

Shapiro

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

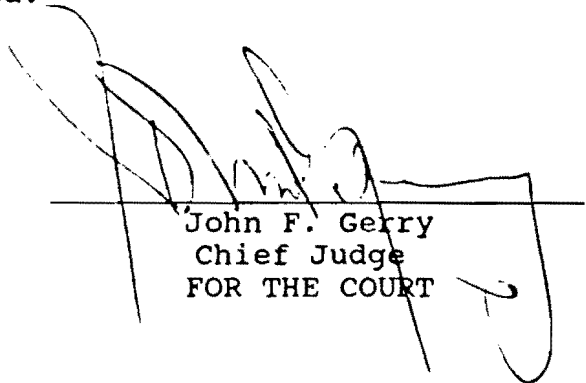
RE: The General Rules
of the Court

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O R D E R

On the Court's own motion and for good cause shown,
IT IS on this 29th day of January, 1993

ORDERED that General Rule 49 - Mediation, and the
amendments to General Rules 7E and 15, in the form attached
hereto, are hereby duly adopted.



John F. Gerry
Chief Judge
FOR THE COURT

GUIDELINES FOR MEDIATION

I. Case Management Responsibility of the Assigned Judicial Officers; Stay of Proceedings

Mediation is intended to afford litigants a less expensive alternative to traditional litigation. General Rule 49, which provides both for compulsory and voluntary mediation, is expected to conserve the resources of litigants which would otherwise be expended in discovery and to concentrate those resources on meaningful and intensive settlement negotiation. Mediation is also intended to conserve judicial resources, enabling Judges and Magistrates to concentrate on cases which have not been referred to mediation. The Court expects and requires both litigants and their attorneys to participate in mediation in good faith.

Cases which are expected to be referred to mediation are those which are complex in nature, including environmental and patent cases. However, any case pending in the Court may be referred to mediation by the assigned Judge or Magistrate. Moreover, any pending case may be referred to mediation if all parties consent.

The referral of cases to mediation does not divest the assigned Judge and Magistrate of the responsibility for exercising overall management control over a case during the pendency of the mediation process. However when a case is referred to mediation all proceedings (including pretrial motions or the pursuit of discovery) are stayed for a sixty-day period. The purpose of this stay is to afford a reasonable period of time within which to reach a settlement. If it appears that it would be futile to continue mediation efforts before the stay expires the mediator may request that the case be restored to the active calendar forthwith.

When the stay expires, a case which has not been settled will be restored to the active calendar, protecting the parties from an extended (and unfruitful) stay. General Rule 49E.5 does provide that the parties and the mediator may make a joint application for an extension of the stay, thus recognizing that certain cases may need additional time for settlement. This application shall be made to and considered by the referring Judge or Magistrate.

General Rule 49B provides for the designation of a "compliance judge for mediation." The duty of this judicial officer is to administer the mediation program and resolve procedural or substantive issues which might arise. Any such issue (including recusal of a mediator) may be brought to the attention of the compliance judge by either the parties or the mediator.

II. Mediator's Responsibility for Managing the Mediation Process

A. When a case is referred to mediation the compliance judge shall designate a mediator or co-mediators as may be appropriate. With the designation of a mediator the Court has delegated to him or her the authority to control and regulate the mediation process, including:

- (1) Communicating with counsel to establish an expedited schedule for, among other things, the submission of position papers and the selection of dates for first and subsequent mediation sessions.
- (2) Communicating on an ex parte basis.
- (3) Determining and designating the appropriate representatives of parties, including individuals with settlement authority or other specific individuals, to attend mediation sessions.

B. The function of the mediator is to serve as a neutral facilitator of settlement. The mediator is expected to conduct the mediation process in an expeditious manner. Neither the parties nor the mediator may disclose any information presented during the mediation process without consent. The only exception to this rule of confidentiality is when disclosure may be necessary to advise the compliance judge of an apparent failure to participate in the mediation process.

Mediation, unlike arbitration, is not intended to be a fact-finding or decision-making process. Instead, the focus of mediation is to resolve the dispute between the parties. Resolution of that dispute may lead the parties and the mediator to explore questions of law or issues of fact beyond the scope of the pleadings or to reach settlements which go beyond the relief sought in the pleadings. In short, mediation is a flexible process which may be molded to fit the needs of a particular case. No specific procedures have been set for the mediator to follow. Instead, the intent of General Rule 49 is for the mediator to assist the parties to reach a negotiated settlement by conducting meetings, defining issues, defusing emotion and suggesting possible ways to resolve the dispute.

III. Attendance of Parties; Participation in a Meaningful Manner

The attendance of parties or their representatives may be deemed by the mediator to be appropriate for mediation to proceed in a meaningful manner. Moreover, one of the goals of the mediation program is to involve both parties and attorneys more

intimately. Accordingly, appropriate sanctions may be imposed on any party or attorney who fails to participate in a meaningful manner or to cooperate with the mediator.

IV. Compensation of Mediators

A mediator shall be compensated at the rate of \$150.00 an hour except for the first six hours of his or her time, which shall not be compensated. The compensation shall be paid equally by the parties.

V. Mediation by Consent

If all parties consent to have a case referred to mediation the parties may request the appointment of a mediator from the panel approved by the Chief Judge or may select any other individual or organization to serve as the mediator.

RULE 7 DISCIPLINE OF ATTORNEYS

E. Disciplinary Proceedings

1. Every attorney authorized to practice law or appearing before this Court, including those specially authorized for a limited purpose or in connection with a particular proceeding pursuant to Rule 4, shall be subject to the disciplinary jurisdiction of this Court.

2. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline of an attorney, shall come to the attention of a Judge of this Court, and the applicable procedure is not otherwise mandated by these Rules, that Judge shall refer the matter in writing to the Chief Judge. The Chief Judge may refer the matter to the appropriate State disciplinary body or, if the Chief Judge concludes that further investigation is warranted, he or she shall direct the Clerk to refer the matter to an attorney ("investigating counsel") who is admitted to practice before this Court to conduct such an investigation in order to determine whether a formal Order to show Cause should issue.

3. The Clerk's order of reference to investigating counsel shall be placed under seal and shall remain under seal unless and until an Order to Show Cause and Complaint are issued under paragraph 7 hereof, at which point an order shall be entered unsealing the entire file.

4. Investigating counsel shall promptly, and with reasonable particularity, notify the respondent attorney in writing of the pendency and nature of the investigation and solicit comments thereon in furtherance of the preliminary investigation. Every attorney, as set forth in subsection E 1. above, has the affirmative obligation to cooperate in an investigation. Such cooperation shall include the production of documents and submission to interviews conducted by the investigating counsel. The failure to cooperate may constitute an independent basis for the imposition of discipline unless it is based upon the proper assertion of a legal or constitutional right.

5. Conclusion of No Formal Disciplinary Proceeding

Should the investigating counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent attorney because (a) sufficient evidence of misconduct is not present, or (b) there is pending another proceeding against the respondent attorney, the disposition of which in the judgment of the investigating counsel should be concluded before further action by this Court, or (c) any other valid reason exists, investigating counsel shall submit a report to the Chief Judge containing his or her

findings and recommendations for disposition of the matter. In the event that the Chief Judge concludes that no further action is required or that the matter should be deferred pending conclusion of another proceeding against the respondent, the Chief Judge shall instruct investigating counsel to so notify the respondent. If the Chief Judge concludes that further investigation is required he or she shall remand the matter to the investigating counsel for further investigation in accordance with the Chief Judge's directive.

6. Conclusion of Private Reprimand

Should investigating counsel conclude after investigation and review that a private reprimand should be issued to the respondent attorney, and the respondent attorney consents, the investigating counsel shall submit a written report to the Chief Judge containing his or her findings and recommendations. If the Chief Judge approves the recommendation of investigating counsel, he or she shall submit the report to the full Court for review. If the Chief Judge or the full Court concludes that further investigation is required, the matter shall be remanded to investigating counsel for further investigation in accordance with the Chief Judge's or the full Court's

directive. In the event that respondent attorney does not consent to the issuance of a private reprimand, the investigating counsel shall proceed in accordance with the provisions of paragraph 7 below.

7. Conclusion of Public Discipline

Should investigating counsel conclude that sufficient evidence of misconduct exists warranting the imposition of public discipline, investigating counsel shall apply to the Chief Judge for the issuance of an Order to Show Cause upon a showing by Complaint signed by the Chief Judge of probable cause requiring the respondent attorney to show cause why such discipline should not be imposed.

8. Upon the occurrence of the events set forth in paragraph 7 above, the respondent shall file an answer within 20 days of the receipt of the Complaint and Order to Show Cause. In the answer the respondent may set forth all affirmative defenses, including all claims of mental and physical disability, if any, and whether they are alleged to be causally related to the offense charged. Within 30 days of the filing of an answer, the respondent attorney and investigating counsel may serve demands for discovery limited to documents, if any.

9. Upon the filing of a Complaint and Order to Show Cause, as set forth in paragraph 7 above, the Chief Judge shall set the matter for prompt hearing before a Judge, provided, however, that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court, the hearing shall be conducted before a different Judge appointed by the Chief Judge, or if the Chief Judge is the complainant, by the next active Judge senior in commission.

10. The hearing referred to in paragraph 9 above shall be presented by the investigating counsel. A stenographic record shall be made of the proceeding. At the conclusion of the hearing, the Judge assigned to the matter shall submit his or her findings of fact, conclusions of law and recommendations, if any, to the full Court for action, with a copy to the respondent attorney and to investigating counsel.

11. The full Court shall review the findings of fact, conclusions of law and recommendations of the Judge designated by the Chief Judge to hear the matter, the transcript of the hearings and the briefs previously filed with the Court. The record may be supplemented by the filing of briefs pursuant to a schedule fixed by the Chief Judge for review on the record and briefs,

without oral argument, by the full Court. The full Court shall take whatever action it deems appropriate including, but not limited to, the dismissal of the action, the issuance of a public reprimand, suspension or disbarment.

12. If a respondent desires legal representation, but claims to be unable to retain counsel by reason of indigence, the respondent may make application to the Chief Judge for appointment of counsel. Upon exceptional circumstances having been shown, the Judge to whom the matter has been assigned shall designate an attorney who is admitted to practice before this Court to represent respondent in the matter without compensation.

13. In furtherance of the investigation proceeding pursuant to paragraph 4 above, investigating counsel may seek the issuance of a subpoena ad testificandum or a subpoena duces tecum by making an application to the Chief Judge. After an Order to Show Cause has been issued by the Chief Judge pursuant to paragraph 7 above, investigating counsel and respondent may seek the issuance of the aforesaid subpoenas by way of application to the Judge designated to hear the matter.

14. The standard of proof in proceedings before the Judge designated to hear the matter and the full Court shall be clear and convincing evidence, and the burden of proof under that standard shall be on the investigating counsel.

RULE 15. CASE MANAGEMENT AND DISCOVERY

A. Scheduling Conferences -- Generally.

1. Conferences pursuant to Rule 16 of the Civil Rules shall be conducted, in the first instance, by the Magistrate, unless the judge otherwise directs. The initial conference shall be scheduled within 60 days of filing of an initial answer, unless deferred by the Magistrate due to the pendency of a dispositive or other motion.

2. The Magistrate may conduct such further conferences as are consistent with the circumstances of the particular case and this Rule and may revise any prior scheduling order for good cause.

3. At each conference each party not appearing pro se shall be represented by an attorney who shall have full authority to bind that party in all pretrial matters.

4. The Magistrate may, at any time he or she deems appropriate or at the request of a party, conduct a settlement conference. At each such conference attorneys shall ensure that parties are available, either in person or by telephone, and as the Magistrate directs, except that a governmental party may be represented by a knowledgeable delegate.

5. Conferences shall not be conducted in those civil cases described in General Rule 40A.4(c) unless the Magistrate so directs.

B. Initial Conferences -- Generally.

1. Prior to the initial conference, in each presumptive Track II case as defined in subparagraph 4 hereof, the attorneys shall confer, either in person or by telephone, to agree on a Joint Discovery Plan. Discussion of counsel shall include, but need not be limited to, the following:

a. phased discovery (e.g., liability from damages discovery);

b. bifurcation (e.g., liability from damages; statute of limitations before other issues);

c. limiting the number of interrogatories, depositions or other discovery;

d. providing for the early exchange of documents;

e. dates for filing of dispositive motions and for trial; and

f. consent to some form of alternative dispute

resolution.

2. Not less than 7 days prior to the initial conference counsel for the parties shall do the following: In each presumptive Track II case counsel shall submit to the Magistrate the Joint Discovery Plan and any disputes regarding the same (or any party's separate discovery memorandum in the event that a joint discovery plan is not achieved). In each arbitration or presumptive Track I case each party shall submit a separate Discovery Memorandum. Any written submission hereunder shall address the issues itemized in Section B.1 above and shall include:

- a. a description of all discovery conducted to date;
- b. a description of all discovery needed to complete discovery;
- c. a description of further discovery needs;
- d. an estimate of the time needed to complete discovery;
- e. a statement regarding whether expert testimony will be necessary, and the anticipated schedule for retention of experts and submission of their reports;
- f. a statement regarding whether there should be any limitation placed upon use of any discovery device and, if so, the reasons the limitation is sought;
- g. a description of any special discovery needs (e.g., videotape, telephone depositions, or problems with out-of-state witnesses or documents);
- h. if the case is to be arbitrated under Rule 47C.1, and any party contends that arbitration would be inappropriate, a statement setting forth the reasons for that contention; and
- i. a statement whether the case is one which might be resolved in whole or in part by voluntary arbitration (pursuant to Rule 47C.2 or otherwise), mediation (pursuant to Rule 49 or otherwise), appointment of a special master or other special procedure.

3. The Magistrate shall, after consultation with counsel, enter a scheduling order which may include, but need not be limited to, the following:

- a. dates by which parties must move to amend pleadings or add new parties;

- b. dates for submission of experts' reports;
- c. dates for completion of fact and expert discovery;
- d. dates for filing of dispositive motions after due consideration whether such motions may be brought at an early stage of proceedings (i.e., before completion of fact discovery or submission of experts' reports);
- e. a pretrial conference date; and
- f. any designation of the case for arbitration, mediation, appointment of a special master or other special procedure.

The scheduling order may further include such limitations on the scope, method or order of discovery as may be warranted by the circumstances of the particular case to avoid duplication, harassment, delay or needless expenditure of costs.

4. The Magistrate shall, after consultation with the parties, designate each non-arbitration case either Track I or II. Each class action, antitrust, securities, environmental, patent, trademark, or multi-district case shall presumptively be designated Track II.

5. The Magistrate shall also advise each party of the provisions of Rule 40A.3.

6. In a civil action arising under 18 U.S.C. Sections 1961-1968, the Judge or Magistrate may require a RICO case statement to be filed and served in the form set forth in Appendix O.

C. Initial Conferences -- General Rule 47 Arbitration Cases.

At the initial conference in cases assigned to arbitration pursuant to Rule 47C the Magistrate shall enter a scheduling order as contemplated by Section B.3 above except that no pretrial date shall be set. Only an initial conference shall be conducted prior to a demand for trial de novo pursuant to Rule 47G, except that the Magistrate may conduct one or more additional conferences if a new party or claim is added, or an unanticipated event occurs affecting the schedule set at the initial conference.

D. Subsequent Conferences -- Track I and Track II Cases.

Track I cases are those which are not subject to Rule 47 arbitration or which are not designated Track II. Track I cases are presumed to require infrequent judicial conferences or other judicial intervention after the initial conference. A pretrial conference shall presumptively be conducted within one year of filing of an initial answer in Track I cases. Track II cases are

those which, based on the pleadings or facts, appear to require frequent conferences or other judicial intervention. Status conferences shall presumptively be scheduled on a regular basis.

E. Discovery and Case Management -- Generally.

1. All parties shall conduct discovery expeditiously and diligently.

2. Counsel shall confer to resolve any discovery or case management dispute. Any such dispute not resolved shall be presented by telephone conference call or letter to the Magistrate Judge. This presentation shall precede any formal motion.

3. Cases in which a party appears pro se shall not be subject to Section E.2 above unless the Magistrate Judge so directs. In such cases discovery or case management disputes shall be presented by formal motion consistent with Section F below.

F. Discovery and Case Management -- Motions

1. Discovery or case management motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall also set forth the date and method of communication used in attempting to reach agreement.

2. Discovery motions shall have annex thereto copies of only those pertinent portions of depositions, interrogatories, demands for admission and responses, etc., which are the subject matter of the motion.

3. General Rule 12C shall apply to discovery and case management motions except that the following schedule shall be followed. No such motion shall be heard unless the appropriate papers are received at the Clerk's Office, at the place of allocation of the case, at least twenty-four (24) days prior to the date noticed for argument. No opposition shall be considered unless appropriate answering papers are received at the Clerk's Office, at the place of allocation of the case, and a copy thereof delivered to the Magistrate Judge to whom the motion is assigned at least fourteen (14) days prior to the date originally noticed for argument, unless the Magistrate Judge otherwise directs. No reply papers shall be allowed except with

the permission of the Magistrate Judge. Unless oral argument is to be heard under Section F.4 below, the Magistrate Judge may decide the motion on the basis of the papers received when the deadline for submitting opposition has expired.

4. No oral argument shall be heard except as permitted expressly by the Magistrate Judge assigned to hear the motion. In the event oral argument is required, the parties shall be notified by the Court. Oral argument may be conducted in open Court or by telephone conference, at the discretion of the Magistrate Judge. Any party who believes that a motion requires oral argument shall request it in the notice of motion or in response to the notice of motion, and so notify the Court in writing at the time the motion or opposition thereto is filed.

G. Discovery - Materials

1. Transcripts of depositions, interrogatories and answers thereto, requests for production of documents and responses thereto, and requests for admissions and answers thereto shall not be filed except when needed in a particular pretrial proceeding or upon order of the Court. However, all such papers must be served on other counsel or parties entitled thereto under Rule 5 of the Civil Rules.

2. In those instances when such discovery materials are properly filed, the Clerk shall place them in the open case file unless otherwise ordered.

3. The party obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or ordered. It shall be the duty of the party taking a deposition to make certain that the officer before whom it was taken has delivered it to that party for preservation and to the Court as required by Rule 30(f)(1) of the Civil Rules if needed or ordered.

Rule 49 Mediation

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A. Designation of Mediators

1. The Chief Judge shall designate as many mediators as determined to be necessary under this Rule.

2. An individual may be designated to serve as a mediator if he or she:

a. has been for at least five years a member of the bar of the highest court of this State;

b. is admitted to practice before this Court;

c. is determined by the Chief Judge to be competent to perform the duties of a mediator; and

d. has participated in a training program (or the equivalent thereof) to the satisfaction of the Chief Judge.

3. Each mediator shall, for the purpose of performing his or her duties, be deemed a quasijudicial officer of the Court.

B. Designation of Compliance Judge

The Chief Judge shall designate a Judge or Magistrate to serve as the compliance judge for mediation. This compliance judge shall be responsible to the Chief Judge for administration of the mediation program established by this Rule and shall entertain any procedural or substantive issues arising out of mediation.

C. Compensation of Mediators

Each mediator shall be compensated \$150.00 an hour for service in each civil action referred to mediation, which compensation shall be borne equally by the parties. Notwithstanding this provision, the first six hours of service shall be without compensation.

D. Civil Actions Eligible for Mediation

Each Judge and Magistrate in the District may, without the consent of the parties, refer to mediation at any one time two complex ("Track II") civil actions. Notwithstanding the above, the parties in any civil action may, with consent of a Judge or Magistrate, agree to mediation and, if such consent is given, select a mediator.

E. Mediation Procedure

1. Counsel and the parties in each civil action referred to mediation shall participate therein and shall cooperate with

the mediator, who shall be designated by the compliance judge.

2. Whenever a civil action is referred to mediation the parties shall immediately prepare and send to the designated mediator a position paper not exceeding ten pages in length. The parties may append to their position papers essential documents only. Pleadings shall not be appended or otherwise submitted unless specifically requested by the mediator.

3. Counsel and the parties (including individuals with settlement authority or specific individuals) shall attend mediation sessions as requested by the mediator.

4. The mediator may meet with counsel and the parties jointly or ex parte. All information presented to the mediator shall, on request, be deemed confidential and shall not be disclosed by anyone, including the mediator, without consent, except as necessary to advise the Court of an apparent failure to participate. The mediator shall not be subject to subpoena by any party. No statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an admission.

5. All proceedings (including motion practice and discovery) shall be stayed for a period of 60 days from the date a civil action is referred to mediation. Any application for an extension of the stay shall be made jointly by the parties and the mediator and shall be considered by the referring Judge or Magistrate.

F. Guidelines for Mediation

The Court, the Clerk, the parties, attorneys and mediators are hereby referred to the Guidelines for Mediation (Appendix _____ to these Rules) for their information and guidance in civil actions referred to mediation pursuant to this Rule.