## RULE L1042.21. MEDICAL PROFESSIONAL LIABILITY ACTIONS. MOTION FOR SETTLEMENT CONFERENCE OR MEDIATION.

(1) Status Conference.

Plaintiff's counsel shall deliver to the Court Administrator, at the time a medical professional liability action is filed with the Prothonotary, a time-stamped copy of the cover sheet of the complaint or praecipe to issue a summons. Ninety (90) days after a medical professional liability action is filed with the Prothonotary, the Court Administrator shall thereafter schedule a status conference before a Judge for the purpose of, inter alia, considering and determining the manner and time in which the case shall proceed through discovery, pretrial motions, mediation, settlement conferences, pretrial conferences and trial for the mutual benefit of the parties and the Court.

(2) Selection of Cases for Mediation.

Upon motion of any party, including a motion pursuant to Pa.R.C.P. 1042.21, or upon written agreement of the parties or on its own motion, the court may refer a case to mediation. Any objection to a motion to request mediation must be filed within ten (10) days of the filing of the motion. A case ordered for mediation shall remain on any trial list upon which it has been placed, but shall not proceed to trial until the mediation process has concluded.

(3) Mediation.

(a) Agreement of the Parties.

All parties are encouraged to stipulate to the terms and conditions of mediation including, but not limited, to the matters referred to in this rule.

(b) Expectations of the Parties.

When ordered by the Court to participate in medical professional liability mediation, the parties are not required to reach a resolution. They are expected to: engage in principled negotiations, commit to the process, keep an open mind, discuss openly and freely, understand the needs of others, and explore ways to create a mutually acceptable resolution in good faith.

(c) Selection of Mediators.

The parties are encouraged to agree on the mediator and, if appropriate, co-mediator. If they cannot agree, then the Court will select a mediator

and, if appropriate, a co-mediator, either on its own or by choosing among suggestions made by the parties.

(d) Judge as Mediator.

The Court, in its discretion, may choose a Judge to serve as mediator.

(e) Type of Mediation.

The parties and the Court shall decide at the outset whether the mediation shall be the facilitative model, the evaluative model, or the facilitative/evaluative hybrid model.

(f) Qualifications of the Mediator/Co-Mediator.

Any mediator or co-mediator, except a Judge, shall have at least the following qualifications: successful completion of an appropriate mediation course of formal training or education (preferably a recognized course of at least forty (40) hours); participation in a minimum of five (5) mediated medical professional liability cases or, in lieu thereof, a minimum of ten (10) mediated civil personal injury cases; mediation professional liability insurance; compliance with all ethical standards of the mediator profession; and the ability to satisfy the parties' practical needs for availability and affordability.

(g) Objections to the Mediator.

Any objection to a named mediator is waived by any party who fails to file an objection within fifteen (15) days after the mediator is named by the Court.

(h) Role of the Mediator.

Mediation is a confidential, informal, nonadversial process where a neutral third party assists disputing parties in resolving by agreement some or all of the differences between them. It shall be the role of the mediator to facilitate communication, clarify interests and issues, identify information that may be gathered to assist in making decisions, foster joint problem solving and assist the parties in reaching a mutually acceptable settlement of their dispute.

Mediators will not provide legal advice, although in evaluative mediations, mediators may express opinions on the applicability of the law to the facts to the extent that such opinions may, in the judgment of the mediator, be helpful in facilitating a settlement. Mediators may offer recommendations, evaluations or suggest settlement proposals, but mediators act for no party and have no authority to make any decisions or compel an agreement. Parties will rely solely on the advice of their attorneys, as well as their own judgment in arriving at a resolution of the

dispute and cannot claim to have relied to their detriment on any advice or comment of a mediator.

(i) Time and Place.

The mediation shall be conducted at a time and place to be arranged by the parties. It is expected that mediation shall take place within forty-five (45) days of the date the mediation order is entered. It is preferred that mediation will not take more than one (1) day. Each party shall pledge to be fully prepared for mediation at that time and make every effort to keep the mediation session within that time frame. Subsequent sessions will be arranged if the parties or the mediator believe(s) that sufficient progress is being made to merit another session. Mediation should be completed within sixty (60) days from the date of the order or agreement to mediate.

(j) Preconference Submissions.

Each party will prepare a preconference statement that shall be presented to the mediator not less than ten (10) days prior to the mediation conference. The summary should not exceed six (6) pages or such additional length as the mediator may permit. Statements should address, in concise form:

(i) Statement of facts including description of the injury and list of special damages and expenses incurred and expected to be incurred;

(ii) Theory relative to liability and damages, and authorities in support thereof;

(iii) Summary of reports of experts and testimony of key non-expert witnesses;

(iv) Status of the case, and expected trial date;

(v) Last demand and offer, if any.

A limited number of documents may be attached to assist the mediator and the parties, but counsel and parties are urged to keep the number of attachments to a minimum. Summaries of data are encouraged, as are stipulations of the parties. The parties are not to attach copies of discovery requests, pleadings, motions, etc. but to provide fair and accurate statements/attributions, since the primary purpose of the preconference submission is to accurately inform the mediator of the facts and issues.

(k) Attendance and Settlement Authority.

Every party or entity that has an interest in the outcome of the case, may

be affected by the outcome of the case, has the ability to effect a resolution, etc. is required to attend the mediation session. Each shall have the authority to settle the case. Each defendant, or each party representing or having an interest in a defendant's case, shall have the authority to settle up to its policy limits or the last demand of a plaintiff, whichever is less. Mediators may postpone the mediation or require the participation of an individual by telephone or by direct communication with the mediator. Telephone attendance must be arranged ahead of time. In an appropriate case, representatives of the M(Care) Fund must either attend in person or be available by telephone during all mediation sessions. If any party or person required to attend fails to appear at the mediation session without good cause, or appears without decision making discretion, the Court, sua sponte, or upon motion, may impose sanctions, including an award of reasonable mediator and attorney's fees and other costs, against any defaulting responsible party.

(l) Confidentiality.

The mediation process must comply with any Pennsylvania statutory mediation confidentiality provisions (42 Pa.C.S. §5949). Mediation proceedings constitute settlement negotiations between and among the parties and mediators. Therefore, all statements made by, or on behalf of, the parties or their representatives relating to anything arising out of or relating to the mediation process, and any documents created for or during the mediation process are beyond the scope of discovery and are not admissible into evidence for any purpose, including impeachment, in any pending or subsequent proceeding. The obligation of total confidentiality will apply to all participants in the mediation process. Evidence that is discoverable or admissible is not rendered inadmissible or undiscoverable as a result of its use in the mediation process (for example: medical records maintained by a physician). If a settlement agreement is reached, it shall be binding upon the parties thereto, and its terms and enforcement shall be governed by the terms of the agreement and not subject to the confidentiality provisions herein. Confidential communications and settlement offers of the parties may not be disclosed or discussed with any other persons, including attorneys representing parties with similar or unrelated claims or the media, or via electronic means, to the general public, or in any other judicial proceedings, including a conciliation before a trial court Judge, or special master. If the mediation did not result in settlement, the final settlement position of any party may not be divulged to any third party, including a Judge, without the consent of all parties.

(m) Mediators Privilege and Immunity.

No party shall request nor subpoena a mediator to testify or provide evidence in any matter for any reason, nor will a party request or

subpoena any mediator's notes, records or any material in possession of the mediator, for any purpose. Mediators shall have the same immunity as Judges and judicial employees have under the laws of the Commonwealth of Pennsylvania, and no mediator is, or will claim to be, a necessary party in any judicial, quasi-judicial or administrative proceeding arising out of or relating to any mediation or the underlying litigation.

(n) Fees and Expenses.

Unless the parties agree otherwise, the Court will order the parties to share, equally, the cost and charges of the mediator, including any deposit or prepayment required by a mediator.

(o) Communications Between Mediators and the Court.

During a mediation, a Judge should only be informed of the following:

(i) The failure of a party to comply with the order to attend mediation;

(ii) Any request by the parties for additional time to complete the mediation;

(iii) If the parties agree, any procedural action by the Court that would facilitate the mediation; and

(iv) The mediator's assessment that the case is inappropriate for mediation.

When the mediation has been concluded, the Court should be informed of the following:

(i) That an agreement has been reached;

(ii) That the parties did not reach an agreement on any matter. The mediator shall report the lack of an agreement to the Court without comment or recommendation; and

(iii) With the consent of the parties, the mediator's report may also identify the pending motions or outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

Whenever possible, all communications with the Judge should be made jointly by the parties. Ex parte communications by less than all of the parties with the Court will not be permitted. Any party seeking further Court action must follow state and local petition and motion practice. Where the mediator must communicate with the Judge, such communications shall be made in writing.