Mediator's Tool Box:
A Case Management Guide for Presumptive Roster Mediators

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Introduction

Case management entails the mediator's administration of a court-assigned mediation – essentially everything that happens outside the meeting room. See New Jersey Court Rule 1:1-2 and Appendix XX. A mediator must engage the parties, properly prepare the parties for the mediation session, convene the mediation, report results to the court and, if the mediation goes beyond the free time, get paid for such efforts. The mediator often initially earns the respect of the parties through case management efforts.

If the mediation does not resolve in the initial session, the mediator can also help the parties and assist the court by facilitating any outstanding discovery issues with counsel. If a mediator has earned the respect of the parties, the mediator may be asked to conduct additional mediation sessions before trial. Less than two percent of cases filed in the Law Division, Civil Part are resolved through a trial to completion. Mediators who properly utilize case management tools can aid the parties to resolve more cases in mediation.

The Mediator's Tool Box: A Case Management Guide for Presumptive Roster Mediators ("Guide") is structured as a series of Frequently Asked Questions (FAQs). Prior to publication of the Guide, few resources existed to assist roster mediators in case management skills. The Guide is not designed to be read from "cover to cover" at one sitting. Rather, much like a dictionary or encyclopedia, the Guide may be used for reference when a question arises.

The Guide attempts to address the most common issues roster mediators face. Should the Guide not address the situation, the Complementary Dispute Resolution (CDR) Point Persons in the vicinages can provide further assistance. Visit njcourts.com for a listing of the CDR Point Persons for each vicinage

Guide Methodology

The process of preparing this Guide commenced with assembly of a list of common case management issues and problems Rule 1:40 qualified civil mediators routinely experience in their practices. These common issues and problems were organized into the various stages of the mediation process. Although the Guide is addressed to civil cases assigned by the Law Division, Civil Part in the Presumptive Mediation Program, the guidance provided should be helpful in dealing with mediation issues generally.

Once the basic outline was prepared, an esteemed panel was assembled to analyze and discuss these issues and concerns, and arrive at a consensus on how to better manage cases from inception (Court Order) to completion. The panel was comprised of leaders in the New Jersey mediation community who are also court approved R.1:40 civil mediation roster members, a Civil Presiding Judge, a CDR Point Person, and the Administrative Office of the Court's Chief of Civil Court Programs. The panel members were (with titles current as of April 2011):

- **Bonnie Blume Goldsamt***, Esq., Past Chair of the Dispute Resolution Section of the New Jersey State Bar Association
- **The Honorable Thomas Brogan**, Presiding Civil Division Judge, Passaic County Superior Court
- **Robert Margulies**, Esq., Executive Director of the Justice Marie L. Garibaldi ADR Inn of Court
- **Robert McDonnell**, MS, APM, Immediate Past President of the New Jersey Association of Professional Mediators
- **Michelle Perone**, Esq., Chief of Civil Court Programs for the Administrative Office of the Courts (ret.)
- **Jeffrey Posta**, Esq., Immediate Past Chair of the Dispute Resolution Section of the New Jersey State Bar Association
- **Marvin Schuldiner***, MBA, APM, Treasurer of the New Jersey Association of Professional Mediators and Chair of NJAPM's Mediator Quality Committee, Panel Moderator
- **Richard Steen**, Esq., APM, President of the New Jersey State Bar Association
- **Nicholas Stevens***, Esq., Director for the New Jersey Association of Professional Mediators
- **Joe Ventola**, Panel Moderator
- **Kathleen Wardlow**, CDR Point Person for Mercer County Superior Court and former Chair of the Committee of CDR Point Persons and Arbitration Administrators

  * Denotes editor of the final version of the publication along with **The Honorable (ret.) John Harper**, President of the Justice Marie L. Garibaldi ADR Inn of Court

The panel addressed each individual issue, coming to consensus on most. The occasional difference of opinion among panel members is duly noted in the Guide unless directed otherwise by the court.

Mediation is a profession. Mediation professionals can best handle any situation as they deem fit. The Guide is not one size fits all. Different situations and different parties might require different solutions than the ones suggested here. This is only a guide and should be used accordingly.

Issues

Commencing the Mediation Process

1) **A party is not participating in the mediation process as required by the Mediation Referral Order ("MRO"), not returning calls, failing to appear on the scheduled organizational conference call, etc.**

   a) How should the mediator proceed?

   The mediator should schedule the conference call (9:00 AM, noon or 4:00 PM preferred, as attorneys are more likely to be in their offices) and let the parties coordinate changing the time if it does not work for them. The mediator does not need permission from the parties to conduct the call. The mediator simply must give the parties 5 days notice of the call, pursuant to the MRO. Obtaining agreement among the parties increases the likelihood of cooperation. The mediator can consider multiple calls to commence the mediation process if unable to get all parties on one call.

   The mediator's authority is pursuant to the MRO and Court Rule 1:40. The MRO requires parties and counsel to proceed in good faith and with a sense of urgency.

   b) What happens if the lack of cooperation occurs after the mediator has spent 1+ hours on the process?

   The mediator should avoid having the process continue long enough to accrue this significant amount of time prior to the organizational conference call. If a party fails to participate on the call, the mediator can simply schedule the mediation in written correspondence to the parties. Only as a last resort, the mediator should contact the vicinage CDR Point Person for further input.

   c) What about a party who appears resistant to the mediator or tells the mediator up front that it will not go past the free time?

   The "free time" is the mediator's opportunity to persuade the parties as to why they should continue past the free time. This involves making a personal connection with counsel and litigants alike. Remember that the court has sent this case to mediation to get it resolved. It is the mediator's job to demonstrate why the process will add "value" to their case.

2) **The MRO is issued after the first defendant answers, but there are multiple defendants listed on the counsel and party sheet.**

   a) How long should the mediator wait for additional defendants to be served?

   b) How long should the mediator wait for a party to file an answer?

   A mediator has until the discovery end date ("DED") to conduct the mediation. Upon receiving an MRO, the mediator should check the DED on the Judiciary website. If there is a short DED, then the mediator may need to move forward with the existing parties. Keep in mind that adding a new party can add at least 60 days to the DED.

   This is where case management applies. The mediator should schedule a conference call to determine how long counsel expects to include all defendants. If a new defendant has been served, but has not answered and his/her attorney is known, the mediator should contact that

attorney to ensure that the new attorney becomes engaged in the process even if it is before the filing of an answer or appearance before the court.

c) Are there cases in which the mediator should proceed even though all parties have not been served?

If the parties who have appeared believe they are the primary parties or the case can be separated into constituent parts and the parties believe they can resolve the case, then the mediator may be able to mediate with those appearing parties, or at least organize the resolution and prioritize the discovery (focused information exchange).

3) **A party tells the mediator he/she intends to add additional parties to the case.**

a) Should the mediator wait before commencing the mediation process?

As each situation is different, this is up to the mediator and within the mediator's discretion. Keep in mind that the mediator is supposed to manage the process. See the answer to 2 c) above.

b) What should the mediator do if a party represents that it will add additional parties and fails to do so within the allotted time?

Give the filing party one motion cycle (2 weeks) to add the additional parties. Consider asking counsel to provide the mediator with correspondence, the Order, and evidence of service pertaining to the additional party. If counsel fails to add the additional parties within the next motion cycle, schedule the conference call and move forward with the mediation process. Again, See 2 c).

4) **Before or during the organizational conference call, a party wants to file a dispositive motion or a motion to withdraw as counsel and therefore halt the mediation process until the motion is decided.**

a) What should the mediator do?

As to a dispositive motion, ask counsel a simple question: if you "succeed" in your dispositive motion, will that end the case for you? The answer will likely be no, as the losing party can appeal, adding costs, not ultimately resolving the case.

Motions for summary judgment typically cannot be successful until discovery is completed. Mediation generally takes place prior to most formal discovery. Mediation can help the parties to avoid these expenses and resolve the case.

If counsel is planning to withdraw from the case or intends on filing a motion for dismissal that does not relate to discovery (e.g., statute of limitations, wrong party), suggest that counsel file the motion. It may be best to confer with both parties about the motion, as, in some instances, the plaintiff will agree that having the motion heard first is more efficient.

b) What happens if the filing of the motion is delayed, despite the "assurances" of counsel?

Give counsel one motion cycle (two weeks) to file a motion. If counsel fails to do so, move forward with the mediation process. The mediator may wish to schedule a mediation or teleconference date that falls after the next motion date, thereby moving forward while providing one more opportunity for the motion to be decided.

5) **Both counsel tell the mediator "there is no way ever this case will ever settle (in mediation)" and they don't want to waste anyone's time in moving forward in the mediation process. What should the mediator do?**

Here is another opportunity for the mediator to persuade the parties as to the benefits of mediation. Also, the mediator can remind the parties that the MRO compels them to mediate and that almost all cases settle prior to trial (less than 2% of filed cases see a trial to judgment). If they continue to persist, the mediator may advise them to refer to R. 1:40 about how to have the case removed from mediation, but this is a last resort.

6) **There are a large number of parties in an assigned case. How should the mediator handle:**

a) coordinating a conference call that large?

If there are more parties than can reasonably be accommodated on a telephonic conference call, a few alternatives can be used. First, the details can be handled via email to all parties. Second, the conference call can be held in parts (based on claim, 3rd/4th party claims, etc. on separate calls).

Numerous free conference call bridge services are available by Googling "free conference call." Many of these services can handle well over a hundred parties.

b) finding meeting space that can handle a large number of parties?

Large law firms will often have large conference rooms. In addition, some courthouses, colleges, and libraries may have large spaces to accommodate large group mediations.

c) collecting mediation fees for multiple parties with preparation time greater than one hour?

Guideline 15 of the Mediator Compensation Guidelines of (Appendix XXVI) provides that in a complex case, the parties "... may agree to compensate the mediator for such time in excess of one hour before an in-person mediation session is held."

7) **A party is refusing to comply with any information exchange requested by another party for mediation (i.e., the limited and informal discovery noted in the MRO). What should the mediator do to break this procedural impasse?**

It is important to note that this is termed "focused information exchange" within mediation and not "discovery." Discovery implies a formal structure and set of rules regarding requests for production, requests for admissions, interrogatories, and depositions. Mediation is designed to avoid the time and expense of formal discovery. The lawyers in the process have been trained to proceed through discovery as part of the litigation process. Therefore, the mediator should strictly avoid using the term "discovery" in discussions and correspondence.

Sometimes, the mediator needs to convince counsel that information exchange is in their clients' best interest. The mediator can ask the parties: (1) how can you convince the other side to pay the claim? (2) what information is needed to make an informed decision to resolve the case? If a party still refuses to share information, ask the party to explain its concerns about sharing the information (may best be done privately). Information exchange in the mediation process often serves to promote settlement.

If the mediator cannot help the parties resolve a dispute about information exchange, it may become necessary for a party to file a motion to compel discovery. This is beyond the purview of the mediator. The mediator should schedule another teleconference for a date after the motion is decided.

8) **A case is taking too long to schedule with the parties.**

a) How long does the mediator keep trying?

b) When does the mediator ask for the court's assistance and how should this be done so as not to affect the mediator's neutrality with the parties?

c) When should the mediator return the case to the court?

d) Can the mediator request sanctions under Appendix XXVI, Guideline 16 from the non-cooperative party(ies)?

The mediator should remind the parties that the mediation is pursuant to the MRO which specifies that the parties and counsel are to participate in the mediation process in "good faith and with a sense of urgency." The mediator and parties alike are under continuing court ordered obligation to proceed expeditiously in the process. Cost savings, relief from the stress of litigation and finality early on in the process are "added value" for litigants.

The mediator additionally can: impose a date and have the parties come back to the mediator with conflicts and alternatives; have one of the attorneys handle scheduling; ask all counsel to have their clients' available dates during the organizational conference call; set deadlines.

The mediator can remind the parties that the court may not extend discovery or delay a trial because the mediation was not held in accordance with the MRO. Returning the case to the court should only be a last resort. Counsel and parties may be advised that non-cooperation may be grounds for sanctions, but this is a last resort.

9) **Does a party need to inform the mediator "officially" in writing when it wants to terminate the mediation?**

The Court Rules (in Appendix XXVI, Guideline 8) state that a party who opts out of the mediation may do so by notice to the mediator and all of the parties. Notice may be oral or in writing. If mediation adjourns without a settlement, the mediator should confirm in writing (email is acceptable) whether the parties want the mediator to remain involved. Failure to do so could lead to a billing dispute about the mediator's invoice for post-mediation follow up.

10) **If the mediator continues following up with the parties after the mediation session was held and adjourned (e.g., so more information can be exchanged or a party needed time to think it over)**.

a) Is this time billable for the mediator?

b) What if a party later claims the mediation was "terminated," and thus, no further mediation costs should have been incurred?

See the answer to the previous question. Confirm in writing with the parties your authority to retain the case for mediation prior to spending post-session time on it.

11) **The mediator has suggested that depositions may not be useful or necessary for mediation. However, counsel insists on depositions of a witness or litigant. It is taking months to schedule the depositions. What should the mediator do?**

Normally, depositions are used to fix testimony, to test a witness and for fact-finding. The mediator can explore with the attorney requesting the deposition why the deposition is needed at this time. The mediator should inquire as to whether the requesting party needs to take the deposition before it will have authority to settle. This occurs frequently with respect to insurance related claims. The mediator can remind the requesting attorney that by taking a deposition, the other party may become hardened in its position. If it appears one or two depositions need to be taken before meaningful settlement negotiations, the mediator can schedule the mediation for a date thereafter.

12) **The case may need an expert's report(s).**

a) Should the mediator, or parties, ask the court for an extension when all parties ask for time to get expert's reports?

b) What if only one of the parties wants an experts' report and the others want to mediate before getting a report?

In some cases (e.g. employment or construction), expert opinions can be necessary or helpful before the parties can participate in meaningful settlement negotiations. Sometimes, insurance companies will require an expert report to justify payment on the claim. The mediator, as case manager, can help the parties schedule due dates for expert reports (even informal ones) to be exchanged, and a mediation date soon after. The mediator should confirm with counsel whether experts will participate in the mediation itself. The mediator can explore with the parties hiring a jointly agreed upon expert who can help flesh out technical and other issues for both sides. Alternatively, in lieu of an expert, the parties can try to agree on a set of facts.

13) **The mediator has spent several hours preparing the case before the mediation. The attorneys decide they want a different mediator.**

a) What is the mediator's recourse?

b) Can the mediator collect any fees?

c) Would the answer be any different if there were multiple adjournments and/or difficulty in getting the parties to engage in the mediation process?

After the issuance of the MRO, the parties have 14 days to select a mediator of their choice and 10 days to petition for removal from mediation. New Jersey Court Rule 1:40-6(b)(d). The mediator should not customarily spend several hours on a case without an express understanding with counsel in advance about payment of fees for preparation work. Assuming such an express understanding, the mediator may bill for the time.

14) **The mediator does not receive a mediation statement from a party despite repeated requests.**

a) What should the mediator do?

b) Should the mediator disclose this lapse to the other parties?

c) What if the mediator is handed the mediation statement and attachments, upon arrival at the mediation location?

If a mediator does not receive a mediation statement or receives it upon arrival to the mediation, the mediator should proceed with the mediation. The parties who did comply should not be penalized. The mediator does not need to disclose this circumstance to the other parties.

15) **What if a mediation statement exceeds the 10 page maximum prescribed in the Court Rules?**

New Jersey Court Rule 1:40-6(e) and Guideline 15 of Appendix XXVI address the length of a mediation submission. The mediator is not required to read beyond 10 pages. If a party submits a longer mediation statement, the mediator may call counsel and confirm their willingness for the mediator's time to read the full submission. If not, it is in the mediator's discretion whether to review the entire submission. Mediator preparation is a key element in the effectiveness of the mediator. It is a way to garner trust in the mediator with counsel and parties.

16) **When can a litigant participate by phone instead of in person? If a litigant is located in New York City or Philadelphia, can the mediator compel them to appear in person?**

This is up to the discretion of the mediator. The mediator should try to determine whether this will materially interfere with the decision-making process. The mediator must try to strike a balance between having the parties committed to the process and creating an environment conducive to reaching a settlement. For instance, insurance adjusters handle several cases in a day. In contrast, an uninsured party may just be trying to avoid the travel and, thus, really not making the effort to participate. If a person is going to participate by phone, the mediator should require that person to be prepared and available upon demand (not on a call, out to lunch, in a meeting, etc.). A party participating by phone should call into the mediator's office so the cost is not on the mediator's tab.

17) **What should a mediator do when counsel says counsel knows the case as well as the client so that the client does not need to appear at the mediation?**

Again, this is up to the discretion of the mediator and much of the answer to the previous question applies. The mediator can remind the parties that the mediation is between the litigants, and not counsel, and that the MRO requires that a person with decision-making authority appear at the mediation. Just as litigants are required to appear in court, litigants are required to appear at the court ordered mediation.

Certain entities such as municipalities, school districts, and condominium associations require Board ratification of any proposed settlement. In such cases, the town manager, the attorney for the Board or an influential Board member may have requisite authority to negotiate and make recommendations to the full Board.

18) **What if a litigant claims he/she cannot get off from work for the mediation?**

The mediator can conduct the mediation in the evening or on a weekend. The mediator can also remind the litigant that the mediation is court ordered, and the ongoing court proceeding will take place during regular work hours. Ultimately, each litigant has a personal investment in the outcome of the litigation and an obligation under the MRO. It may be better for that party to miss a short amount of work time for the mediation and resolve the case before the party will miss much more time from work for depositions, trial preparation, and the trial itself.

19) **An attorney appears in person at the mediation and says the client will not be appearing, but can participate by phone if the attorney feels it will be helpful. Other counsel and litigants, who are already there, object. What should the mediator do?**

The mediator has discretion to conduct the mediation with the parties already present and with the non-appearing party by phone. Alternatively, the mediator can adjourn the mediation until such time as the non-appearing party attends. The best course of action is to ask the parties (perhaps in caucuses) what they would like to do since it is their case and their money being spent.

20) **Counsel tells the mediator his/her local client is ill/out of state on family emergency, but can participate by phone. When the client is called, he/she is not ill, at home and did not even know the mediation was occurring. What should the mediator do?**

Be professional and proceed, as there is nothing to be gained by making an issue about it.

21) **Both parties ask for a telephonic mediation despite everyone being local. Should the mediator allow it?**

No. Mediation is more effective with all parties present. However, this is up to the mediator. Refusal of parties to attend in person may indicate a lack of good faith.

22) **Both litigants are out of state. Counsel wants to do everything by phone, including their own appearance. Good idea?**

No. See previous answers dealing with appearance questions.

23) **The "decision maker" is scheduled to appear by phone but counsel will not let the mediator talk directly to that person. The mediator senses this is impeding progress. What should the mediator do? What if the defense counsel is hired by an insurance company and the "client" is an adjuster which the attorney will not let the mediator speak to?**

The mediator may wish to take a break and talk with counsel separately to ascertain why the mediator is being prevented from speaking with the decision maker. Typically, the mediator can speak to the client or adjuster in counsel's presence. However, if the attorney resists, the mediator can confirm the points he/she wishes counsel to convey. Alternatively, the mediator can adjourn the mediation and require the party representative to appear.

24) **What if the decision maker or adjuster is not reachable by phone during the mediation despite assurances by counsel?**

The mediator can give counsel time to reach this person. If the person is still not available to participate in the mediation, the mediation may need to be adjourned. The best way to prevent a

delay from happening is to discuss participation expectations during the organizational conference call and thereafter in any follow-up calls.

25) **A party wants a non-attorney "advisor" and/or family member/friend to attend mediation. New Jersey Court Rule 1:40-4(g) requires consent of the mediator and attorneys to the participation of a non-party. The New Jersey Uniform Mediation Act (at N.J.S.A. 2A:23C-10) does not require mediator or adversary agreement.**

a) What should the mediator do if an attorney vehemently objects to the non-party's participation in the mediation?

The mediator can speak with counsel privately about the advantages, disadvantages, and concerns about the participation of the non-party and emphasize that the case may have more of a chance of resolving with that person's participation, especially if they will influence the ultimate decisions. Note that the non-party must sign a confidentiality agreement in order to participate.

b) If an attorney objects to the non-party's participation, can the non-litigant participate in caucus sessions?

Maybe. This is subject to the execution of a confidentiality agreement.

26) **What should a mediator do if a party files for bankruptcy protection?**

The mediator should determine whether the filing stays (stops) the entire case or only the ability of the filing party to participate. If only the filing party is affected and there are multiple parties, then the mediation may proceed with the remaining parties. If the entire case is stayed, then the mediation cannot proceed and the mediator should return the case to the court. The mediator can express to the parties that he/she would be willing to mediate if the Bankruptcy Court later authorizes the case to proceed.

Mediation Adjournments

27) **A party calls the mediator on the morning of a scheduled mediation (or 5:00 PM the day before) and tells the mediator that he/she cannot make the mediation.**

a) What should the mediator do?

b) Is there recourse for the mediator's compensation for lost time?

The mediator can reschedule the mediation to allow for party participation. The comments to the Court Rules and Guidelines permit the Mediator to charge for a last minute cancellation. See Appendix XXVI.

28) **A party fails to show at a scheduled mediation. What should the mediator do?**

The mediator has discretion. The questions become "can the mediation proceed meaningfully without the missing party?" "Is the appearance of counsel sufficient?" Under the Court Rules and the Guidelines, the mediator may seek compensation for one hour of the mediator's time. Under such circumstances, aggrieved parties may also ask the court for sanctions. See Appendix XXVI.

29) **A party arrives an hour late for a scheduled mediation. What should the mediator do?**

a) If the mediator starts with other parties, has the late party relinquished his/her free time?

b) What if the late party objects?

The mediator has discretion. The mediator should use the time productively by meeting with the party(ies) who are present. The party who arrives late forfeits his/her free time since the mediation proceeding has already begun.

30) **Mediation has been adjourned and rescheduled multiple times. One counsel calls and says that he has been called into trial/court-ordered deposition/Federal Court. What takes precedence?**

The mediation, while court ordered, is generally not ordered to be on a specific date. Other court events take precedence. The mediator could ask if an associate for the attorney with the conflict may be able to appear in the attorney's place.

31) **What is a reasonable number of times to allow an adjournment for a scheduled mediation and for what reasons?**

Barring exceptional circumstances, only one adjournment should be granted.

32) **Counsel calls the mediator on the morning of the mediation stating that the parties have settled the matter and the mediation is no longer needed. The mediator has already put in several hours of preparation time.**

a) Can the mediator bill for preparation time?

No. However, counsel must confirm the settlement in writing.

b) What if counsel says they have resolved "most" of the outstanding issues and the mediation need not be held. Should the adjournment request be granted?

No. Unless each Count of the Complaint is resolved, the case is not settled and the mediation should proceed.

c) Does the mediator have any recourse on invoicing in either circumstance?

d) What if the matter was adjourned and rescheduled 3+ times?

Under Appendix XXVI, Guideline 12, if the party who cancelled gave less than 24 hours notice (or no notice), the mediator may charge that party for one hour of time. See question 27 for more details.

33) **A case is settled in mediation. The parties still have to complete a formal settlement agreement and a stipulation of dismissal.**

a) When should the mediator close out the case with the court?

b) What if the parties agree to hold the settlement in escrow until the agreement has been performed, which could take months?

Before the parties leave the mediation, the mediator should insist that a short form settlement agreement (term sheet) be drafted by one of the attorneys and signed by the parties at the mediation table. Thereafter, the mediator will send in a completion form, marked "settled,"

to the court. The case is dismissed without prejudice when the mediator returns a "settled" completion form. If the case is not resolved, the parties will incur additional expense and time to reinstate it. The mediator should confirm a settlement when the agreement is signed, or the attorneys confirm an agreement in writing. If the term sheet is contingent on a formal settlement agreement to be drafted by counsel, the mediator should not file the completion form until the mediator knows all parties have signed the agreement.

34) **A mediator has mediated a case; it has not resolved. The mediator still thinks there is a chance the case can be settled. When should a mediator close out the case with the court?**

The mediator may continue to work on the case until it is settled. The completion report needs to be returned (either way) before the DED.

35) **A case is returned to the court, marked "not settled". Thereafter, the parties re-engage in the process and the mediator assists the parties in resolving the case. Should the mediator report the resolved case to the CDR Point Person?**

Yes. The mediator can report a settled case to the court at any time, even if the case had been previously reported as not settled.

36) **A case is resolved in mediation and reported as settled to the court. The mediator speaks to counsel a few weeks later and learns that one party has reneged on the agreement.**

a) What, if anything, should the mediator report to the court?

b) Does the answer change if the parties have signed a settlement agreement?

The mediator may contact the parties to see if the mediator can help resolve the problem. The mediator has no further obligation to the court or the parties.

Invoicing Issues

37) **What counts as preparation time and what does not?**

Billable preparation time consists of the following: the time a mediator spends on the organizational conference call and any necessary follow up calls; correspondence from and to the parties; review of mediation statements and attachments; scheduling and other activities reasonably related to setting up the mediation.

Travel time, time spent by a paralegal and/or secretary and legal research are not billable, unless explicitly agreed to by the parties. Roster mediators cannot charge for independent research.

38) **When does the clock start at a mediation session?**

a) Scheduled time?

b) Actual start time?

The mediation starts at the scheduled time, unless the mediator arrives late, which should be avoided. Then the mediation begins upon the arrival of the mediator. If a litigant or counsel arrives "x" minutes late; that party forfeits "x" minutes of his/her free time (but is still obligated to participate for one hour). While waiting for a late-to-arrive party or attorney, the mediator can use the time productively by meeting with the parties who are already there.

39) **Is the mediator required to "keep an eye on the watch/clock" and advise the parties when the free time expires?**

At the beginning of the in-person mediation session, the mediator, on a form prescribed by the Administrative Director, must disclose to the parties in writing the specific time at which the free mediation will conclude. All parties must sign the disclosure agreement.

40) **An additional party is added to the case after the mediation process has commenced. When does "billing time" start for this party?**

Unless otherwise agreed, if the party is added before the first in-person mediation session is conducted, the new party splits the preparation time equally with the existing parties. If the new party is added after an initial session is held, the time is split equally from the time the new party is added.

41) **A party informs the mediator that he/she will not go past the free time, but then does not opt out of the mediation at the end of the first hour. At the start of the mediation, the mediator properly informed the parties and counsel as to all of their preparation time before the mediation, and his/her intention to charge for all time less the two free hours (provided the parties stay beyond the first free hour of the initial mediation session). Despite going beyond the free time, a party subsequently refuses to pay the mediator's invoice. What should the mediator do?**

At the beginning of the in-person mediation session, the mediator, on a form prescribed by the Administrative Director, must disclose to the parties in writing the specific time at which the free mediation will conclude. All parties must sign the disclosure agreement. It is the party's responsibility to terminate the mediation formally with both the mediator and all other parties. Termination can be oral, but it must be explicit. Intention to terminate is not a termination any more than intention to settle constitutes a settlement. See Appendix XXVI, Guideline 8. The mediator can pursue remedies for collection of the invoice as discussed below under collection issues.

42) **The mediator has accumulated a significant amount of preparation time due to the parties or the circumstances of the case. When should the mediator inform the parties of the preparation time?**

At the beginning of the in-person mediation session, the mediator, on a form prescribed by the Administrative Director, must disclose to the parties in writing the specific time at which the free mediation will conclude. All parties must sign the disclosure agreement. In the written disclosure, the mediator must also inform the parties if he/she intends to charge for excess preparation time (less the free time).

A wise mediator will keep the parties informed during preparation time if there is a need for more extensive preparation time. Pursuant to Appendix XXVI, Guideline 15, a mediator may advise the parties that he/she expects to expend more than one hour of preparation time and ask the parties for payment of preparation time in excess of one hour. The parties must agree to this. A mediator's preparation time should be reasonable, measured, and justifiable.

43) **If multiple, but related, parties are named in a case, how should the mediator's fees be apportioned according to the rules?**

a) What if the relation is husband/wife or parent/child?

b) How should a business and its owner be treated?

c) A business and a subsidiary?

There is a difference of opinion on this topic. Some believe that common interests (i.e. as in the above questions, or all parties represented by a single attorney) count as one party for purposes of splitting the mediator's invoice. Others believe that the Rule can be interpreted to read each listed party counts as one party. The parties can return to court to pursue "equity" in splitting the mediator's bill. Guideline 10 in Appendix XXVI, also gives the mediator discretion to decide on how the invoice is split. In making such a decision (which should be avoided at all costs),the mediator should use extreme caution as there is a chance one or more parties will sense the mediator is no longer neutral and has taken sides. A better approach is for the mediator to discuss billing with counsel during the organizational conference call and thereafter to make sure everyone is in agreement. The mediator should facilitate rather than mandate the mediation fee sharing arrangement.

44) **The mediator has been mediating for ten months in a three-party matter. Plaintiff's counsel tells the mediator that the second defendant was added primarily for contribution purposes. Thus, most communications have been between two of the three parties.**

a) Absent an agreement otherwise, are the mediator's fees still divided equally?

b) What if the other party does not wish to pay in full?

The mediator's fees are divided equally per the Court Rules, unless the parties agree otherwise. Even if added for contribution, that party still must defend itself and is benefitting from the mediation. The parties are free to agree on an alternate arrangement, but the Court Rules are the default position. The mediator should make sure all parties understand the Rules upfront (during the organizational call).

45) **If one party drops out after expiration of the free time and others opt to continue in the mediation, are the mediator's fees reapportioned from that point?**

Yes. The split is adjusted from the time each or any party drops out.

a) Would it change anything if the one party settles (versus terminates)?

No. It is treated the same. Settling around a party is often a good strategy for obtaining a global settlement.

46) **Party/counsel decides to leave mediation but tells the mediator to call if any progress is made with the party(ies) who remain. Does the party who left still pay for the session time after they departed?**

Either a party is participating in the mediation (whether or not physically present) or not. If the party benefits from the process, the party should pay its share of the mediator's fees.

47) **The mediator makes preparation time disclosures to all parties in the prescribed disclosure form, which a party refuses to sign. The mediation continues beyond the free time. The party later claims the mediator did not disclose excess preparation time and refuses payment. Other parties refuse to be fact witnesses in the matter. What should the mediator do?**

The mediation should not proceed without the party/parties signing the prescribed disclosure form. This becomes a matter for the court since the party/parties are not mediating in good faith.

Collection Issues

48) **What is the definition of "prompt payment" of the mediator's invoice in terms of days?**

There is no formal definition within the Court Rules. The generally accepted billing practice is 30 days from the date the invoice is sent.

49) **How many times should a mediator contact counsel or a self-represented litigant over an unpaid invoice before seeking relief in court?**

The mediator should use reasonable efforts to contact the parties. Generally, a reminder letter should be sent once the invoice is overdue (beyond 30 days), and 15-30 days later a final demand letter should be sent if the bill remains unpaid.

a) How long should the mediator wait before seeking relief in court?

This is a business decision. A mediator should not contact the court if the mediator has made no efforts to collect on his/her own first. The court is not the collection agent for roster mediators. The mediator must sue in Special Civil Part, just like any other business pursuing an unpaid invoice. If it is likely an invoice is uncollectible, it may be best to write it off.

50) **What can the mediator do if counsel claims that they no longer represent their client in the matter since:**

a) They haven't been paid either?

b) The case is settled/over and they have no further responsibility?

R. 1:40-4(b) requires the parties, not their attorneys, to pay the fees and expenses of mediation. Attorneys have a "responsibility to facilitate prompt payment of mediator fees." See Appendix XXVI, Guideline 13. An attorney is not responsible for paying the mediator's invoice for the client unless the attorney agrees to do so.

51) **A party disputes the mediator's invoice on the grounds that "you didn't do a good job" (a euphemism for the case didn't resolve and you wasted my time). The party threatens to file a complaint against the mediator if the mediator pursues their invoice. What should the mediator do?**

The mediator should use his/her discretion. Is the bill amount worth the time the mediator may have to spend in defending a potential complaint (whether or not the mediator prevails)? Are there any grounds for the complaint? Is the amount owed worth the risks?

The mediator can remind the recalcitrant party that there is no guarantee to the outcome of any mediation and that the Standards of Conduct for Mediators in Court-Connected Programs (at VII-3) does not permit linking the outcome of the mediation to mediator compensation.

52) **The mediator has billed a party who declares bankruptcy. What can the mediator do other than file a claim with Bankruptcy Court?**

Bankruptcy law prohibits any party from pursuing collections outside of Bankruptcy Court against a party under bankruptcy protection. Continuing to do so may result in sanctions against that party by the Federal Bankruptcy Court. The mediator may file a proof of claim with the Bankruptcy Court and await the outcome.

53) **The mediator invoices a business. The attorney for the business tells the mediator the business has "ceased operations" and there is no money to pay the mediator. Beyond getting a judgment against the party, what else can the mediator do?**

There is little a mediator can do other than pursuing what may be a worthless judgment. "Piercing the corporate veil" of an incorporated business and seeking to have the judgment enforced against the owner or a "successor" corporation is a difficult task and can only be done upon proof of fraud or other extenuating circumstances. The mediator can seek legal advice should the mediator want to pursue this course. Query: is it worthwhile for a mediator to secure a judgment, which may not be collectible? The mediator should use his/her best business judgment.

Ethical Issues for Mediators

54) **During a caucus, one of the attorneys confides he/she likes how the mediator works. He/she would like to use the mediator in other cases, and/or refer colleagues to the mediator, etc.**

a) What should the mediator say to that attorney?

The mediator should say that it is inappropriate to discuss other matters while the current case is active.

b) Should the mediator disclose this to the other side?

No. The above answer should defuse the issue before it becomes a problem. If the mediator feels that the offer and any subsequent discussion have compromised the mediator's impartiality, the mediator should recuse himself/herself without disclosing the substantive discussions.

55) **The R.1:40 program uses a facilitative mediation model. A party insists that the mediator provide the party an evaluation of the case. Should the mediator do so?**

This is up to the discretion of the mediator. A mediator should only do this if he/she feels competent in the subject area. The evaluation should only be given with the knowledge and consent of all parties. The mediator runs the risk of alienating a party - or embarrassing an attorney in front of the client - with even a moderately harsh evaluation of the attorney's case (even if it is correct or well intentioned). In providing the evaluation, the mediator should use caution so as not to lose or appear to lose his/her impartiality. The mediator should remember to apply the principle of self-determination in making such a decision, since it is the parties' expectation of the process that must be satisfied.

56) **At impasse, the parties ask the mediator for a mediator's proposal. Should the mediator give one?**

See the answer to question 55. This situation may be less risky than giving an evaluation since the mediation may be at an end anyhow. The mediator's proposal is tricky. The mediator should avoid "splitting the difference" and endeavor to use a "non-evaluative/arbitrary" number for the proposal.

57) **Is the mediator permitted to communicate with counsel/parties ex-parte (outside the presence of the other counsel/parties) outside the mediation session(s)?**

Yes. The mediator may be, and in some cases is, encouraged to discuss the case and mediation preparation elements privately with each party since the mediator is not a decision maker. Mediation statements may also be submitted ex-parte by R. 1:40-6(e).

58) **A party informs the mediator that he/she does not want to mediate and will only participate for the "free hour." How should the mediator respond?**

"Let's see what happens in that first hour." The first hour is the mediator's opportunity to persuade the parties on the mediation process and his/her abilities as a mediator, as well as the value added by participation in the process (i.e., focused information exchange).

59) **The parties decide they want to replace the mediator after several months and several hours' preparation time into the mediation process. When the mediator objects and advises the parties of some of the salient court rules, the parties decide to go to the mediation for the free hour to avoid any fees but still be in compliance with the court's rules and MRO. What should the mediator do?**

The mediator and the parties are all obligated by the Court Rules and the MRO to participate in the mediation. As in the previous question, the mediator has the opportunity to convince the parties of the value to the process he/she bring as a mediator. The parties may thereafter decide to continue with the court appointed mediator.

60) **In caucus, the mediator realizes that an offer one party is making to the other will likely not be sustainable (either legally or in the ability of the party to carry out what they offered). What should the mediator do?**

This is not the mediator's concern. A good mediator will explore with both parties the consequences of a default in the agreement and help the parties place default contingencies in any agreement.

61) **Should the mediator ever sign a settlement agreement as a "witness"?**

No. The mediator is not a party to the dispute. By signing the agreement the mediator becomes a potential witness, contrary to the intent of the Court Rules and the NJ UMA.

62) **Should the mediator prepare, write or type the settlement document?**

No. Counsel should construct a terms sheet reflecting the elements of the agreement, which should be signed by their clients. While a controversial topic, at most, the mediator may act as a scrivener for the parties (i.e. write down their words of the agreements, not the mediator's).

a) Should the settlement agreement be signed or initialed by the parties or counsel?

Yes.

b) Should the mediator sign or initial the settlement agreement?

No. The mediator is strongly advised not to sign or initial any agreement the parties make since the mediator is not a party to the dispute or the resulting agreement.

63) **To avoid mediating the case, an attorney tells the mediator to tell the court that the mediation was unsuccessful. What should the mediator do?**

The mediator should advise the attorney that he/she will not mislead the court by filing a false mediation report and will proceed with the mediation.

64) **A mediation is running long and counsel has an appointment (court hearing, deposition, etc.) they must depart for. As there is progress being made in the mediation, counsel tells his/her client to remain at the mediation but call him/her before agreeing to anything. May the mediator continue the mediation and speak with the client?**

This is up to the discretion of the mediator and counsel, but may not be a wise idea. The mediator may want to obtain written consent from the attorney and the client.

65) **A party states they cannot afford to pay for further mediation time.**

a) Can the mediator waive their fees for the one side and continue?

Yes.

b) If so, is the mediator obligated to tell the other side of the waiver arrangement?

The mediator is strongly encouraged to advise the other side of the arrangement. If the other side should subsequently find out that the mediator is waiving fees to the other side - and was not told - that party may wonder what other deals/favors the mediator gave and the mediator's impartiality and reputation may come into question.

66) **A party takes a hard "no pay" position and wishes to cease mediating. The mediator believes he/she can still settle the matter.**

a) Can the mediator continue mediating and "stop the clock" or waive his/her fees for that party?

Yes.

b) If so, is the mediator obligated to tell the other side of the waiver arrangement?

The mediator is strongly encouraged to advise the other side of the arrangement. If the other side should subsequently find out that the mediator is waiving fees to the other side - and was not told - that party may wonder what other deals/favors the mediator gave and the mediator's impartiality and reputation may come into question.

67) **One of the parties to the mediation is an unsophisticated self-represented litigant.**

a) How should the mediator handle the self-represented litigant when his/her ignorance of procedures is frustrating the mediator and parties alike?

Whether or not the mediator is an attorney, the mediator cannot give any legal advice to the self-represented litigant. The mediator should advise the self-represented litigant to consult with and retain counsel, or to seek help from legal services (if eligible) or the court's ombudsman (for help with pleadings).

b) The self-represented litigant asks the mediator what he/she should do. What should the mediator do?

The mediator should not give any advice to the self-represented litigant. See the previous answer.

c) The self-represented litigant needs extra "hand holding" by the mediator. Should the other parties share in compensating the mediator for that extra time?

Yes. Per Appendix XXVI, Guideline 10, the mediator's bill is split equally between/among all the parties. There are no self-represented exceptions, only economic status exceptions such as indigency.

68) **The self-represented litigant does not appear on the scheduled organizational conference call. When the mediator calls the number on the counsel and party list, the self-represented litigant's spouse answers and says he/she will speak for the self-represented litigant and refuses to put the self-represented litigant on the phone. What should the mediator do?**

If a party opts to be a self-represented litigant, he/she must speak for him/herself. Reschedule the conference call for another time and instruct the spouse that the self-represented litigant must participate in the organizational conference call.