

Mediators Mixed on Pay Proposal for First 3 Hours

By Mary P. Gallagher

A proposal to raise the pay of court-referred mediators from nothing to \$100 an hour for the first three hours is working its way through the system. But mediators are split on whether it is enough — or even necessary.

The Supreme Court Committee on Complementary Dispute Resolution recommended the rate in April in the face of large numbers of mediators abandoning the program.

The recommendation is before the Judicial Council and then will head to the Court.

And looming in the background is the expected expansion of the program from 17 to 21 counties, increasing the need for mediators.

While most mediators welcome the prospect of payment, some say it is too little, too late. Others say they see themselves as volunteers and are happy to continue that way.

Free mediator time has been part of the deal since court-referred mediation in Superior Court began in 2000. The idea was that litigants, who had gone to court and paid a filing fee only to be thrust into mediation, should not have to pay for it.

After the first three hours, including at least 90 minutes of actual mediation time, mediators are allowed to charge their usual hourly rates, which average about \$250 to \$300 per hour.

According to the court's Web site registry, only one mediator charges as low as \$100 — Geoffrey Alexander, an attorney employed by CNA Insurance who was on vacation last week and could not be reached for comment. The highest rate listed, \$510, is for John



NO PRO BONO SITUATION: Says Hanan Isaacs: 'We're being asked to donate money in the form of reduced fees or no fees to people who don't need the donation.'

McGahren, a lawyer with Latham & Watkins in Newark.

The problem has been that mediators are not getting the chance to earn some money on the back end of the process once the meter starts running.

A court survey found the average number of hours spent per mediation was 3.04 and the average time paid was 1.43 hours.

Lost Days

John Sands, a West Orange lawyer who exclusively does mediation, says he was losing more than three hours per case before he quit. Parties would

often just go through the motions, ready to walk out the door as soon as the three hours were up, he recalls. Because he usually sets aside an entire day, that leaves him with "a loss of inventory that's never going to be made up," he laments.

Litigants don't give it a real effort not just because they are forced into it but because offering it for free is "an inherent devaluation of the mediation process," says Sands.

Significant numbers of other attorneys have been resigning from the program or going on inactive status, according to Michelle Perone, chief of civil court programs for the Administrative Office of the Courts.

From a high of about 750 active mediators roughly two years ago, the number fell to 565 as of May, with another 285 on inactive status. Of those who gave a reason for leaving, many said they were tired of not making any money, says Perone.

Some who deactivated themselves indicated they would reactivate if the \$100 per hour rule were adopted while others are close to quitting but are waiting to see what will happen with the committee's recommendation, she adds.

Robert Margulies, a past chair of the State Bar Association's Dispute Resolution Section and a member of the committee that made the \$100 recommendation, predicts that if the Court rejects the proposal, "enough good people will leave the program that it will fall apart."

Perone's concern is the loss of many experienced people who are "theoretically, getting the most worn out."

Margulies, of Jersey City's

Margulies, Wind & Herrington, estimates he is donating \$30,000 worth of his services a year based on his \$400 per hour rate.

"We'd love full compensation but this is a reasonable compromise," he says of the proposal.

One lawyer who got tired of waiting was Hanan Isaacs, who was with the program from the start but tendered his resignation two weeks ago. The Princeton lawyer, a past president of the New Jersey Association of Professional Mediators, does not plan to return if the Court accepts the recommendation, calling low pay not much better than no pay.

Isaacs says his refusal to continue is a matter of principle and not just economics. This is not a pro bono situation where the parties cannot afford to pay, he says. "We're being asked to donate money in the form of reduced fees or no fees to people who don't need the donation."

Moreover, it is hard to schedule sessions with people who have not chosen the process, he says. "My staff is thrilled we're not doing it anymore."

It also rankles Isaacs that no one else is working for nothing, including the parties' counsel and the judges.

He says he would prefer a system where litigants are told "you don't have to go to mediation but if you go, you have to pay." Or where they are told that the mediators have varying levels of skill, and that some will give three free hours. He would also like orientations for the parties.

Anju Jessani, who will become president of the mediators' group in October, says "three free hours is unacceptable" and the group supports the proposed \$100 per hour rate as "a significant first step." Though many members feel they should be able to charge market rates, the group has taken no official position on that aspect, she says.

Jessani, a nonlawyer, works for Divorce with Dignity in Hoboken and

her usual rate is \$200 an hour.

Jeffrey Mintz, a Mount Holly lawyer-mediator, sees \$100 an hour as "a reasonable compromise," especially because the parties split the cost. But he wishes cases were not automatically assigned out so early because they are not all ready to be mediated at that point.

On the other side of the coin is McGahren, the \$510-per-hour mediator, who says he views the program as pro bono and has never charged for court-referred mediation. "If I was looking to do this for other than pro bono purposes, \$100 would not be adequate," he adds.

Taking a similar view is Hackensack solo Patrick Amoresano, who says he is not unhappy with the status quo but understands why others might find even \$100 per hour insufficient. He says having the credential and getting to meet new lawyers is enough for him. His usual rate is \$150 per hour.

Jonathan Hyman, a member of the Court's and Bar's dispute resolution committees, calls compensating mediators "an important thing to do to keep the mediation program growing." A professor at Rutgers Law School-Newark who teaches mediation, Hyman is not part of the court program.

Other states have court-referred mediation but none "requires or has built in such a massive amount of donated time" from mediators, he notes.

Expanded Program, Expanded Need

Stemming the outflow of mediators is especially important with the number of cases sent for mediation expected to grow markedly in the near future.

The program now covers 17 counties — all but Morris, Sussex, Atlantic and Cape May — but the presiding judges recently voted to extend the program statewide.

The Supreme Court has yet to act on the issue but Perone says the presiding civil judges for the four counties not yet in the program — Carol Higbee for Atlantic/Cape May and W. Hunt Dumont for Morris/Sussex — recently told her they plan to move toward presumptive mediation even if the Supreme Court does not require it.

At present, matters in those counties are referred to mediation on a case-by-case basis when ordered by a judge and not as a matter of course.

In addition, next year will bring an influx of Lemon Law cases. Courts had been regularly sending such cases to mediation but stopped last year because there were not enough mediators to deal with them, though judges could still refer them on an ad hoc basis, says Perone.

Only 18 mediators currently appear on the court roster as experienced in Lemon Law matters, but Perone expects to add a lot more with training sessions planned for this fall.

Under a statewide pilot program slated to begin Jan. 1, Lemon Law litigants will have 90 days after the answer is filed to choose among mediation, arbitration or voluntary binding arbitration. (Arbitrators who participate in court programs are paid for their time.) Those who make no choice will be sent to mediation. An estimated 1,500 Lemon Law cases are filed annually.

Once all 21 counties are routinely referring civil cases to mediation, the statewide total could rise as high as 10,000 a year, anticipates Perone, creating a substantial jump in the demand for mediator hours.

AOC statistics show 5,764 cases referred to mediation in 2004, down slightly from 2003's high of 6,163. The drop was probably largely caused by the Lemon Law loss, says Perone.

The presumptive mediation pilot program for civil cases began in 2000 in Hudson, Mercer and Union counties. ■