CIVIL CDR PROGRAM
RESOURCE BOOK

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Hon. Stuart Rabner, Chief Justice

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

N O T I C E

This Manual is intended to provide procedural and operational guidance for New Jersey Judiciary staff in the management of cases within their area of responsibility. The Manual was prepared under the supervision of the Conference of Civil Presiding Judges, along with the Conference of Civil Division Managers and the Civil Practice Division of the Administrative Office of the Courts (AOC). It is intended to embody the policies adopted by the New Jersey Supreme Court, the Judicial Council and the Administrative Director of the Courts, but does not itself establish case management policy. It has been approved by the Judicial Council, on the recommendation of the Conference of Presiding Judges, in order to promote uniform case management statewide and, as such, court staff are required to adhere to its provisions.

While the Manual reflects court policies existing as of the date of its preparation, in the event there is a conflict between the Manual and any statement of policy issued by the Supreme Court, the Judicial Council, or the Administrative Director of the Courts, that statement of policy, rather than the Manual, will be controlling. Other than in that circumstance, however, this manual is binding on court staff.

Statement to Accompany Operations Manuals
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APPENDIX

SECTION 1 : INTRODUCTION

The New Jersey court system, like other courts across the country, must contend with growing civil caseloads in the face of dwindling resources.[1] Consequently, courts must find ways to work smarter without sacrificing the quality of the judicial process. One tool that has helped New Jersey to stretch its resources while also enhancing access to justice is widespread use of complementary dispute resolution (CDR). [2] To date, New Jersey has created and strengthened the infrastructure needed to support high quality civil CDR programs through such efforts as the development of a CDR master plan, early screening of new cases for CDR reference, programs that match expertise of neutrals to case needs, development of program standards, mandatory and on-going training of neutrals and establishment of an active oversight committee.

The New Jersey Supreme Court has adopted the following guiding principle concerning the development, use and management of dispute resolution:

> "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 highest quality of justice possible."[3]

New Jersey has in place a statewide civil caseflow management system to ensure that its high volume and diverse mix of cases are processed with the greatest possible fairness, efficiency and timeliness. This system was implemented effective September 5, 2000 to ensure uniform and consistently applied processes, programs and procedures statewide. This system facilitates the court and the parties in tailoring case preparation to promote timely resolution consistent with the circumstances of each individual case. This in turn should conserve costs and

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[1] In addition to increasing filing volume, there is a strong sense among the bench and bar that the civil caseload is growing ever more complex -- that is, more and more cases are being filed that involve many parties, voluminous discovery, the testimony of large numbers of experts and very complicated factual and legal issues.

[2] Complementary Dispute Resolution (CDR) refers to court-annexed dispute resolution programs while Alternative Dispute Resolution (ADR) refers to privately run dispute resolution programs.

[3] Implicit in this principle is the understanding that in some instances justice will be best served by providing opportunities to individuals and groups to resolve their disputes without resort to a trial presided over by a judge. On the other hand, dispute resolution programs should not be used in circumstances where judges would provide a better quality of justice. Complementary dispute resolution techniques and the traditional adjudicatory process, when viewed collectively, form a complete and integrated dispute resolution system within the New Jersey court system.

time, enhance the quality of the process leading up to and including the effective resolution of the case and, by so doing, buttress public confidence in the courts.

The effectiveness of any CDR technique relies on a variety of factors, some of which include: the ability of court staff to screen and gather case information early; to routinely monitor case progress; to identify and resolve problems that may impede a case's progress; and to refer each case to the most appropriate CDR technique. The New Jersey Civil Division is supported in this effort by the statewide Automated Case Management System (ACMS).

Although the Civil Division handles nearly 100,000 cases every year, only a relatively small percentage of these – about 2% are resolved by trial. How are the remainder to be assured quality justice? Part of the answer lies in the role attorneys play in resolving suits, *e.g.*, through settlement, mediation or arbitration. But the vast bulk of the trial courts' caseload relies on case management procedures primarily carried out by court support staff organized into case management teams.

INTEGRATION OF CDR INTO CASEFLOW MANAGEMENT

Caseflow management refers to the overall court supervision or management of the time and events necessary to move cases from initiation through resolution, regardless of the type of resolution. The New Jersey Civil case tracking system recognizes that all cases are not alike and that the amount and extent of court intervention needed will vary from case to case. By evaluating the likely complexity of each case early, the court can tailor events and preparation time to meet case needs. This system is designed to offer a predictable, orderly flow for each case from filing to termination to achieve the twin goals of timely, cost-efficient resolution and just resolution. The essence of the system is enhancement of the quality of the litigation process and its outcome. This approach offers early court involvement and measured steps to facilitate orderly resolution.

CDR programs are a collection of tools or methods for resolving civil disputes without the time and expense ordinarily associated with the conventional trial process. They complement and supplement the traditional litigation process. Having such a range of options available allows the court (and the parties) to match a dispute resolution mechanism to the needs of the particular case. CDR has long been used to resolve disputes, including disputes that have involved traditional litigation. Within the past two decades, however, courts have recognized that the overall process of dispute resolution can be greatly enhanced if the judicial system facilitates the availability of these processes and integrates them into an effective procedure for

managing all civil cases.[4] The CDR processes in New Jersey are governed by *R.* 1:40 *et seq.* A copy of relevant portions of the rules appear in the appendix.

According to Litigation Control: The Trial Judge's Key To Avoiding Delay,[5] "…no aspect of case processing is divorced from another; a continuum exists that leads to a result. This case management process must provide a consistent, predictable system. Attorneys are entitled to a uniform approach from judges, which provide them clear expectations in order to maintain their practices in a competitive business climate. Certainty is critical (emphasis added)."[6] An integrated civil caseflow management system is one that incorporates dispute resolution into all appropriate stages of the caseflow management process. It avoids duplicative or conflicting efforts to resolve cases and results in a more comprehensive and efficient system of dispute resolution.

There are five aspects of effective caseflow management to which CDR mechanisms are especially closely related.[7] They are:

Early Court Intervention

This may be any early, substantive action taken by the court. "Early" means at the time of filing or shortly thereafter. "Substantive action"[8] occurs when the activity is management-related, rather than solely clerical in nature.

In the context of CDR, early court intervention takes the form of screening of cases to determine the most appropriate dispute resolution method to be used. The earlier that assessment can be made, the greater the likelihood of reducing litigation time and cost. It should be noted that *R.* 1:40-1 provides that counsel have a responsibility to become familiar with the available dispute resolution programs and inform their clients of them. The Civil Case Information Statement (CIS) and which must be filed with every first pleading in a case, elicits information that is useful for CDR screening purposes. For example, the CIS asks if the parties have an

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[4] Bakke, Holly, *et al*., Integrating ADR Into Trial Court Civil Caseflow Management Systems: An Implementation Guide, State Justice Institute (1996), p.3.

[5] ABA, Litigation Control: The Trial Judge's Key To Avoiding Delay, State Justice Institute (1996).

[6] Ibid. at p.3.

[7] Bakke, Holly, supra at pp. 1-4.

[8] Screening cases for complexity to establish an appropriate time period for resolution is an example of a substantive action, in contrast with the clerical tasks of recording and indexing new filings and subsequent pleadings.

ongoing relationship or if the case involves fee shifting. If answered affirmatively, those questions suggest that the case could possibly benefit from early referral to mediation.

Timing of CDR Events

Just as the determination of which CDR mechanism is most appropriate in particular is critical to the effectiveness of the CDR event, so too is a determination of when that event should occur.

In the New Jersey Civil Part, cases are assigned to one of four tracks, based on the presumed discovery and management needs of the case types. As the length of the discovery period is tied to the complexity of the case, and cases are not sent to arbitration until the discovery period has ended, more complex cases go to arbitration after longer discovery periods. With respect to cases being referred to mediation, oftentimes cases are sent after the first answer is filed. Although formal discovery may be stayed, it usually is not. Nonetheless, the mediators may facilitate the early and informal exchange of information in lieu of discovery so that all participants feel comfortable proceeding to mediation. Because mediation does not result in an adjudication, cases certainly do not need to be trial ready for mediation to be successful. Moreover, in many of the cases suited for mediation the parties possess all of the operative information well before suit is even filed. To facilitate early referral of appropriate cases to mediation, ACMS provides weekly reports identifying answered cases in which the CIS indicates case characteristics demonstrating amenability to early resolution by mediation.

Date Certainty and Predictability

The single most important thing a court can do to ensure that counsel and litigants are prepared for a court proceeding is to ensure, insofar as possible, that events occur on the first scheduled date. Experience has shown that cases are better prepared on the first scheduled date than when an event is adjourned multiple times. Good preparation can enhance the quality of the event and the outcome of the case.

The touchstone of the New Jersey case management system is event date certainty. Accordingly, CDR events such as arbitration should occur as scheduled, any necessary rescheduling must be under the control of the court, a new firm date should be given after any adjournment, and the assignment of a case to CDR must not be used as an opportunity to delay case progress.

Benefits of Integration

Properly integrated into a court's caseflow management system, CDR can potentially produce significant benefits in at least five key areas:[9]

1. **Quality of Case Processing**

Tailoring CDR referrals to the characteristics of each case, an integrated system should improve the quality of case processing. As noted above, early case screening promotes better attorney preparation, a more informed discussion of disputed issues, and a better understanding of the factors that facilitate selection of the most appropriate CDR technique, and may result in a resolution that is more responsive to litigant needs and concerns.

2. **Reduced Litigant Costs**

Earlier case resolution results in fewer discovery-related motions. Limitations on the amount, the formality and mode of discovery in selected cases referred to CDR may reduce litigation costs and the number of appearances resulting from adjournments, as well as other events that do not meaningfully contribute to case resolution.

3. **Faster Resolution of Cases**

Since most civil cases filed are resolved without trial, earlier attention to these cases can markedly reduce the court's overall time-to-resolution and provide litigants with a quicker resolution to their disputes. However, the impact of CDR on the speed of case resolution is largely dependent on the timing of the CDR event. CDR should occur as early as possible and when parties, using the most streamlined process, have completed such discovery as is necessary to ensure the effectiveness of the CDR process.

4. **Better Utilization of Court Resources**

Early screening identifies cases that require substantial judicial involvement and attorney preparation as well as cases requiring less judicial intervention (which can be dealt with administratively by staff and referred with less formal preparation to CDR). By tailoring the process to the management needs of cases filed, court resources can thus be used more efficiently, and judges' time can be reserved primarily for functions that only judges can perform. Furthermore, effective timing of the CDR referral may achieve earlier resolution and thus remove the case from the system earlier, thereby further reducing judge and staff workload.

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[9] Ibid. at p.4-5.

5. **Litigant Satisfaction/Improved Public Perception of the Court**

A number of studies show that the public's greatest irritation with the court system is not the quality of judicial decisions, but calendar congestion and an inability to have a case tried in a timely manner.[10] Integration of CDR into the case management process significantly increases the likelihood that the issues in a legal dispute will be addressed faster, in an appropriate fashion, and at less cost than the traditional litigation process. This results in increased litigant satisfaction with the process and enhanced credibility of the court and its calendar with the legal community and the general public.

DETERMINING THE MOST APPROPRIATE CDR TECHNIQUE

The following provides some useful information to help determine which CDR technique best suits the needs of a particular case:

Mediation

Mediation is appropriate in cases where:

- the parties have or have had a significant business or personal relationship;
- there are communication problems between the parties;
- the principal barriers to settlement are personal and/or emotional;
- resolving the dispute is more important than the legal or moral principles;
- multi-faceted settlements are possible;
- the law governing the dispute is well-established and not challenged;
- subjective questions of fact (*e.g.*, state of mind or 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 case involves fee-shifting;
- the parties are not represented by attorneys;
- a valuation process (such as arbitration or judicial settlement conferencing) has failed to resolve the case.

Cases considered inappropriate for mediation are those in which:

- a party or parties are not able to negotiate themselves or with the assistance of counsel;
- there is significant resistance to settlement on the part of one or both parties;
- an independent evaluation of the relative strengths and weaknesses of the parties' evidence and legal arguments to settlement is needed.

[10] ABA, supra at p.8, citing Yankelovich, Skelly & White, Inc., The Public Image of the Courts (1978); Citizens' Commission to Improve Michigan Courts, Final Report and Recommendations to Improve the Efficiency and Responsiveness of Michigan Courts (1986).

Arbitration

Cases most appropriate for arbitration include those where parties:

- require an independent decision to resolve the dispute;
- have full information, but seek the opinion of a third party respecting the extent of damages or the credibility of witnesses;
- are committed to litigating the case;
- have not had a relationship beyond a single incident and are disputing money damage issues only;
- dispute a relatively small amount and a quick third-part decision is of primary importance;
- have an auto negligence, personal injury, personal injury protection or commercial case that is not better suited to mediation.

Arbitration may be inappropriate for cases in which:

- the parties want to improve their communication, find common ground, or work toward a creative solution.

Note: If the parties wish a binding decision and wish to have a high/low agreement to control the parameters of the outcome, they should consider Voluntary Binding Arbitration.

Voluntary Binding Arbitration

Voluntary binding arbitration has been found to be particularly effective in resolving cases having the following characteristics:

- the parties require an independent decision to resolve the dispute;
- the parties have full information, but seek the opinion of third parties respecting the extent of damages, or the credibility of a witness;
- the parties are committed to "litigating" and are not open to negotiation;
- the parties have no relationship beyond a single incident and the disputed issues involve only the amount of money damages; or
- the amount at stake is relatively small and a quick third-party decision is of primary importance.

Voluntary binding arbitration is inappropriate for cases in which:

- the parties do not wish a binding result;
- the parties want to improve their communication, find common ground, or work toward a creative solution.

Summary Jury Trials or Expedited Jury Trials

Summary jury trials or expedited jury trial are appropriate in cases where:

- significant issues or substantial sums are at issue;
- the parties differ substantially in their opinion of how a jury will apply concepts such as reasonableness and ordinary care to the facts;

- one or more parties (or their counsel) appear to have an unrealistic view of the merits of the case even after hearing a reasonable presentation of their opponent's arguments;
- one or more parties are reluctant to settle because they want their "day in court."

Summary jury trials or expedited jury trials are inappropriate for cases:

- which could be tried before a real jury in a day or two;
- where more convenient and less expensive settlement techniques have not yet been explored.

Note: If the parties want to be bound by the result, subject to limited grounds for appeal, an expedited jury trial is more appropriate than a summary jury trial.

SECTION 2 : STATEWIDE CIVIL NON-BINDING ARBITRATION PROGRAM

WHAT IS ARBITRATION?

Arbitration is a process in which a dispute is submitted to experienced and knowledgeable neutral attorneys or retired Superior Court judges to hear arguments, review evidence, and render a decision. It is less formal, less complex, and often concluded more quickly than court proceedings. Statutes, rules, forms and other materials relevant to the civil arbitration program are attached in the appendix.

HISTORY

N.J.S.A. 39:6A-24 et seq., signed into law on October 4, 1983, mandates that all auto negligence cases valued at $15,000 or less be submitted by the court to arbitration. The statute also provides for voluntary arbitration of cases in which the value exceeds $15,000 provided no complex factual or novel legal issues are involved. The stated purpose of the statute is to establish an informal system of handling such cases in an economic and expeditious manner, and to ease the congestion of the courts.

On December 22, 1987, legislation (now *N.J.S.A.* 2A:23A-20 et seq.) was signed into law mandating arbitration of certain personal injury cases valued at $20,000 or less. Like the statute establishing the auto arbitration program, the statute also provided for voluntary arbitration of cases valued in excess of the $20,000 threshold.

Subsequently, arbitration was expanded to cover additional types of cases and this is embodied in *R.* 4:21A *et seq.*

PURPOSE OF ARBITRATION

The purpose of arbitration is to provide an informal process for resolving civil cases in an economic and expeditious manner.

Pursuant to *R.* 4:21A-1(d), an arbitration hearing must occur no later than 60 days after the closing date of discovery. The earlier the arbitration occurs, the greater the likelihood of meeting the goal of expeditious resolutions, thereby reducing litigation time and cost. Research has confirmed what practitioners have long believed that the existence of specific time standards for case resolution correlates with earlier resolutions.

The single most important thing a court can do to ensure that counsel and litigants are prepared for arbitration is to ensure that the arbitration occurs on the first scheduled date. Good preparation enhances the quality of the arbitration and the outcome.

The New Jersey arbitration program has shown that arbitration works most effectively and cost-efficiently when the court schedules matters for trial *de novo* on an expedited basis in cases in which a party rejects an arbitration award. Thus, *R.* 4:21A-6(c) requires that all trials *de novo* be scheduled to be held within 90 days following the filing and service of a trial *de novo* request.

WHAT TYPES OF CASES ARE ARBITRATED?

The following cases on Tracks I, II and III are subject to mandatory arbitration, unless they were referred previously to an unsuccessful mediation:

- all auto negligence cases, regardless of the amount in controversy;
- all personal injury cases, regardless of the amount in controversy, including assault and battery, but excluding professional negligence and products liability cases;
- all Personal Injury Protection (PIP) cases;
- all book account cases and actions on a negotiable instrument; and all other contract and commercial cases that, after screening by the case management teams, are determined to be appropriate for arbitration;
- lemon law cases in which the parties fail to affirmatively choose mediation or voluntary binding arbitration. [11]

Cases on Track IV may be subject to arbitration in the discretion of the managing judge.

HOW DOES ARBITRATION WORK?

All attorneys and all *pro se* parties are notified at least 45 days in advance of their scheduled arbitration hearing. Before the scheduled hearing date, all parties must exchange statements of the factual and legal issues. Two uniform statements of facts and issues have been adopted for statewide use, one for commercial cases and the other for all other cases. These appear as Appendices XXII-A and XXII-B to the Rules of the Court; copies are included in the appendix to this manual.

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[11] The Supreme Court approved a statewide pilot program that will allow 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 pilot program commenced statewide on January 1, 2006 and applies to all Superior Court "Lemon Law" cases answered subsequent to that date.

Under the program, following the filing of the first answer, all counsel and *pro se* parties are 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, posted on the Judiciary's Internet website at www.njcourtsonline.com and appearing in the appendix. Failure to affirmatively choose a CDR modality will result in the case being scheduled for arbitration after the close of discovery unless otherwise ordered by the court.

On the scheduled hearing date, all attorneys and parties are encouraged to appear. Although *R.* 4:21A-4(f) does not require a party to appear if an attorney is appearing on that party's behalf, arbitration is more meaningful when parties attend. It affords litigants their "day in court." When they arrive, they will be greeted by staff who will mark a calendar with appearances. Once all attorneys and parties in a particular case have arrived, the case will be placed on a "ready list" to be assigned accordingly. Cases are heard by a single arbitrator or a panel composed of two arbitrators, as determined by the Assignment Judge. See *R.* 4:21A-2(c), a copy of which appears in the appendix.

The arbitrators having previously reviewed the statements of facts and issues then conduct the hearing during which each party presents its case. A copy of the *Procedures Manual for Arbitrators in the Civil Arbitration Program* without the appendices appears in the appendix to this resource book. Parties are permitted to introduce exhibits and other relevant documentary evidence. Arbitrators generally exercise the power of the court in the management and conduct of hearings. Although the parties themselves may testify during the arbitration, reports are offered in lieu of testimony of witnesses. In more complex cases, however, counsel sometimes will present witnesses to provide limited testimony at the arbitration hearing.

ARBITRATION PROGRAM OPERATING STANDARDS

The following standards were developed by the Supreme Court Arbitration Advisory Committee and approved by the Conference of Civil Presiding Judges for mandatory statewide use.

- The courts should ensure that arbitrators possess at least the minimum qualifications, (at least seven years of experience in New Jersey in the pertinent area of law), are approved by the local bar and the Civil Presiding Judge, are regularly evaluated by the court in consultation with the local bar to ensure both competence and opportunity to serve. The local bar arbitrator selection committee should make every effort to include women and minorities as arbitrators to ensure cultural diversity.
- Unless there is an exceptional need to reserve a particular decision, arbitrators' decisions must be announced in the presence of the parties.
- Cases should be scheduled with at least 45 days' advance notice and with the hearing to occur within 60 days from the close of the discovery period.
- Arbitration hearings should not be adjourned except for exceptional circumstances. Any matters adjourned should immediately be given a new, firm hearing date.

- All those serving as arbitrators must complete at least three classroom hours of initial training and at least two hours of continuing education every two years thereafter.
- Written proof of this training must be provided to the AOC.
- There should be an annual assembly of civil judges, staff and arbitrators in the vicinage.
- Trials *de novo* must be scheduled to occur within 90 days after the filing of the trial *de novo* request.
- The staff and judges should coordinate with the insurance carriers and self-insured parties to block-schedule groups of ready cases whenever possible.
- Arbitrator lists should be broken down by areas of substantive expertise and cases should be matched with arbitrators having relevant expertise.
- Once the court is aware of verbal threshold issues, attorneys should be encouraged to consider the use of voluntary binding arbitration.
- The Civil Presiding Judge is responsible for the overall administration of the arbitration program.
- Arbitration hearings should be conducted in facilities that convey the dignity of a court proceeding.
- Arbitrators' decisions should be based on relevant input by all parties and reflect jury verdicts in the county of venue.
- All participants at arbitration should be treated fairly, impartially, and with dignity.
- Arbitrators must be impartial in fact and in appearance.
- Attendance by the parties or their attorneys at arbitration is vital; absent extraordinary circumstances, arbitration should never be done "on the papers." Also, every effort should be made to have the plaintiff participate by telephone in the arbitration hearing in the event that the plaintiff is out of state on the date of the hearing.
- The 30-day time period for filing of trial *de novo* requests should not be enlarged absent "extraordinary circumstances."
- Upon advance notice to the arbitration staff, every effort must be made to provide interpreters at arbitration hearings involving foreign language speaking or hearing impaired participants.
- Arbitrators should separate "economic" and "non-economic" damages.
- "Friendlies" must be held in all cases in which an arbitration award is accepted on behalf of an infant or a mentally incapacitated person.

- An arbitration award can be confirmed and judgment entered against a party who was in default at the time the arbitration hearing took place so long as the party received advance notice of the arbitration hearing. It should be noted that ACMS currently provides advance notice only to defaulted parties who previously appeared in the case.[12]

FEATURES OF THE ARBITRATION PROGRAM

Some of the features of the arbitration program include:

- Arbitrators adjudicate cases thereby providing the parties with a decision on the merits and a "day in court." [*R.* 1:40-2(a)(1)].
- The arbitration hearing must occur within 60 days after the close of the applicable discovery period permitted for the particular track, thereby providing a rapid resolution to the dispute but only after all parties are ready to proceed [*R.* 4:21A-1(d)].
- Arbitration hearings are held in court facilities and thus have the same dignity as trials; however, they are not recorded [*R.* 4:21A-4(d)].
- The Rules of Evidence do not apply at the arbitration hearing. Arbitrators may hear any evidence necessary to render a decision. Further, instead of bringing actual witnesses, other than the parties, to testify at the hearing, arbitrators may accept affidavits of witnesses, interrogatories, deposition transcripts, and bills and reports of hospitals, doctors, or other experts [*R.* 4:21A-4(c)]. This more informal and flexible procedure saves both time and witness fees.
- The average length of an arbitration hearing is considerably shorter than most trials. Simpler cases, such as two-party auto negligence cases, often can be heard in less than an hour. More complex cases may take an entire day to hear, but this is still significantly quicker than a trial.
- Arbitrators must be either attorneys with seven years of experience in New Jersey in the particular area of law or retired Superior Court judges. The qualification requirements for arbitrators are intended to ensure that those serving in the program are particularly skilled and competent in the particular area of law. Arbitrators must also complete at least three classroom hours of initial training and at least two hours of continuing training every two years thereafter. [*R.* 1:40-12(c)] The roster of qualified arbitrators in each county is maintained by the Civil Presiding Judge and is composed of names recommended by the arbitrator selection committee of the county bar association. Each

[12] See, however, *America's Pride v. Farry*, 175 *N.J.* 60 (2002), which was decided based upon the rules in effect prior to civil "best practices."

selection committee, appointed by the county bar association, consists of two plaintiffs' attorneys, two defense attorneys and one attorney who does not regularly represent either side. The selection committee must also include attorneys having relevant subject matter expertise in each substantive area arbitrated [*R*. 4:21A-2(b)]. This procedure is designed to ensure that the arbitrators in each county are chosen in an unbiased manner and have the confidence of the local bar and the litigants.

- Although the rules provide that the parties to an arbitration hearing may choose the arbitrators who will hear their case by stipulating in writing to the names of the arbitrators [*R*. 4:21A-2(a)], this alternative procedure is rarely, if ever, used.
- Counties have the option of using either single arbitrators or two-person arbitration panels. Single arbitrators are paid $350 per day and two-arbitrator panels are paid $450 per day, to be split evenly by the panel members.
- If any party is not satisfied with the arbitrator's award, that party can request a trial *de novo* upon demand filed and served within 30 days of the filing of the arbitration award and upon payment of $200 [*R*. 4:21A-6(b)(1), -6(c)]. A trial *de novo* must be scheduled to occur within 90 days of the filing of the trial *de novo* request. This provision is intended to prevent the use of a trial *de novo* request as a delay tactic and to alleviate the burden on attorneys and litigants of having to prepare a case twice.
- If the party demanding a trial *de novo* does not improve its position at trial by at least 20 percent, that party may be subject to monetary sanctions, up to a total of $750 in attorney's fees and $500 for witness costs [*R*. 4:21A-6(c)].
- If no trial *de novo* is requested, the case will be dismissed 50 days after the filing of the arbitration award unless either party moves for confirmation of the arbitration award and entry of judgment, or submits a consent order to the court detailing the terms of settlement and providing for dismissal of the action or entry of judgment [*R*. 4:21A-6(b)].

PROVISIONS RELATING TO ARBITRATORS

Who Are the Arbitrators?

Arbitrators must be either attorneys who have at least seven years of experience in the particular area of law in New Jersey or retired Superior Court judges. Separate rosters must be maintained for each discrete area of law. Arbitrators must complete at least three classroom hours of initial training and at least two hours of continuing education every two years thereafter. [*R*.1:40-12(c)] Attorneys wishing to serve as an arbitrator should submit a completed application

and a resume to the Civil Presiding Judge and the county bar arbitration selection committee for review and determination. The application form and Arbitration Screening Guidelines are included in the appendix. The selection committee sends recommendations to the Civil Presiding Judge. Once the Civil Presiding Judge acts on an application, all approved must complete the approved required initial training and must submit proof to the AOC before they can be added to the roster.

Evaluation and Reappointment of Arbitrators

The success of the arbitration programs depends in large part upon the perception of the litigants and the bar of the effectiveness of the arbitrators. For example, do they appear impartial? Do they allow each side to tell its story? Do they conduct the hearing with dignity? Are they familiar with the cases before them? Do they know the law involved? Was the award rendered in the presence of the litigant? Evaluation forms have been developed for statewide use. These forms should be provided to every litigant and attorney attending arbitration hearings. The Conference of Civil Presiding Judges has recommended that the completed forms should be used on an on-going basis. Moreover, at least annually, the Civil Presiding Judges, staff and the local arbitrator selection committee shall review each roster of arbitrators in accordance with the arbitration screening guidelines and consider the results of the completed evaluation forms received. Following this review, however, the AOC should be contacted in order to verify the names of all individuals who have submitted proof of completion of the continuing training required under *R*. 1:40-12(c). Upon verification received from the AOC that individuals have completed the required continuing education, the individual may be added to the roster. Every September, the counties shall forward copies of the updated rosters of arbitrators to the AOC Civil Practice Division. Finally, the AOC should be contacted immediately as roster information is changed.

Arbitrator Standards of Conduct

Attached and appearing in the appendix are the Standards of Conduct for Arbitrators in the Court-Annexed Arbitration Program. The standards were approved by the Supreme Court in May 2003 and apply to all individuals serving in the civil court-annexed arbitration program.

Arbitrator Checklist

A checklist has been developed to guide arbitrators in the optimal handling of hearings. A copy appears in the appendix.

Arbitrator Settlement Protocol

At its June 9, 2006 Administrative Conference, the Supreme Court approved the following settlement protocol for civil arbitrators to follow:

Disclosures by the Parties at Arbitration

With the consent of all counsel and *pro se* litigants, any previous or current offers or demands in the case may be disclosed to the arbitrator(s). Said disclosures shall not result in that arbitrator's disqualification. The arbitrator shall not be bound by these disclosures, unless the respective litigants have entered into a binding high/low agreement.

Settlement Conferences at Arbitration

Upon the consent of all counsel and *pro se* litigants, given prior to the commencement of the hearing, the arbitrator(s) may conduct a settlement conference. In the event that the conference does not result in settlement of the case, the arbitration shall be conducted by a different arbitrator or panel. Nothing herein shall preclude the arbitrator or panel from conducting a settlement conference, upon the request of <u>all</u> parties after the determination by the arbitrator or panel.

Arbitrator Appreciation

Certificates of appreciation are used to recognize the contributions of the attorney arbitrators to the success of the arbitration programs. To be eligible to receive a certificate, an arbitrator must have served in a particular county's arbitration programs on at least ten separate hearing dates. Finally, it is recommended that a special time be set aside each year, *e.g.*, Law Day, for the formal awarding of the certificates of appreciation.

Powers of Arbitrators

Arbitrators serving in the civil arbitration program have the following powers:

- To issue subpoenas, at the request of a party or on their own initiative, to compel the attendance of witnesses or the production of documents at the arbitration hearing. See *N.J.S.A.* 39A:6A-4(b) and 2A:23A-24. An arbitrator faced with a case in which a party fails or refuses to obey a subpoena or request for the production of documents should immediately bring the matter to the attention of the Assignment Judge or the Civil Presiding Judge for appropriate action.
- To administer oaths and affirmations. See *R.* 4:21A-4(b).

- To determine the law and facts in the case. See *R*. 4:21A-4(b).
- To exercise the powers of the court in the management and conduct of the hearing. See *R*. 4:21A-4(b).
- To receive any reliable, relevant evidence and determine its weight, regardless of the Rules of Evidence. See *R*. 4:21A-4(c).
- Because they act as both judge and jury, arbitrators should determine whether the plaintiff has met the verbal threshold. In situations in which the arbitrator feels that there is a clear failure to meet the verbal threshold, the arbitrator should not hesitate to declare a "no cause."

Liability, Defense and Indemnification of Arbitrators

Arbitrators are entitled to a defense by the Attorney General of New Jersey and to indemnification by the State pursuant to the provisions of the New Jersey Tort Claims Act for claims or actions arising out of their service as arbitrators. See Opinion Letter of Attorney General dated January 8, 1985 (copies available from the AOC upon request).

SCHEDULING

Block Scheduling of Cases Involving Common Insurance Carriers

Although *R*. 4:21A-1(a)(d) states that the arbitration hearing must take place no later than 60 days following the expiration of the discovery period, the Conference of Civil Presiding Judges determined that counties can be allowed to hold cases for block scheduling no more than 90 days after the close of discovery. ***(9/28/04 Conference of Civil Presiding Judges' Meeting).***

Scheduling of Arbitrators

Arbitrators, including retired judges, are selected in rotating order from the approved roster for each sub-specialty. ***(4/19/05 Conference of Civil Presiding Judges' Meeting).*** Arbitrators should not be scheduled on days when they have other commitments in the courthouse, including representing clients at hearings before other arbitrators ***(12/13/05 Conference of Civil Presiding Judges' Meeting).***

Scheduling Considerations and Arbitrator Caseload

Experience in the auto arbitration program indicates that the settlement/ adjournment/ removal rate of cases scheduled for arbitration is approximately 65 percent. This should be taken into consideration in scheduling cases. The Arbitration Advisory Committee recommends that,

on the average, arbitrators should be hearing at least five to six negligence cases per arbitration day. Such a calendaring approach is intended to promote the purposes and goals in expediting the resolution of arbitrable matters and reducing costs. However, complex cases such as products liability or more complicated commercial matters will generally take longer to handle and therefore fewer such cases should be scheduled.

No Scheduling of Previously Mediated Cases

Effective September 1, 2004, cases that were previously referred to mediation should not be scheduled for arbitration, unless all parties request arbitration or the court finds good cause for the matter to be arbitrated. See *R.* 4:21A-1(a).

Motions To Extend Discovery – Impact On Arbitration Scheduling

- If a motion to extend discovery is filed *before the arbitration date is fixed*, no arbitration should be scheduled until the motion is decided and the discovery end date passes.

- If a motion to extend discovery is filed *after the arbitration date has been scheduled* and the motion is heard *before* the scheduled arbitration date, the judge will decide whether the arbitration date will be adjourned. This is not a problem if the judge does not grant the motion, but if discovery is extended beyond the scheduled arbitration date, unless otherwise ordered by the court, the arbitration must be adjourned to occur after the discovery end date has passed. If the discovery end date is extended after an arbitration hearing is scheduled (which might occur if an exceptional circumstances motion to extend discovery is made after the discovery end date has passed and a hearing scheduled), the order should expressly address the arbitration date issues." If, discovery is extended and the order is silent on the arbitration date, the court must adjourn the arbitration, whether the attorneys request this or not. However, if all attorneys expressly consent that the arbitration may go forward prior to the discovery end date, this is permissible.

If the motion to extend the discovery end date is *returnable after the scheduled arbitration date*, the vicinage has the discretion to adjourn the arbitration until after the motion is heard or to require that the arbitration go forward on the scheduled date. ***(9/30/03 Conference of Civil Presiding Judges' meeting)***

Although arbitration is normally scheduled after the close of discovery, the setting of an arbitration date in an order extending discovery is only permissible after the discovery end date has been extended via the "automatic" consensual 60-day extension, or if the parties cannot

consent, in an order extending discovery more than 60 days, provided, in either case, that at least 45 days' advance notice of the arbitration is provided. ***(6/10/08 Conference of Civil Presiding Judges' meeting)***

Block-Scheduling of Cases for Arbitration

Some counties have had great success in block-scheduling a group of cases involving a common insurance carrier for arbitration. Using RMDS Report 294, counties can identify cases involving a particular carrier and then schedule a group of the cases for a given day. Frequently, attendance of an adjustor with settlement authority is required. Moreover, immediately following the hearing, the case is sent on arbitration day to a settlement conference. Such initiatives have been shown to greatly reduce the trial *de novo* request rate.

REMOVAL FROM ARBITRATION

Prior to the notice of the scheduling of the case for an arbitration hearing or within 15 days thereafter, removal from arbitration can be sought upon submission of a certification to the arbitration administrator, rather than by motion. If the stated reasons are not sufficient, the request to remove must be denied even if all parties consent to removal. The only situations in which staff may grant the removal request is if the case involves a non-arbitrable case type, *e.g.*, medical malpractice, that was scheduled in error or that the matter was previously mediated unsuccessfully and participation in arbitration would be fruitless. A judge must act upon all other certifications for removal such as those alleging that the case involves unusually complex factual or novel legal issues. After 15 days of the notice of arbitration hearing, removal can only be requested by formal motion.

HANDLING ADJOURNMENT REQUESTS

Because arbitration is not scheduled until after the close of discovery, arbitration hearings should not be adjourned barring "exceptional circumstances." According to *R.* 4:21A-1(d), adjournment requests must be handled in the same way as trial adjournment requests. The procedure is as follows:

- Adjournment requests must be made in writing to the Civil Division Manager or designee and must state the reason for the request,
  - must be made by Wednesday of the week preceding the scheduled arbitration hearing date,
  - state that all parties have consented to the adjournment, and

- include a proposed arbitration date agreed upon by all parties. The date must be on a regularly scheduled arbitration day.
- If all parties do not consent to the adjournment or to a proposed rescheduled date, or if the arbitration has already been adjourned once at a party's request, the court will conduct a conference call with all parties to determine if the case should be adjourned and, if so, when it should be rescheduled.

Statewide Adjournment Procedure

Attached and appearing in the appendix is a copy of the AOC Directive #6-04, effective May 14, 2004. The directive provides the statewide adjournment procedure for civil trials and arbitrations.

Reasons for Adjournment Requests

- Adjournment requests should generally be made only if a necessary attorney, party or witness is unavailable.
- No adjournment request based on incomplete discovery should be made or granted barring exceptional circumstances.
- No adjournment request should be granted to accommodate a dispositive motion returnable on or after the arbitration date.

Pursuant to *R.* 4:21A-1(d) and *R.* 4:36-3(b), once a case is scheduled for arbitration, there should be no adjournments barring exceptional circumstances. This requires a judicial determination; the Arbitration Administrator may not adjourn cases for incomplete discovery. If, however, a judge extends the discovery end date after an arbitration hearing has already been scheduled, the order extending discovery should specify whether the arbitration date is to remain fixed or be rescheduled. (The judge may determine to allow additional discovery without changing the date of the arbitration hearing.) ***(10/30/02 Conference of Civil Presiding Judges' Meeting)***

ATTENDANCE AT ARBITRATION HEARINGS

Rule 4:21A-4(f) provides that an appearance by or on behalf of each party is required at the arbitration hearing. The comment to the rule makes clear that it is sufficient for either the party or the party's attorney to appear. Nevertheless, to ensure that the purpose of arbitration to provide litigants a "day in court" is not compromised, litigants should routinely be encouraged to

attend and participate in arbitration hearings. Evaluations of the arbitration program have found that there is a real benefit in having people come to the courthouse, tell their stories and receive a impartial assessment of their cases from an experienced, competent arbitrator.

If the attendance of a particular party is critical to the other side's proof of his or her case, the opposing party should serve a notice in lieu of a subpoena on the party whose attendance is needed.

If neither the party claiming damages nor that party's attorney appears, the party's pleading will be dismissed. If neither a defendant nor the defendant's attorney appears, the answer will be stricken, the arbitration will proceed and the non-appearing party shall be deemed to have waived the right to request a trial *de novo*. Relief from any order entered as a result of a non-appearance shall be granted only on motion showing good cause and on such terms as the court deems appropriate, including payment of litigation expenses and counsel fees incurred as a result of the non-appearance. In this regard, see *Delaware Valley Wholesale Florist, Inc* v. *Addalia*, 349 *N.J. Super*. 228 (App. Div. 2002).

UNIFORM ARBITRATION STATEMENT OF FACTS FORMS

Pursuant to *R*. 4:21A-4(a) uniform statement of facts forms must be exchanged by all parties at least 10 days prior to the scheduled arbitration hearing. There are two different forms set forth in Appendix XXII - A and - B of the Rules of Court, one to be used in commercial cases and the other for all other cases. Copies of the forms also appear in the appendix.

Attorneys who fail to bring the completed applicable uniform statement of facts form appearing in the Appendices to the Court Rules to arbitration will be required to fill out the requisite form on the day of arbitration and prior to the start of the hearing. If attorneys' statements were not exchanged 10 days prior to the hearing, as required by *R*. 4:21A-4(a), the aggrieved attorney may enforce this requirement by bringing the dereliction to the attention of the judge. ***(9/26/00 Conference of Civil Presiding Judges' Meeting)***

THE ARBITRATION AWARD

After each side has completed its presentation, the arbitrator renders a decision and prepares a written award. A copy of the award forms appear in the appendix to this manual. There is one form for commercial and lemon law and another for all other cases. The decision is normally made on the day of the arbitration hearing in the presence of the participants. The parties are given a copy of the decision (for which they must sign) along with a trial *de novo* request form. A copy of the request form also appears in the appendix. In consolidated cases, the

arbitrator should use a separate award sheet for each separate case. In order to avoid confusion in the application of *N.J.S.A.* 2A:15-53, the comparative negligence statute, when completing the arbitration award form arbitrators should separate the economic and non-economic damages awarded in those situations in which the plaintiff is asserting a claim for economic damages.

The original award should be given to court staff by the arbitrator at the conclusion of each hearing and staff must immediately date-stamp it "filed" on the day of the arbitration hearing. In the event that the arbitrator reserves decision, court staff must stamp it "filed" on the date that it is received from the arbitrator. Thereafter, the court must provide a copy of the decision to all parties pursuant to *R.* 4:21A-5. This procedure is intended to eliminate any question as to when the 30-day period for requesting trial *de novo* begins to run (*i.e.*, from the "filing" date).

Unanimity Required; Procedure When Lacking

When more than one arbitrator hears a case, the decision must be unanimous. If the arbitrators cannot agree, they must immediately advise the parties and the arbitration administrator of the conflict. Within 10 days of being so advised, the parties may request either the designation of a new panel to conduct a second hearing or a trial in Superior Court without further arbitration. In the event that a trial is requested, the provisions of *R.* 4:21A-6(c), providing for the payment of a trial *de novo* fee and for the award of costs following a trial *de novo* do not apply.

Non-Served Parties

Awards should then be reviewed and the presence of non-served parties should be clearly noted by the arbitrator on the report and award. An Order (a sample appears in the appendix) should then be prepared dismissing all claims asserted against the non-served parties for lack of prosecution.

Public Access to Arbitration Awards

Because of the nature of arbitration as a court-annexed, adjudicatory procedure, the public has a right of access to arbitration awards and arbitration hearings.

Prejudgment Interest on Arbitration Awards

The prejudgment interest rule provides that prejudgment interest on arbitrated matters accrues from the date the complaint was filed or six months after the cause of action arose, whichever is later, and ends on the date a court order is entered terminating the action. See *R.*

4:21A-6(b)(3) and *R.* 4:42-11(b). Therefore, the full amount of prejudgment interest can not be calculated until an order has been entered terminating the action. It should be noted that in the absence of the calculation of prejudgment interest, the plaintiff is nevertheless entitled to such interest in addition to the damages awarded, and it continues to accrue until the action is terminated. Prejudgment interest should be calculated by counsel for the party to whom it accrues.

Awards on Behalf of Infants and Incapacitated Persons

In the event that an award is accepted on behalf of an infant or mentally incapacitated person, it must be approved by the court and a "friendly" settlement proceeding must be held as expeditiously as possible. See *R.*4:21A-7 and *Mack v. Berry*, 205 *N.J. Super*. 600 (Law Div. 1985).

NON-APPEARING PARTIES AT ARBITRATION HEARINGS

R. 4:21A-4(f) provides that an appearance by or on behalf of each party is required at the arbitration hearing. The comment to the rule makes clear that it is sufficient for either the party or the party's attorney to appear. If neither the party claiming damages or that party's attorney appears, the party's pleading will be dismissed. If neither a defendant nor the defendant's attorney appears, the answer will be stricken, the arbitration will proceed, and the non-appearing party shall be deemed to have waived the right to demand a trial *de novo*. However, relief from any order entered as a result of a non-appearance shall be granted only on motion showing good cause and on such terms as the court deems appropriate, including payment of litigation expenses and counsel fees incurred as a result of the non-appearance. If the motion is granted, the judge may send the case either to a second arbitration or to a trial, depending on the circumstances.

In *Severino v. Marks*, 366 *N.J. Super*. 275 (App. Div. 2004), the Appellate Division reversed and remanded a case in which the trial judge dismissed plaintiff's demand for a trial *de novo.* The court held that the plaintiffs' failure to be personally present at the arbitration hearing and the failure of plaintiffs' counsel to file an arbitration statement did not constitute a waiver of the plaintiffs' right to a trial *de novo*. The court also noted that the arbitration should not have been scheduled before the completion of discovery.

If a plaintiff appears for arbitration and the defendant does not and the plaintiff requests adjourning the case rather than going forward with the arbitration, staff may not adjourn the case, but rather should refer the matter to a judge for review.

If a plaintiff and plaintiff's attorney appear for arbitration and the defendant appears but defense counsel, despite notice, does not appear, staff must make a good faith effort to reach defense counsel by telephone. If after this good faith effort defense counsel still cannot be reached or refuses to attend, staff may not adjourn the matter, but rather the matter must be referred to a judge who will determine whether there is good cause to adjourn.

If a previous non-appearing party on "good cause" gets a case reinstated on motion following dismissal or striking of the answer because of failure to appear at arbitration and the judge orders the case to a trial rather than to a second arbitration, the $200 trial *de novo* fee must be paid within 10 days of the judge's order. Such order should specifically provide for payment of the trial *de novo* fee within 10 days as a condition of granting the motion.

HANDLING ARBITRATIONS INVOLVING CASES WITH DEFAULTING OR STRICKEN PARTIES

The Conference of Civil Presiding Judges considered a variety of issues relating to arbitrating cases in which a defendant's answer had been stricken for failure to provide discovery or in which a defendant, who had previously answered or appeared in the case, is in default, and made the following determinations:

- if there is but one defendant and that defendant's answer has been stricken or the defendant is in default, the case should not be scheduled for arbitration;
- if there are multiple defendants and one or more (but not all) are in default or have had their answers stricken for failure to provide discovery, the case should be scheduled for arbitration;
- the stricken or defaulted defendant(s) should receive notice of the arbitration hearing;
- the stricken or defaulted defendant(s) should be allowed to participate in the proceeding as they would be allowed to participate at trial, that is, they may cross-examine but may not present affirmative witnesses;
- the stricken or defaulted defendant(s) that participate in the arbitration hearing are not entitled to a trial *de novo* unless that party has moved to vacate the dismissal or default and that motion has been granted before the time to file the trial *de novo* has run;
- if another party files for a trial *de novo*, the defendant(s) in default or whose answer(s) have been stricken should get notice and may participate in the trial; and the defendant(s) in default or whose answer(s) have been stricken are bound if the arbitration award is confirmed. ***(5/14/02 and 6/25/02 Conference of Civil Presiding Judges' Meetings)***

PROCEEDINGS FOLLOWING ARBITRATION HEARINGS

An order shall be entered dismissing the action following the filing of the arbitrator's award unless:

1. within 30 days after the filing of the arbitration award, a party files and serves on all adverse parties a notice of rejection of the award and demand for a trial *de novo*; or
2. within 50 days after the filing of the arbitration award, the parties submit a consent order to the court detailing the terms of settlement and providing for dismissal of the action or for entry of judgment; or
3. within 50 days after the filing of the arbitration award, any party moves for confirmation of the award and entry of judgment thereon.

TRIALS *DE NOVO*

Within 30 days after the filing of the arbitration award either party may file and serve a trial *de novo* request. A party demanding a trial *de novo* must tender with the request a check in the amount of $200 made payable to the "Treasurer, State of New Jersey." The case is then returned to the active trial list for resolution as to all parties. Accordingly, only one party needs to request a trial *de novo*. Any subsequent requests are returned to the filer. Similarly, in consolidated cases, only one trial *de novo* request and fee is needed to place all non-settling cases within the consolidation back on the trial calendar.

Rule 1:5-6 (c) specifically authorizes staff to reject late trial *de novo* requests, as well as those submitted by parties in default or whose answer has been suppressed.

Time for Request

A trial *de novo* request must be filed and served within 30 days after the arbitration award is filed. See *R.* 4:21A6(b)(1). See also *Jones v. First National Supermarkets, Inc.*, 329 *N.J. Super*. 125 (App. Div. 2000) making it clear that service of the request on all adverse parties within the 30-day period is as critical as filing it with the court. See also *Corcoran v. St. Peter's Medical Center*, 339 *N.J. Super*. 337 (App. Div. 2001), holding that the substantial compliance doctrine excusing strict application of the requirements of *R.* 4:21A-6(b)(1) applies to service of a request for a trial *de novo*. See also *Woods v. Shop-Rite Supermarkets, Inc*., 348 *N.J. Super*. 613 (App. Div. 2002), holding that oral notification of an intention to file a trial *de novo* request following arbitration was insufficient and did not constitute substantial compliance with the requirement of timely service of the demand on one's opposing party.

Trial *De Novo* Requests Filed by Non-Appearing Parties

Rule 1:5-6(c) permits staff to reject trial *de novo* requests and accompanying fees submitted beyond the applicable 30-day time period within which such requests must be filed, as well as those submitted by parties in default or whose answers have been suppressed. Therefore, if a party's pleading is stricken for failure to appear at arbitration pursuant to *R.* 4:21A-4, it may not file a trial *de novo* request unless the pleading has been timely restored.

Late Trial *De Novo* Requests

Trial *de novo* requests received beyond the 30-day time period must be returned by staff. See *R.* 1:5-6(c)(3).

Grounds for Enlargement of Time for Requesting a Trial *De Novo* -- Extraordinary Circumstances

The 30-day time period for filing a demand for a trial *de novo* may be extended upon a showing of "extraordinary circumstances":

For example, if plaintiffs contend that defendants, through negotiations, lulled them into missing the filing date, a court might determine that defendants should be equitably estopped from raising the 30-day bar and that the petition should be deemed filed *nunc pro tunc.* There may also be a finding of substantial compliance with the filing limitation. Generally, when asked after the passage of 30 days to bypass the binding effect of this statutory arbitration, the trial courts should be guided by the same principles as they would apply in passing upon a motion for relief from an order or a judgment under *R.* 4:50-1. Of course, the one year limitation of *R.* 4:50-2 would not apply, since this proceeding has its own internal limitation. But, considering the intention of the arbitration program to provide finality, the passage of time should be a critical factor in a judge's consideration. See *Mazakas v. Wray*, 205 *N.J. Super*. 367, 371-372 (App. Div. 1985.)

In *Behm v. Ferreira,* 286 *N.J. Super.* 566 (App. Div. 1996), the court held that the fact that counsel was too busy or had too heavy a workload to properly handle the litigation or supervise staff was insufficient to constitute "extraordinary circumstances." Similarly, an attorney's failure to review his diary and ensure that his secretary followed his instructions to timely file a trial *de novo* request was not found to constitute "extraordinary circumstances." See *Hartsfield v. Fatini,* 149 *N.J.* 611 (1997). See also *Wallace v. JFK Hartwych*, 149 *N.J.* 605 (1997) and *Martinelli v. Farm-Rite, Inc*., 345 *N.J. Super*. 306 (App. Div. 2001).

See also *Flett Associates v. Catalano*, 361 *N.J. Super.* 127 (App. Div. 2003), in which good cause for the relaxation of the 30-day period under *R.* 4:21A-6(b)(1) was demonstrated by the unusual circumstances of an accident which prevented the legal secretary to the client's attorney from serving the demand for a trial *de novo* in a timely manner.

Mere Carelessness is Insufficient

A communication breakdown between a claims agent and a motorist's attorney was not a sufficient ground for granting the motorist's untimely request for trial *de novo* of an arbitrated claim. The motorist's attorney, never having received instructions from the agent to reject the arbitrator's decision and proceed with a trial *de novo*, failed to request the trial *de novo* within the 30-day period required by law. These circumstances were found to constitute mere carelessness or lack of proper diligence, which are insufficient to extend the time for filing a request for a trial *de novo*. *Lawrence v. Matusewski*, 210 *N.J. Supe*r. 268 (Law Div. 1986).

Substantial Compliance (Can be Basis for Enlarging Time)

The filing of a request for a trial *de novo* one business day late was held to constitute substantial compliance with the Rules of Court and constituted an "extraordinary circumstance" permitting the enlargement of the time within which to demand a trial *de novo*. See *Gerzenyi v. Richardson*, 211 *N.J. Super.* 213 (Law Div. 1986). Similarly, in *De Rosa v. Donohue*, 212 *N.J. Super.* 698 (Law Div. 1986), the court found that the particular circumstances in the case, namely, that the mailed trial *de novo* notice took eight days to travel a distance of only fifteen miles, constituted exceptional reasons for extending the 30-day time constraint. The court specifically pointed out, however, that its ruling should not be interpreted to excuse the late arrival of a trial *de novo* request mailed a few days before the filing deadline. *Id*. at 703. See also *Nascimento v. King*, 381 *N.J. Super.* 593 (App. Div. 2005).

Actual Filing Required

Actual filing rather than mailing within the 30-day period is required. See *Gerzenyi v. Richardson*, 211 *N.J. Super*. 213 (Law Div. 1986).

State of New Jersey Not Required to Pay Fees or Monetary Sanctions; Unsatisfied Claim and Judgment Fund Cases Exempt

Whenever the State of New Jersey is a party to an arbitrated case, it is not required to pay a trial *de novo* fee or monetary sanctions pursuant to *R.* 4:2lA-6(c). Therefore, attorneys filing trial *de novo* requests on behalf of the Unsatisfied Claim and Judgment Fund are exempt from

payment of the fee. Staff should be sure that the attorney filing the request is the attorney representing the Fund and not one representing another party to the case.

Handling Receipt of Multiple Fees on a Single Case

Since a trial *de novo* request from one party returns the entire case to the trial calendar, any additional trial *de novo* fees received after the initial fee is received are surplusage and should be returned to the party or parties submitting them. It is important that staff update ACMS so that there is a record of the details of the fees being returned. ***(9/30/03 Conference of Civil Presiding Judges' Meeting)***

Effect of Failure of a Party Requesting a Trial *De Novo* to Submit the Proper Fee

Trial *de novo* requests sent without the proper fee should be returned to the filer. In the past, in some vicinages attorneys were given a reasonable grace period within which to submit the required fee without jeopardizing the timeliness of the trial *de novo* request. However, the Arbitration Advisory Committee has found that such practice dilutes the effectiveness of the trial *de novo* request, thereby frustrating the legislative goals of the program.

Refundability of Trial *De Novo* Fees

Trial *de novo* fees are nonrefundable even if the case settles shortly after the trial *de novo* request is made. To refund fees would be administratively cumbersome and costly, and would encourage the routine rejection of arbitrators' awards. The $200 fee and the 30-day period during which a party may decide whether or not the award is acceptable are designed to preserve the finality of an arbitrator's decision while also allowing the litigants a reasonable opportunity to request a trial *de novo.*

Faxed Requests Not Acceptable

Just as in the case of any other trial *de novo* request unaccompanied by the requisite fee, faxed requests should be returned to the attorney faxing them. *R*. 4:21A-6(c) requires a trial *de novo* fee to accompany the trial *de novo* request and service of the request on all adverse parties in order for the filing to be effective. Filing by fax in such cases circumvents the intent of the rule.

Effect Upon Other Defendants When Only One Defendant Requests a Trial *De Novo*

When only one defendant requests a trial *de novo,* the matter is returned to the trial calendar as to all parties. See *R*. 4:2lA-6(c).

Other Consequences of Requesting a Trial *De Novo* - Award of Costs Following Trial *De Novo*

Rule 4:21A-6(c) provides that if a party rejects an arbitrator's award and the case thereafter goes to a trial *de novo*, that party may be liable to pay reasonable costs, including attorney's fees, incurred by those parties not demanding a trial *de novo*. Reasonable costs shall be awarded on motion supported by detailed certification. However, no costs may be awarded if the verdict is not at least 20 percent more favorable than the award. Moreover, if the rejected arbitration award was for a "no cause," no costs will be awarded if the party requesting the trial *de novo* has obtained a verdict of at least $250. See *R.* 4:21A-6(c)(2). The award of attorney's fees shall not exceed $750 in total nor $250 per day. Compensation for witness costs, including expert witnesses, shall not exceed $500. See *R.* 4:21A-6(c)(3) and (4).

***Per Quod* Claims to Be Combined with Award to Injured Spouse in Determining Whether to Award Costs**

A *per quod* claim should be combined with the award to the injured spouse in determining a party's potential eligibility for counsel fees and costs under *R.* 4:21A-6(c)(1) following a trial *de novo*. See *Coughlin v. Morell and Pfeiffer, 222 N.J. Super.* 71. (App. Div. 1987).

Costs Limited to Extent of Damages Awarded

If a plaintiff who had rejected an arbitrator's award is found to have no cause of action following a trial *de novo*, no attorney's fees or costs may be assessed against that plaintiff. This is because under *N.J.S.A.* 39:6A-34 attorney's fees and costs can only be offset against any damages awarded to a party. See *Ghazouly v. Benjamin*, 251 *N.J. Super*. 1 (App. Div. 1991).

Substantial Economic Hardship Justifying Denial of Costs

In *Helstoski v. Hyckey*, 255 *N.J. Super*. 142 (App. Div. 1988), the court provided guidance as to the circumstances necessary to justify the denial of costs following a trial *de novo* of an arbitrated case in which the plaintiff failed to improve its position by 20 percent. A hardship giving rise to a denial of reasonable costs under *R.* 4:21A-6(c)(5) might exist, if an award for costs exceeds the amount of the recovery. Furthermore, although the economic hardship does not have to be created by the subject matter of the lawsuit, a substantial hardship determination may not be made without full disclosure of all assets and liabilities, the current employment status and all sources and amounts of income of the party seeking a waiver from the

imposition of costs. Finally, the reasonableness of a party's rejection of an arbitration award is it relevant to the determination. See *Helstoski v. Hyckey, supra.*

Delegability of Power to Determine Applications for Costs

In *Helstoski v. Hyckey, supra,* one of the issues raised on appeal was whether the trial judge had the power to rule on an application for the imposition of costs following a trial *de novo* of an arbitrated case since the pertinent Rule (*R.* 4:21A-6(c)) provided, at that time, that such an application shall be made to the Assignment Judge. As the court resolved the case on other grounds, however, it did not reach or rule upon that issue.

Following the decision in the *Helstoski* case, *R.* 4:2lA-8(a) was amended effective 1989 to provide expressly that such functions are delegable.

Trial *De Novo* Request Must Be Filed to Preserve Appeal

According to *Grey v. Trump Castle Associates, L.P., 367 N.J. Super*. 443 (App. Div. 2004), when a matter has been arbitrated pursuant to *R.* 4:21A *et seq.*, a party may preserve the right to seek appellate review of the interlocutory order only by timely filing a trial *de novo* request. However, once the award has been confirmed and judgment has been entered, an appeal from the award or any interlocutory order is barred.

CONFIRMATION OF AWARD/DISMISSAL

Within 50 days after filing of the arbitration award either party may move to confirm the arbitration award and file a motion to enter judgment. A uniform order (see the appendix) must be used. This form of order allows for a resolution of all claims as to each named party in the complaint, and includes the specific percentages of liability, amount of damages, interest and costs assessed.

Extending the Time for Confirmation of Arbitrator's Award

Unlike the "extraordinary circumstances" standard applicable to requests for extending the 30-day period for filing a trial *de novo* request, there is ample justification for applying a more relaxed standard to applications to extend the time for confirmation of the award. See *Allen v. Heritage Court Association, supra.* Therefore, unlike requests to extend the time for filing a trial *de novo,* requests to vacate a dismissal and extend the time for confirming an award should be liberally granted.

Effect of 50-Day Dismissals

According to *Accilien v. Consolidated Rail Corporation*, 323 *N.J. Super*. 595 (App. Div. 1999), if a motion is brought to vacate a 50-day dismissal and file a late trial *de novo* request, the dismissal order is considered to be "with prejudice" and the moving party must show "extraordinary circumstances." Under *Allen v. Heritage Court Associates*, 325 *N.J. Super*. 112 (App. Div. 1999) if the motion to vacate the dismissal is brought to confirm the arbitration award and enter judgment, a more relaxed standard is applied. The court in *Allen* noted:

> Although a motion to vacate a dismissal for failure to file a timely motion to confirm an arbitration award should be viewed with great liberality, litigants should be discouraged from adopting a cavalier attitude towards the requirement that a motion to confirm must be filed within fifty days. Therefore, some sanction should be imposed for plaintiff's failure to comply with this requirement. Accordingly, although we reverse the order denying plaintiff's motion to reinstate her complaint and remand for entry of an order confirming the arbitration award, we direct that prejudgment interest on that award shall be suspended for the period between the expiration of the fifty days allowed for a motion to confirm and the filing date of this opinion. See *R*. 4:42-11(b) (providing for suspension of prejudgment interest in "exceptional cases") (325 *N.J. Super*. at 121.)

See also *Sprowl v. Kitselman*, 267 *N.J. Super*. 602 (App. Div. 1993), holding that the standards set forth in *R*. 4:50-1 apply to late requests to confirm an award and enter judgment filed after a 50-day dismissal.

At the January 13, 2000 meeting of the Conference of Civil Presiding Judges, it was agreed that 50-day dismissal orders must always be mailed to all parties and they should not specify "with prejudice" or "without prejudice."

MISCELLANEOUS MATTERS FOLLOWING ARBITRATION

In *Ravelo v. Campbell*, 360 *N.J. Super*. 511 (App. Div. 2003), an attorney for a motorist's insurer appeared at the arbitration of the claims of the other driver unaware that the passengers' actions had been consolidated with those of the driver. The trial court directed the motorist's insurer to pay the arbitration award for passengers in the other vehicle involved in the accident even though motorist and insurer were not parties to the passengers' suit. On appeal, the Appellate Division held that because the motorist was not a party to the arbitration of the passengers' claims, he did not have to file a notice of rejection of the arbitration award and a request for a trial *de novo* and the trial court had no basis to order that the insurer pay the award.

However, the court ruled that the motorist was collaterally estopped from challenging a liability determination on the remand for arbitration of the passengers' claims.

See also *Hernandez v. Stella*, 359 *N.J. Super.* 415 (App. Div. 2003), in which the trial judge, finding that the *Automobile Insurance Cost Reduction Act*, *N.J.S.A.* 39:6A-1.1 *et seq.*, (AICRA) applied to the case, granted the defendant's motion for summary judgment and dismissed the plaintiff's complaint. On appeal, the court held that AICRA did apply, but that defendants were estopped from relying on the plaintiff's failure to provide a physician's certification because they did not raise the issue until after the arbitration had been conducted pursuant to *R.* 4:21A. See also *White v. Karlsson*, 354 *N.J. Super*. 284 (App. Div. 2002), *certif. denied*, 175 *N.J.* 170 (2002).

SECTION 3 : VOLUNTARY BINDING ARBITRATION (VBA)

At its June 20, 1995 Administrative Conference, the Supreme Court approved implementation of voluntary binding arbitration (VBA) programs to handle verbal threshold cases in any vicinage that chooses to establish such a program. At its June 7, 2005 Administrative Conference, the Court approved use of VBA in lemon law cases. Guidelines for the program which permit counties to use voluntary binding arbitration for other case types with advance notice to the AOC and sample forms appear in the appendix.

The substance of the program's operation is as follows. The parties file a written consent form, signed by all attorneys and the parties themselves, submitting the case to binding arbitration. The parties must also submit a consent order of dismissal with prejudice. The case is then presented, in abbreviated form, to a panel of two arbitrators whom the parties have selected. A sitting Superior Court judge, also selected by the parties, is present but becomes involved in the process only if (and to the extent that) the arbitrators do not agree. The proceedings are held in the courtroom, and the judge explains to the parties at the outset and on the record that the determination of the panel will be final and not appealable. All parties must then agree, on the record, that they understand the final and binding nature of the program. The hearing, however, proceeds off the record. Frequently, the parties use a high/low agreement which normally is not revealed to the arbitrators. The high/low provision seems to be an incentive for some attorneys trying to avoid the uncertainty of a trial. For the plaintiffs, that’s a guarantee that at least they get something. The incentive for the defense is that it can set a cap and limit its exposure. The high/low provision helps to insulate and protect the client -- whether the client is the plaintiff or the defendant.

This program requires little court involvement other than making a courtroom and the selected judge available. Court staff should not be involved in the scheduling or compensation of the attorney arbitrators used in this program. It is the responsibility of the attorneys using voluntary binding arbitration to privately coordinate the arbitrators, provide for their compensation and ensure attendance when the selected judge is available.

SECTION 4 : CIVIL MEDIATION PROGRAM

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 (other than CEPA and LAD)

608 - Toxic Tort

305 - Construction

302 - Tenancy (not Special Civil Part matters)

616 - Whistleblower (CEPA)

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.

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 <u>must</u> 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, and are assigned to each case on a rotating basis according to the mediator's expertise to the case type. 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 parties have the opportunity to select a replacement mediator or 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 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.

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 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

The mediator *shall* terminate the session if (A) there is an imbalance of power between 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.

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 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 in interest 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

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#16).

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 #8). 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 #15, 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

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 appear in the appendix and are available on the Judiciary's website, www.nj.courts.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.

Mediator Training Course Content

Rule 1:40-12(b)(5) prescribes the content of the 40-hour Civil General Equity and Probate Actions mediation skills training. It provides that the classroom course shall include basic and advanced mediation skills as well as specialized civil mediation training; the content of which shall include not only theoretical teaching but also role play and observation.

Rule 1:40-12(b)(2) requires the mediator's annual four-hour 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: case management skills or mediation and negotiation concepts and skills.

Annual Continuing Education

All mediators must attend a minimum of four hours of annual continuing mediation 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.

Limitations on Service as a Mediator

Rule 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 and the Administrative Office of the Courts has 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.

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 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.

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SECTION 5 : BAR PANELING

Bar paneling is a dispute resolution process in which a matter is scheduled or referred to a panel of two or more experienced and neutral attorneys who hear the case and provide a non-binding recommendation for its resolution, including settlement range. Cases are bar paneled in some counties in the Law Division, Civil Part and/or in the Chancery Division, General Equity and Probate Part. Except in individual judge-managed Track IV cases, in the Law Division, Civil Part, the court may mandate only one settlement event, which includes bar paneling, in a case.

Bar paneling proceedings are confidential, non-binding, and are usually held in court facilities. In all counties where bar paneling is done, the attorney panelists serve pro bono. In many of the counties, bar paneling is conducted frequently with the assistance of the county bar association and occurs usually on the trial date.

Given the results of bar paneling efforts in New Jersey thus far, it appears that bar paneling programs need some modification in order to be more effective. For bar paneling to be successful at least two critical concerns must be met. First, it is important for the attorneys to bring clients and insurance company representatives to the bar paneling, so that they may participate. Second, it is equally important that the attorneys serving as panelists possess a certain degree of expertise in the particular area of law.

SECTION 6 : SUMMARY JURY TRIALS

The Summary Jury Trial (SJT) was developed to target complex cases, which constitute only a small percentage of the overall caseload, but consume a disproportionate amount of time and resources. In 1987 the Supreme Court of New Jersey authorized the Superior Court in Gloucester County to conduct a pilot program to stud the effectiveness of the SJT, originally developed for use in the Federal courts, in the State trial courts. Participation in the program was voluntary. The purpose of the SJT is to provide the parties with a way to learn the probable outcome of an actual jury trial using an abbreviated trial lasting approximately one-half to one full day with little or no live testimony, before an advisory jury. These cases would otherwise take significantly longer to try to completion and would involve the concomitant expenditure of time and resources. Since live, expert testimony is not needed, the technique is inexpensive and easy to schedule. No record is made at the proceeding, but is conduction with the same decorum as a trial. Essentially, all aspects of the traditional trial are streamlined: limited challenges to the jury are allowed and the attorneys present their respective cases, usually by oral summary, based upon discovery documents and affidavits of experts. It is explained to the advisory jury, prior to the verdict, that they are participating in a streamlined, innovative proceeding. In order to best approximate an actual trial, however, the jury is not told before the verdict that the verdict will be nonbinding. Sample forms and jury charges developed by retired Assignment Judge Samuel G. DeSimone appear in the appendix.

The SJT provides a cathartic effect to litigants who, for emotional reasons, require a "day in court," and it does so at a substantially lower cost, in a significantly shorter time, and in a manner which litigants can understand and appreciate. It also avoids litigants having to be subjected to rigorous examination and a complex web of technical or legal jargon and procedure. After the jurors have rendered their verdict and the advisory nature of the proceeding is explained to them, the jurors are asked to informally discuss with the participants the strengths and weaknesses of each side's case. This has been recognized as being extremely instrumental in efforts to settle the cases. Subjective feedback received from participants indicates that this technique provides a high level of satisfaction and meets the various criteria for which it was developed.

The experience in Gloucester County suggests that the technique can also be effective in resolving matters not typically regarded as complex, but which nonetheless are resistant to other settlement efforts and would, in fact, result in lengthy trials.

An article prepared by Judge DeSimone entitled *Summary Jury Trials: An Untapped Tool for State Courts* outlines the Gloucester experience with the technique; a copy appears in the appendix.

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SECTION 7 : EXPEDITED JURY TRIALS

An "Expedited Jury Trial" is a jury trial conducted in an expedited or streamlined manner which produces an appealable verdict more quickly than a regular trial. It is conducted pursuant to a "Consent Order for Expedited Jury Trial" which is signed by counsel and the court. The Expedited Jury Trial is different from a Summary Jury Trial, in which a jury hears a summary of a complex civil case and renders an advisory verdict which is used in settlement negotiations. Although based on the summary jury trial model, the Expedited Jury Trial results in a verdict on which judgment is entered. The judgment is appealable pursuant to *R.* 2:2-3(a)(1). The technique was developed by retired Superior Court Judge John D'Amico. Sample materials, prepared by retired Judge D'Amico, appear in the appendix.

The Expedited Jury Trial is well suited for any case in which the parties wish to save time and expense by using reports, depositions or statements in lieu of live testimony from expert and/or lay witnesses. It is ideally suited for cases where such witnesses are unavailable; cases with limited potential value for which the cost of bringing experts to trial is not justified; cases involving "matters of principle" but little money, which one or both parties insist be decided by a jury; and cases that litigants and attorneys would rather not spend a lot of time trying because of busy schedules or other commitments.

In an Expedited Jury Trial, only one or two witnesses -- generally, the plaintiff and defendant -- testify live and the rest of the evidence, including expert reports and depositions, is presented to the jury by counsel.

The Expedited Jury Trial can thus save time and money for litigants, attorneys and the courts, and facilitate the effective and efficient presentation of evidence to juries. For example, the parties stipulate, pursuant to *R.* 1:8-2(c), that the jury will consist of six persons with no alternates, with a verdict being rendered by five jurors agreeing if one juror is excused for any reason. Although regular voir dire is conducted, the jury selection process is streamlined because the minimum number of jurors is being chosen and each party agrees to be limited to three peremptory challenges. Opening statements are limited to fifteen minutes and summations to thirty minutes. Counsel agree to submit Requests to Charge only on issues not covered by the Model Civil Jury Charges.

The major advantage of an Expedited Jury Trial is that it obviates the need to present live expert testimony. It also reduces the number of lay witnesses who need to testify. In fact, as noted above, usually only the plaintiff and defendant give live testimony, although the parties can agree to additional live witnesses. After the live testimony, the attorneys present to the jury

the expert reports, depositions, and other evidence. Counsel may read or show the evidence to the jury, summarize it, or simply ask the jury to look at it during deliberations.

The key to a successful Expedited Jury Trial is the preliminary hearing that occurs on the record pursuant to *Evidence Rule* 104. At the hearing, counsel mark for identification all of the items of evidence they intend to use. Uncontested exhibits are marked into evidence right away. Contested exhibits are reviewed by the court, which hears and decides all objections in limine. Exhibits that are admitted subject to the redaction of inadmissable material are marked after the redactions are completed.

A model jury charge developed by the Supreme Court Model Civil Jury Charges Committee for use in Expedited Jury Trials also appears in the appendix.

SECTION 8 : CASE EVALUATION PROGRAMS

Early Neutral Evaluation (ENE)

In commercial and other types of cases and in particular in those in which liability is established but damages are at issue, consideration should be given to the use of Early Neutral Evaluation (ENE). This technique is used early in the litigation, *e.g.*, at first answer, and helps the parties to isolate the core of their particular dispute. Case evaluation also offers litigants a confidential and candid assessment of the strengths and weaknesses of their positions, as well as an overall valuation of the case. This technique is also appropriate in cases where technical or scientific issues exist. Developed from the need to reduce the expense of litigation, ENE offers a confidential, non-binding conference where the parties and their counsel present the factual and legal basis of their case to one another and to a trained, court-appointed attorney with expertise in the subject matter. In an informal face-to-face session held shortly after the complaint is filed, the neutral evaluator hears both sides, identifies the principal issues in dispute, explores settlement and helps the parties devise a discovery or case preparation plan.

ENE can lead to settlement since the parties are compelled to confront their positions critically. It also forces the lawyers to conduct core investigative work early and communicate directly. In addition, by requiring the active participation of clients at an early stage, ENE helps clients feel less more a part of the litigation process, and thereby reduces obstacles to resolution. It can also help both lawyers and clients to gain a necessary "reality check" about the strengths and weaknesses of their case before the momentum of the pretrial process takes over.

ENE may also be a cost-effective substitute for some formal discovery and pretrial motions.

SECTION 9 : SETTLEMENT CONFERENCES AND SETTLEMENT WEEKS

A judicially conducted settlement conference may be held at any time during the pendency of a civil case. Settlement conferences are conducted by judges, although the judge has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. Except in individual judge-managed Track IV cases, in the Law Division, Civil Part, the court may mandate no more than one settlement event (with a judge or before a bar panel) in advance of the trial date.

A settlement conference is suitable for any kind of civil case, from the most straightforward to the most complex. The process is informal. Parties may communicate *ex parte* with the person conducting the conference, who can offer an informed yet neutral view of the case.

If settlement is reached, the parties will either sign an agreement or place such agreement on the record, and the cost of trial or other litigation is avoided. If no settlement is reached, the case proceeds to trial before the judge to whom the action is assigned.

The court may periodically schedule settlement weeks to allow for the resolution of a large number of cases within a brief period of time. Cases may be selected for conferencing based on age (*e.g.*, over three years old), case type, or carrier or attorney representation. Attorneys are given advance notice and are usually advised that all discovery should be completed prior to the conference. If a case is not settled at the conference, an expedited trial date is usually set.

The AOC has developed a course including a video tape on settlement techniques and ethics. Anyone interested in obtaining information concerning this course should contact Michelle V. Perone, Esq., Chief of Civil Court Programs at the Administrative Office of the Court's Civil Practice Division at (609) 292-8471.

Judicial Settlement Guidelines, developed as a result of a State Justice Institute-funded study by the American Judicature Society, are included in the appendix.

SECTION 10 : NON-COURT MEDIATION BY THE NEW JERSEY OFFICE OF DISPUTE SETTLEMENT

Under *R.* 1:40-11, cases may be sent to non-court mediation through the Office of Dispute Settlement (ODS). However, the approval of the Assignment Judge or designee is required. ODS has full-time mediators on staff with expertise in all areas of civil litigation including construction, insurance coverage, environmental clean-up and employment law. Costs of the mediation are paid for by the parties. The ODS retains the discretion to waive or reduce fees. A sample order referring a case to the ODS appears in the appendix.

ODS has been providing sophisticated mediation services to the state and federal courts to resolve complex civil litigation and public disputes. Significant cases mediated by ODS in the past include the major Exxon oil spill in the waters between New York and New Jersey, a 40-party $500 million environmental insurance coverage dispute, and a $100 million class action lawsuit involving the proposed demolition of high-rise public housing in Newark.

SECTION 11 : PRIVATE OPTIONS FOR DISPUTE RESOLUTION

While this manual primarily describes CDR programs that the court sponsors, there are other civil dispute resolution procedures that have been developed in the private sector and have proven effective in a wide range of cases. There are numerous dispute resolution providers in the private sector offering a variety of services, including mediation, arbitration, fact-finding, conciliation, negotiation, and private trials. The role of neutral may be played by experienced attorneys or other professional with specialized expertise in dispute resolution techniques, including retired judges, law professors and former government officials. Virtually all private sector providers charge fees for their services.

Rule 1:40-11 allows any judge (with the approval of the Assignment Judge or designee) to mandate parties to participate in mediation or any other non-binding ADR program before a skilled, private neutral. However, if the neutral is a retired judge, that neutral may not be selected by the court. Any order of appointment of a retired judge (in addition to being approved by the Assignment Judge or designee), must simply memorialize the parties' choice. A referral to private dispute resolution may take place *sua sponte* or on any party's motion, at any time after joinder subject to the restrictions on the selection of retired judges. In determining whether, when and to whom to refer cases, judges consider factors such as characteristics of cases that make them appropriate for ADR, skills and experience of professional neutrals, and simple cost-benefit analysis.

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