disclose it as soon as is practicable. If, after the entry of the Order of Referral to Mediation, the court is advised by the mediator, counsel or one of the parties that a conflict exists, the court must reassign the case to a new mediator.

REMOVAL FROM MEDIATION

Following the referral of a case to mediation, any party may make a motion pursuant to *R.* 1:40-6(d) to remove the case from mediation.

CONDUCT OF MEDIATION PROCEEDINGS

Rule 1:40-4(g) and Appendix XXVI govern the conduct of civil mediation proceedings. This rule provides that mediation must begin with an opening statement by the mediator describing the purpose of mediation and the procedures used in the process. Additionally, the parties must sign a Disclosure Statement on a form prescribed by the Acting Administrative Director of the Courts. The form is found in the appendix. (For further information, please see the last paragraph under the section entitled "Compensation of Mediators".) 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 mediation. A waiver of representation or participation given before the mediation may be rescinded. Non-party witnesses may be heard in the discretion of the mediator and other non-parties may be permitted to attend 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 in accordance with program guidelines.

MEDIATIONS REQUIRING INTERPRETERS

In order for the Judiciary to provide a spoken language interpreter for civil mediations, mediation must be held at the courthouse. At the organizational telephone conference, mediators should ascertain whether there will be a need for a foreign language or a sign language interpreter. If that is the case, the mediator should immediately contact the Civil CDR Point Person in the county of venue. The court will pay the cost for foreign language interpreters. Requests for sign language interpreters for the deaf and hard of hearing will be handled on a case-by-case basis since these raise complex issues under the *Americans with Disabilities Act* (ADA). See Supplement to Directive #3-04, a copy of which appears on the Judiciary's Internet website.

TERMINATION OF MEDIATION

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

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

ROLE OF COUNSEL AND LITIGANTS IN MEDIATION

Attorneys and their clients are required to make a good faith effort to proceed *with a sense of urgency* and cooperate with the mediator. They should engage in constructive dialogue regarding ways to meet client interests in a mutually acceptable settlement. Attorneys should prepare their clients prior to mediation by explaining what will happen and what the roles of attorneys and clients are in the process. They should also agree on who will be the principle 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 should also 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 any other consultation with their clients.

FAILURE TO PARTICIPATE IN ACCORDANCE WITH ORDER

Failure of parties and/or attorneys to participate in good faith and with a sense of urgency may result in an assessment of costs or other consequences pursuant to *R.*1:2-4(a).

STAY OF DISCOVERY

Rule 1:40-6(c) authorizes the judge to stay formal discovery during the mediation process for a specific or indeterminate time period. Although the rule provides judicial discretion to stay discovery, in practice this is rarely done because the case continues to age. The fact that discovery has not been completed is not grounds for postponing mediation. Whether or not discovery is stayed, mediators nevertheless work with the parties prior to the mediation session to ensure that all needed materials are informally exchanged. In the Presumptive Mediation Program, discovery is not stayed. Mediation is to be completed by the discovery end date (DED). If mediation is not completed by the DED, the case will be placed on the trial calendar.

PLEADINGS AND MOTIONS FILED DURING MEDIATION STAY

Although some Orders of Referral to Mediation may contain a stay of formal discovery, parties must always have access to the court even while mediation is pending. Consequently, staff must accept pleadings, motions and other documents presented for filing during the pendency of the mediation stay.

EXTENSION OF TIME FOR COMPLETION OF MEDIATION

Mediation is to be completed by the discovery end date (DED). Ongoing mediation does not provide exceptional circumstances for a request for an adjournment of trial. Failure to complete mediation by the DED does not provide exceptional circumstances for an extension of the DED or adjournment of trial.

REPRESENTATION AT MEDIATION BY OUT-OF-STATE COUNSEL

RPC 5.5(b)(3)(ii) permits a party to be represented at mediation by an out-of-state attorney who has not been admitted *pro hac vice* under limited circumstances, that is, provided that 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. See *RPC* 5.5(b)(3)(ii).

REPRESENTATION OF CORPORATIONS AT MEDIATION

R. 1:21-1(c) prohibits, with specific exceptions, a business entity other than a sole proprietor from appearing or filing any paper "… in any action in any court of this State except through an attorney authorized to practice law in this State." Therefore, corporations must be represented by counsel at every mediation.

COMPLETION OF MEDIATION

Mediators must promptly complete and submit to the court a Completion of Mediation form. A copy of the form appears in the appendix and is posted on the Judiciary's web site, www.njcourts.com under Civil Mediation Resources.

EVALUATION

On-line questionnaires have been developed for use in evaluating the impact of mediation on resolution of cases. At the conclusion of mediation, the mediator, the parties and the attorneys must complete evaluations and submit them to the AOC. Copies of sample forms appear in the appendix. Evaluation forms are to be completed through an online survey on the Judiciary's web site njcourts.com through a link under Civil Mediation Resources. Please note that no paper versions will be accepted.

COMPENSATION OF MEDIATORS

Roster mediators shall be compensated as provided by *R.*1:40-4(b) and the Guidelines for Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs (Appendix XXVI of the Court Rules). A copy of the Compensation Guidelines appears in the appendix and are posted on the Judiciary's website.

Roster mediators serve free for the first two hours of mediation, as defined in

Guideline #1 of the Compensation Guidelines. Thereafter, if the parties opt to continue with the mediation process, they share the fees and expenses of the mediator equally on an ongoing basis, subject to court review to create equity. However, the fees and expenses of the mediator may be waived upon the court's determination on motion of a party that the party satisfies the requirements of *R.* 1:13-2(a) (*i.e.*, is indigent). A motion is unnecessary if the party is represented by a legal aid society, a legal services project, and private counsel representing indigents in cooperation with any of the preceding entities or counsel assigned by the court to represent an indigent person. It shall be the responsibility of the mediator to make arrangements directly with counsel or *pro se* parties for payment of these fees. However, under *R.* 1:40-4(b), a mediator who has not been paid may apply to the court for an order directing delinquent parties to pay and imposing appropriate sanctions.

If a mediator is not timely paid or a mediator and/or party has incurred unnecessary costs or expenses because of the failure of a party and/or counsel to participate in the mediator process in accordance with the Order of Referral to Mediation, the mediator and/or party may bring an action to compel payment in the Special Civil Part of the county in which the underlying case was filed (Guideline#15).

In accordance with Appendix XXVI of the Rules of Court, 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 his/her market rate as set forth on the Civil Mediator Roster (Guideline # 7). The writing also shall disclose the amount of preparation time the mediator has spent to that point on the case. If the amount of preparation time by the mediator exceeds one hour and if the mediator intends to charge the parties for that additional preparation time beyond the one free hour in accordance with Guideline #14, should they agree to continue with mediation on a paying basis, then in that written disclosure the mediator 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 his/her market rate as set forth on the Civil Mediator Roster (Guideline #2). The Disclosure form appears in the appendix and is found at njcourts.com under Civil Mediation Resources.

MEDIATOR FACILITATING COMMITTEE

A committee has been established to provide assistance to civil mediators with questions or problems concerning a particular case and to judges with questions about referral of a particular case. A copy of the committee roster appears in the appendix and on the Judiciary's web site at www.njcourts.com.

MINIMUM QUALIFICATIONS FOR MEDIATORS

Eligibility for inclusion on the mediator roster is determined by a subcommittee of the Supreme Court Committee on Complementary Dispute Resolution. Applicants must complete an application form. A copy of the form appears in the appendix and also in an interactive format on the Judiciary's web site at www.njcourts.com.

All applicants must successfully complete a minimum of 18 hours in an approved mediation course meeting the standards of *R.* 1:40-12(b)(3). Effective September 3, 2002, all new applicants must also be mentored by an experienced mediator (who has been approved by the AOC to serve as a mentor) in at least five hours in at least two Superior Court cases. Individuals may obtain a waiver of the mentoring requirements from the AOC on the successful demonstration that they have previously served as a mediator in at least five cases in the Superior Court (other than in the Special Civil Part) or in a comparable mediation program or have satisfactorily completed at least 10 hours in an approved advanced mediation course. The mentoring guidelines approved in July 2003 by the Supreme Court appear in the appendix. The mentoring guidelines and the list of approved mediator mentors also are posted on the Judiciary's website.

Rule 1:40-12(a)(3) also requires applicants to possess the following educational and mediation experience:

1. *Juris Doctor* (or equivalent law degree) or
   Advanced Degree in Business, Finance, or Accounting, or
   Advanced Degree in a field of expertise in which the individual will practice mediation (*e.g.* engineering, architecture, mental health) or
   State Licensure in the professional field (*e.g.*, CPA, Architect, Engineer) and

evidence of successful mediation of at least two cases within the last year. Recent mediation experience is waived if mediation training was completed within the last five years.

Or

2. Undergraduate degree and evidence of successful mediation of at least ten cases involving subject matter cognizable in the Superior Court within the last five years.

Applicants must also have at least five years of professional experience in the particular field of expertise. See *R.* 1:40-12(a)(3).

MEDIATOR TRAINING COURSE CONTENT

Rule 1:40-12(b)(3) prescribes the content of the basic mediation skills training. It provides that such a 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.

Rule 1:40-12(b)(2) requires the mediator's annual four-hour annual continuing education course to include instruction on ethical issues associated with mediation practice, program guidelines and/or case management and should cover at least one of the following:

- reinforcing and enhancing mediation and negotiation concepts and skills;
- ethical issues associated with mediation practice; or
- other professional matters related to mediation.

ANNUAL CONTINUING EDUCATION

All mediators must attend a minimum of four hours of annual continuing education. See *R.* 1:40-12(b)(2). They must file proof of attendance annually with the AOC Civil Practice Division, P.O. Box 981, Trenton, NJ 08625. According to *R.* 1:40-12(b)(2), time actually spent mentoring by approved mentors can be applied towards satisfaction of the annual continuing education requirements.

LIMITATIONS ON SERVICE AS A MEDIATOR

*Rul*e 1:40-4(e) sets forth the limitations on individuals who can serve as mediators. It requires that mediators be qualified and trained in accordance with *R.* 1:40-12. It also provides that no one holding a public office or position or any candidate for a public office or position may serve as a mediator in a matter directly or indirectly involving the governmental entity in which the individual serves or is seeking to serve.

The approval of the Assignment Judge is required prior to the mediator being added to the roster for any of the following:

- police or other law enforcement officers employed by the State or any local unit of government;
- employees of any court; or
- government officials or employees whose duties involve regular contact with the court in which they serve.

Additionally, the Assignment Judge has the discretion to request prior review and approval of the Supreme Court of prospective mediators whose employment or position appears to the Assignment Judge to require such review and approval.

EVIDENTIARY PRIVILEGE AND CONFIDENTIALITY OF MEDIATION

R. 1:40-4(c) provides that 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 - 13. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence. Moreover, subsection (d) of the rule provides that unless the participants in mediation agree otherwise or to the extent disclosure is permitted by the rule, no party, mediator, or other participant in 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. See *R.* 1:40-4 (c) and (d).

MEDIATOR STANDARDS OF CONDUCT

The Supreme Court has approved Standards of Conduct for Mediators in court connected programs. These standards apply to all court mediators. The standards provide as follows:

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 fundamental principle of self-determination by the parties. Self determination requires that he 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 (i), and that the mediator may not impose or force any settlement on the parties.

B. The primary role of the 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 conflict 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. 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.

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 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 of 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 *R.* 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 advise 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 *R.*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 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.

ADVISORY COMMITTEE ON MEDIATOR STANDARDS

An Advisory Committee on Mediator Standards was established to assist mediators who seek advice on interpretation of the standards. The committee is also responsible for monitoring complaints about mediators received from attorneys or parties in mediation. Questions about the standards or requests for clarification from the Advisory Committee may be directed to Kathleen Gaskill, Manager, CDR Programs, Administrative Office of the Courts, P.O. Box 988, Trenton, NJ 08625; Phone No. 609-984-2337.

MEDIATOR COMPLAINTS

A procedure is available for review of mediator complaints. A copy of that procedure approved by the Supreme Court in June 2007 and effective August 7, 2007 appears in the appendix.