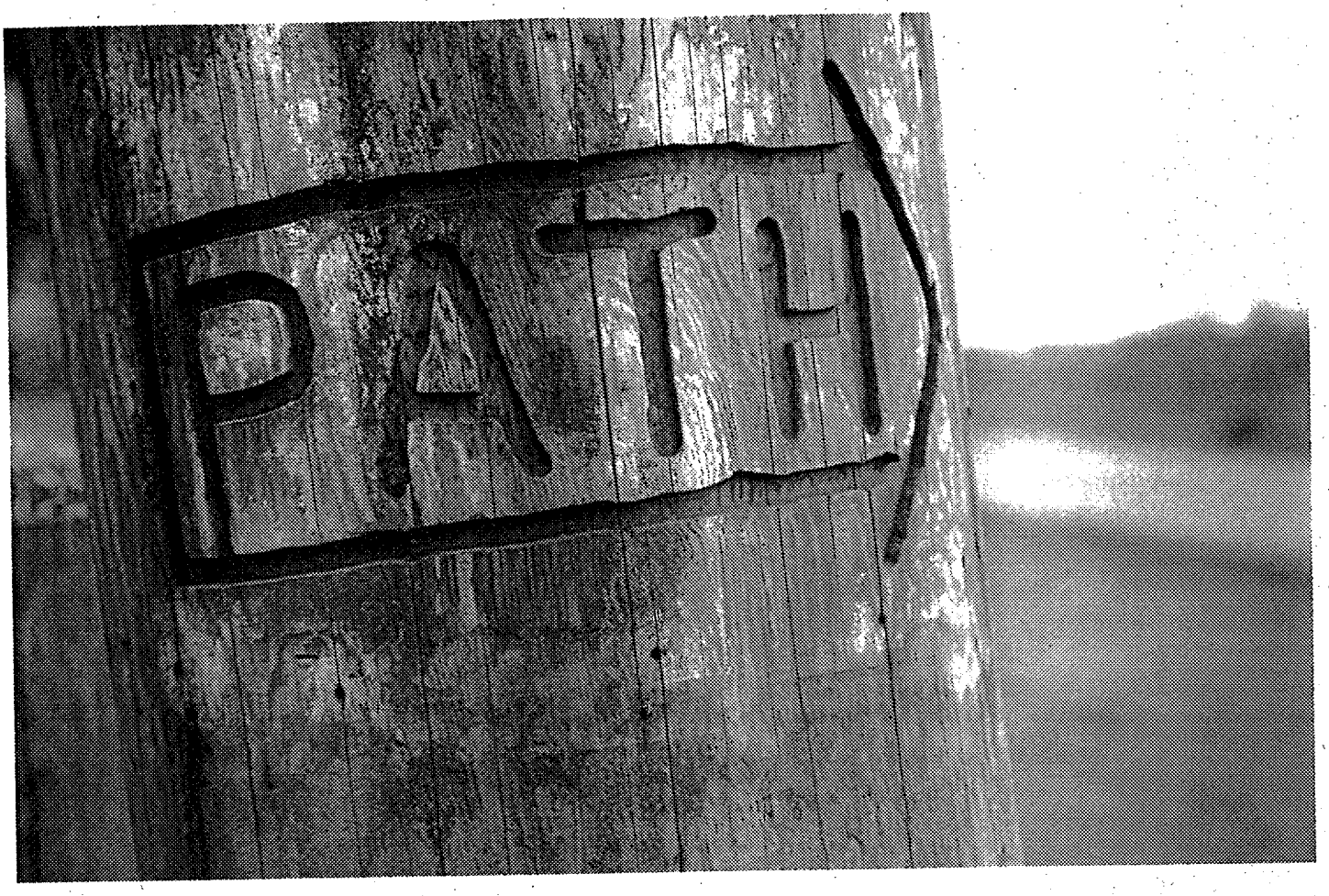

CARVING A PATH TOWARD FINAL RESOLUTION USING MEDIATION OR ARBITRATION

by Marie E. Lihotz

A client's enthusiasm for litigation decreases in direct relationship to the length of time it takes to obtain a final result. As years elapse, filled with ineffective settlement conferences, increasing costs, and continued motion practice, clients anxiously seek to be unencumbered by the litigation's distractions. With trial time at a premium and crowded court dockets, proactive counsel should ask: "Does it make sense to engage a form of alternative dispute resolution rather than to continue litigation?"

The Supreme Court endorses the settlement of litigation, noting: "Settlement spares the parties the risk of an adverse outcome and the time and expense—both monetary and emotional—of protracted litigation."[1] Moreover, a mutual resolution "preserves precious and overstretched judicial resources."[2] New Jersey's court rules echo this policy and acknowledge the utility and effectiveness of comprehensive dispute resolution programs.[3] The rules identify court-sanctioned dispute resolution programs as constituting "an integral part of the judicial process, intended to enhance its quality and efficiency."[4] In addition to programs operated and supervised by the Judiciary,[5] private dispute resolution is widely available.

Two highly effective and popular forms of private alternative dispute resolution include mediation and arbitration.[6] Both offer far greater flexibility than the courtroom and even the court-sanctioned dispute resolution programs. Mediation or arbitration affords parties control to fashion how and where

resolution will be handled and who will guide resolution. Mediation and arbitration also remain confidential, providing an expeditious and efficient path to finality, saving time, money and emotion. Nevertheless, mediation is different from arbitration, and an appreciation of the distinctions between these resolution tools enables an attorney to choose the most effective alternative to address and resolve a client's interests as raised within the litigation.

Mediation

In large part, mediation involves managed negotiation.[7] A mediator, as a neutral third party, works with parties to gain insight and understanding of all needs and possible barriers to settlement. Using information gathered when exploring concerns underlying each party's position, a mediator suggests creative solutions to satisfy expressed needs. The parties, guided by independent counsel, are steered toward shaping a settlement acceptable to all. In this way, mediation offers a sharp contrast to a court-ordered result that may not satisfy anyone.

The court rules authorize "a Superior Court or Municipal Court judge [to] require the parties to attend a mediation session at any time following the filing of a complaint."[8] In addition, mediation is governed by the New Jersey Uniform Mediation Act.[9]

Mediation requires flexibility and compromise to achieve deal making. The process is furthered when participants are mindful of civility and professionalism. Each side listens carefully, without judgment or assent, as the other offers a position for resolution. This process promotes insight and helps identify areas of consensus and those of significant divergence.

Certainly, litigation and mediation are not mutually exclusive; the two may be pursued simultaneously. In that way, no time is lost if mediation proves unsuccessful. However, taking the single step of using a good mediator may bring the controversy to a swift end.

Before accepting the role of a trusted, non-partisan problem solver, a qualified mediator[10] must disclose facts or associations that might tear at impartiality. Further, care must be taken to resolve any waivable conflicts of interest.[11]

A good mediator gains the parties' respect and confidence by creating an open atmosphere for discussions. A mediator's experience and personality are important. To engage parties to open up, an effective mediator views issues from different angles—including those overlooked when parties myopically focus on singular positions. Rather than the two sides exchanging demands setting the 'floor' and 'ceiling,' a mediator should encourage alternative possibilities for a satisfactory result, setting up choices for discussion. This ability to objectively listen and brainstorm creative solutions pilots the parties to success.

The mediator also maintains control if tensions intensify and emotional reactions overrun rational responses. Reasonableness carries the day when expressing a position, as well as when listening to what the other side offers. During mediation, although respective grievances are aired, successful resolution results when parties maintain an attitude of openness to the process as a path to swiftly resolving a disagreement. Importantly, parties must want to strike a deal, commit to negotiate in good faith, and overcome the tendency to value vindication. "A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues [and] encouraging parties to accommodate each other['s] interests."[12]

"The success of mediation as a means of encouraging parties to compromise and settle their disputes depends on confidentiality—a point recognized in both our jurisprudence and our court rules."[13] To this end, and unless otherwise agreed to,[14] communications made during mediation are generally privileged.[15] Although there are some exceptions, facts disclosed in mediation may not be revealed by any party or the mediator in any future proceeding. The parties may also choose to discuss with the mediator confidential information that is not revealed to the other party. An experienced mediator evaluates this candid, confidential information to develop a clearer understanding of a party's needs for a desired result.[16] A mediator's focus remains to neutralize negativity, enhance trust and redirect efforts toward mutual gain. When dialogue centers on the problem not the personalities, a creative mediator finds a solution that 'works' for all parties and the parties avoid public access to their dispute, while considering resolution.

Frankly, a mediator's role is not to decide who is the 'winner.'[17] Rather, a good mediator strikes the balance between listening without judgment and assertiveness. However, a mediator who holds expertise in the substantive law at issue, may be asked to evaluate each party's claim. Evaluative mediation allows the mediator to express an opinion regarding the legal merits of a party's position or assess likely courtroom success. Parties may agree to pursue this alternative to a facilitative process if it is helpful to focus resolution efforts.

In any mediation, achieving settlement demands an acknowledgment of each side's best arguments, along with acceptance of existing vulnerabilities. Always key is a practical understanding of alternatives to a mediated result.[18] All lawyers can relate stories of the whimsy accompanying litigation—cases that should have been won and successes that were undeserved. Indeed, counsel's realistic analysis of risks of a negative litigation outcome enhances a client's view of the total picture and improves appreciation for the need to compromise. Such an analysis examines: How

long before the case is set for trial? How long will the trial last? How disruptive will a trial be to a party's work and personal life? How much will a trial cost? What is the likelihood of success in the courtroom? What happens if litigation is unsuccessful? How much time, energy and treasure is involved in the appellate process after receiving an adverse result? What is involved when the appeal results in a remand—essentially starting the process over.

When parties comprehend the reality of hearing "no deal," they more realistically examine limitations posed were the case tried. Concomitantly, a party must realistically estimate the other side's best case at trial. Considering what happens if the matter were litigated reveals the likely maximum an adversary will concede in negotiations. This objectivity allows each party to consider a real bottom line: what they will concede, as well as the place where negotiation become impractical.

All cases may benefit from mediation. Even when settlement is not achieved through the process, at the very least mediation assists in further understanding each party's position. Also, partial settlements may result, paving a path for later resolution of all problems. Once success is achieved, satisfaction with a mediated result has been found to be higher than the satisfaction with a final order or judgment by a court.

Arbitration

Like mediation, arbitration proceedings are voluntary, private and confidential. Unlike mediation, an arbitrator considers the evidence presented and imposes an outcome upon the parties. In binding arbitration, the two sides mutually agree to waive the right to pursue their cause in a judicial forum, in favor of presenting the matter to an independent, neutral professional, accompanied by due process protections and defined evidentiary safeguards.[19]

"The object of arbitration is the final disposition...of the controversial differences between the parties."[20] Unlike a typical trial conducted in a courthouse, arbitration provides "a speedy, inexpensive, expeditious," process conducted in "perhaps [a] less formal manner,"[21] which remains confidential to permit a private airing of the controversial differences between disputants.[22] The Supreme Court commented: "Arbitration should spell litigation's conclusion, rather than its beginning."[23] Certainly, once binding arbitration begins, the court's role in reviewing the substantive issues in the underlying dispute "is significantly narrowed."[24] In fact, some describe arbitration as 'private judging.' However, the process can be much more.

Arbitration proceedings are governed by the terms of the parties' agreement.[25]

Parties can negotiate any aspect of the arbitral process because "[a]rbitration is a 'creature of contract.'"[26] "[T]he duty to arbitrate, and the scope of the arbitration, are dependent solely on the parties' agreement. The parties may shape their arbitration in any form they choose and may include whatever provisions they wish, to limit its scope."[27] However, an arbitration agreement must clearly state that all parties intend to be bound by the result and further must "'convey that parties are giving up their right to bring their claims in court or have a jury resolve their dispute[,]'[28] in favor of accepting the final award issued."[29]

In an arbitration agreement, parties delineate all parameters of the process, thus allowing not only control over what occurs, but also flexibility to decide whether to be bound by the result; what issues will be determined; how the case will move forward; the location and timing; the rules for the arbitration proceeding and the parameters for appeal.[30] Further, unlike the courthouse, where the most available judge may be assigned to try a case, in arbitration the parties choose who is the most qualified professional or professionals to finalize the issues in dispute.[31]

The arbitrator controls the process, including discovery, issuing subpoenas, conducting conferences, and deciding the admissibility and form of evidence. If agreed, settlement negotiations may also be undertaken prior to the commencement of arbitration.[32] Again, procedures must be reduced to writing prior to commencement of discussions.

Two New Jersey statutes define the arbitration process: the Uniform Arbitration Act (UAA)[33] and the Alternative Procedure for Dispute Resolution Act (APDRA).[34] Importantly, the APDRA applies only if the parties refer to the statute in an arbitration agreement.[35] Likewise, "in the absence of an express designation in an agreement to arbitrate...the Arbitration Act governs...."[36]

Both statutes governing arbitration limit judicial review or modification of an ultimate arbitration award[37] and provide for confirmation and enforcement.[38] Available judicial relief differs under the UAA and the APDRA, so care must be taken when deciding the arbitration boundaries.[39]

One important distinction between the two arbitration statutes centers on appellate review of an order confirming an award. The APDRA generally prohibits appellate review of a trial court's confirmation of an arbitrator's decision, except to determine whether the court acted within the confines of the statute and vacated or modified the award based on the stated statutory bases.[40] The statute states: "Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered by the court in conformity therewith and be enforced as any other judgment or decree. There shall be no further appeal or review of the judgment or decree."[41] Exceptions to this provision are very narrow, and include child support issues,[42] attorney

fee awards,[43] matters related to the Appellate Division's supervisory function over the courts (for example when the court displays bias), and other "limited circumstances where public policy would require appellate review."[44]

Under the UAA, parties define whether to allow or limit rights to appeal an award.[45] Circumscribing rights of appeal are not contrary to public policy.[46] Therefore, "unless varied or waived by contract"[47] the UAA permits delineated procedures that limit circumstances for the superior court to vacate an award[48] or for the Appellate Division to review orders confirming, modifying, or vacating an arbitration award.[49] Agreements may also provide for appellate review by private appellate arbitrators, maintaining all requisites of confidentiality and privacy during review.[50] "The only caveat is that th[e] intention to do so must be clear and unequivocal."[51]

Many matters may be decided in arbitration. Both the Civil Division and the Family Division provide procedures for arbitration of cases.[52] Although certain case types are excluded from the Judiciary's arbitration program,[53] parties may agree to privately arbitrate if they demonstrate equal bargaining power and create a clear, comprehensive agreement that unequivocally defines any waiver of rights.[54]

Combining Mediation and Arbitration

"[C]an parties who agree to proceed in binding arbitration change the process to mediation?"[55] The Appellate Division has answered this question affirmatively.[56] Parties can integrate mediation of specific issues and arbitration of others. A change in course will not invalidate settlement agreements reached if participants execute a written statement of intent, clearly waiving any trial rights and knowingly accepting the arbitration process.[57]

The court rules require arbitration to precede mediation; starting prior to release of a final award, mediation may be undertaken.[58] If successful, the arbitration award is disregarded in favor of a mediated settlement agreement.[59] If unsuccessful, the arbitration award is released.[60]

Caution must be taken if a professional neutral engages in mediation and arbitration of the same matter. The subjects of each process, incorporating components of mediation and arbitration, must be stated in the parties' agreement.[61] This results because the hallmark of mediators and arbitrators is neutrality, but the information-gathering procedures in each dispute resolution process vary considerably.[62] "Consequently, absent the parties' agreement, an arbitrator appointed under the [UAA] may not assume the role of mediator and thereafter, resume the role of arbitrator."[63] A separate waiver agreement defining any contemplated dual roles is necessary.

Choosing a Strategy

When deciding which process to pursue, counsel should identify the client's goals in achieving a resolution of the litigation. Although the need for confidentiality often drives matters from the courthouse to a private neutral professional, it is most helpful to prioritize goals from most to least important, and choose the forum where the strengths of a client's position will shine. For example, if the parties have a working relationship, then mediation might be the best alternative, as it allows them to develop a dialogue to reach a swift result. On the other hand, if prior negotiations were divisive—driving a wedge of disagreement deeper between the parties—arbitration may be the better option.

Lawyers should discuss the pros and cons of each course of action, and engage the program most favorable to meet a client's needs. ⚖

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Endnotes

1. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 253-54 (2013).
2. *Id.* at 254.
3. *See* R. 1:40-1 to -12.
4. R. 1:40-1; *see also* R. 1:40-5 (addressing mediation in family part matters), R. 1:40-6 (addressing mediation in civil, probate and general equity part matters), R. 40-7 (addressing complimentary dispute resolution of special civil part matters) and R. 1:40-8 (addressing mediation of specified municipal court matters).
5. *See* R. 1:40-2(a) to (g).
6. In addition to mediation and arbitration, alternatives to conventional litigation include intensive settlement panels, R. 1:40-2(a)(2), evaluative processes, R. 1:40-2(b), and collaborative law, N.J.S.A. 2A:23D-1 -18; R. 5:4-2(h).
7. *See* N.J.S.A. 2A:23C-2 ("'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.").
8. R. 1:40-4(a).
9. N.J.S.A. 2A:23C-1 to -13. *See also Willingboro Mall, supra* 215 N.J. at 254.
10. Court-appointed mediator qualifications and training requisites are set forth in R. 1:40-12(a) and (b).
11. *See* R. 1:40-4(f).
12. *Minkowitz v. Israeli*, 433 N.J. Super. 111, 143 (App. Div. 2013) (*quoting Lehr v. Affitto*, 382 N.J. Super. 386, 394 (App. Div. 2006) (citations omitted) (alteration in original).
13. *Willingboro Mall, supra* 215 N.J. at 254 (*citing State v. Williams*, 184 N.J.

432, 446-47 (2005); R. 1:40-4(d)).

14. At any time in the process, parties may waive the privilege of confidentiality. N.J.S.A. 519(a) (*citing* N.J.S.A. 2A:23C-4). There is no privilege attached to conduct and statements are identified in N.J.S.A. 2A:23C-6.
15. N.J.S.A. 2A:23C-4 (stating except as defined by statute, a communication made during mediation is privileged) ; R. 1:40-4(c) (same). *See also* N.J.R.E. 519 (a) (stating except as otherwise provided by [N.J.S.A. 2A:23C-6], a mediation communication is privileged....").
16. *See* N.J.R.E. 519 (stating the parameters of confidential communications in mediation); N.J.S.A. 2A:23C-5, -4(a).
17. *See* James R. Coben and Peter N. Thompson, Disputing Irony: A Systematic Look at Litigation About Mediation, 11 *Harv. Negot. L. Rev.* 43 ("As a facilitator, a mediator is not tasked with reaching a final decision in a matter, but rather instills trust and confidence of the participants in the mediation process, allowing them to resolve their differences") (citation omitted).
18. *See* Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In,* (Penguin, 1991, second edition), p. 97-106.
19. Parties may also proceed to non-binding arbitration prior to pursuit of a judicial determination, allowing the rejection of the arbitration award for any reason. *See e.g.*, N.J.S.A. 39:6A-31 (providing for non-binding arbitration of certain automobile tort claims as a way to settle claims); *see also* N.J.S.A. 2A:23A-20 (allowing judicial assignment of automobile tort claims to non-binding arbitration as a means of achieving settlement).
20. *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 343 (2005) (*quoting Carpenter v. Bloomer*, 54 N.J. Super. 157, 162 (App. Div. 1959)).
21. *Ibid.*
22. *Ibid.*
23. *N.J. Tpk. Auth. V. Local 196, I.F.P.T.E.*, 190 N.J. 283, 292 (2007).
24. *Minkowitz, supra* 433 N.J. Super. at 133 (*citing Fawzy, supra*, 199 N.J. at 462). *See also Curran v. Curran*, ___ N.J. Super. ___ (App. Div. 2018) ("[T]he court's role is limited following the parties' agreement to proceed in an arbitral forum."
25. *See Fawzy v. Fawzy*, 199 N.J. 456, 469 (2009) ("Although arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract." (*quoting Kimm v. Blisset, L.L.C.*, 388 N.J. Super. 14, 25 (App. Div. 2006), *certif. denied*, 189 N.J. 428 (2007)). *See also Allstate Ins. Co. v. Sabato*, 380 N.J. Super. 463, 465 (App. Div. 2005) (explaining arbitration "is a voluntary procedure that only applies if it is invoked in a written agreement."
26. *Minkowitz, supra*, 433 N.J. Super. at 132 (*quoting Kimm v. Blisset, LLC*, 388 N.J. Super. 14, 25 (App. Div. 2006), *certif. denied*, 189 N.J. 428 (2007)).
27. *Badiali v. N.J. Mfrs. Ins. Group*, 220 N.J. 544, 556 (*quoting United Servs. Auto. Ass'n v. Turck*, 156 N.J. 480, 485 (1998)). Note: Rule 4:21A-1 to -9 provides the framework for the superior court's mandatory non-binding arbitration program involving certain civil cases, and includes the process to remove a case from the process, R. 4:21A-1(c).
28. *Barr v. Bishop Rosen & Co.*, 442 N.J. Super. 599, 606 (App. Div. 2015) (*quoting Atalese v. U.S. Legal Servs. Grp, L.P.*, 219 N.J. 430, 442 (2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015).
29. *Atalese, supra*, 219 N.J. at 447. In family matters, *see* R. 5:1-5; Appendix XXIX-A.
30. *See Atalese, supra*, 219 N.J. at 442 ("An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law." (citation omitted); *Fawzy, supra*, 199 N.J. at 482 ("It goes without saying that parties are not bound to arbitrate on an all-or-nothing basis, but may choose to submit discrete issues to the arbitrator."). *See also* N.J.S.A. 2A:23B-4 (detailing the applicable arbitration procedures unless otherwise waived by contract). The Arbitration Act does not require an arbitrator to conduct an in-person hearing, unless the parties' agreement requires that detail. *See State Farm Guar. Ins. Co. v. Hereford Ins. Co.*, __ N.J. Super. __ *3 (App. Div. 2018). Hearings may be telephonic or by video conferencing, so long as due process rights are protected. *Ibid.*
31. R. 1:40-12(v) sets forth arbitrator's qualification and training requisites.
32. N.J.S.A. 2A: 23B-15(a).
33. N.J.S.A. 2A:23B-1 to -32.
34. N.J.S.A. 2A:23A-1 to -30. *See also* Federal Arbitration Act, 9 U.S.C.A. sec 1-16.
35. N.J.S.A. 2A:23A-2.
36. *N.H. v. H.H.*, 418 N.J. Super. 262, 287 (App. Div. 2011).
37. N.J.S.A. 2A:23A-13; N.J.S.A. 2A:23B-5, -23(a), -24(b).
38. N.J.S.A. 2A:23A-12, 13; N.J.S.A. 2A:23B-22, 23(a)(1)-(6). The Court has also instructed an arbitration award may be vacated where it violates "a clear mandate of public policy" that is "not reasonable debatable...." *Weiss v. Carpenter*, 143 N.J. 420, 443 (1996).
39. Because "the decision to vacate or confirm an arbitration award is a decision of law," [appellate] review is "de novo." *Manger v. Manger*, 417 N.J. Super. 370, 376 (App. Div. 2010). Nevertheless, the scope of

appellate *de novo* review is "narrow," *Fawzy, supra*, 199 N.J. at 470, and "is informed by the authority bestowed on the arbitrator by the [UAA]." *Manger, supra*, 417 N.J. Super. at 376.

40. *Fort Lee Surgery Ctr., Inc. v. Proformance Ins. Co.*, 412 N.J. Super. 99, 103 (App. Div. 2010).
41. N.J.S.A. 2A:23A-18(b).
42. *Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project L.P.*, 154 N.J. 141, 151-52 (1998) (holding the APDRA's limitation on appellate review does not apply to child support issues).
43. *Allstate Ins. Co. v. Sabato*, 380 N.J. Super. 463, 473 (App. Div. 2005) (stating an award of attorney's fees may be reviewed as it is governed by the Rules of Professional Conduct, which lies "within the exclusive supervisory powers of the Court").
44. *Mt. Hope, supra*, 154 N.J. at 152.
45. *See Van Duren v. Rzasa-Ormes*, 394 N.J. Super. 254, 262-263, 268 (App. Div. 2007). *Accord N.J. Mfrs. Ins. Co. v. Travelers Ins. Co.*, 198 N.J. Super. 9, 12-13 (App. Div. 1984).
46. *Van Duren, supra* 394 N.J. Super. at 263.
47. *Fawzy, supra* 199 N.J. at 469.
48. N.J.S.A. 2A:23B-23(a)(1) to (6).
49. N.J.S.A. 2A:23B-28(a)(1) to (6). *See also* that R. 2:2-3(a) (allowing appeals as of right from all orders permitting or denying arbitration). *But see* R. 2:9-1(a) (permitting the trial court to retain jurisdiction to address issues relating to the claims and parties that remain in that court, pending appellate review of order compelling or denying arbitration); *GMAC v. Pittella*, 205 N.J. 572, 586 (2011).
50. *See Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P.*, 154 N.J. 141, 147 (1998) ("The general rule...is that a party may, by express agreement or stipulation before trial or judgment, waive his right to appeal, and such agreements or stipulations will be enforced by dismissal of the appeal taken out of violation thereof, or by refusing to pass upon questions covered by the waiver. The intention and agreement to waive the right of appeal must be clear, and there must be sufficient consideration. Such agreements are upheld upon the grounds of public policy in encouraging litigants to accept as final decisions of courts of original jurisdiction." (*quoting Harmina v. Shay*, 101 N.J. Eq. 273, 274, 137 A. 558 (E. & A 1927)). *See also Van Duren v. Rzasa-Ormes*, 394 N.J. Super. 254, 257 (App. Div. 2007) ("[A]n arbitration agreement...between two sophisticated business parties, each represented by counsel, that clearly precludes judicial review of an arbitration award beyond the trial court level, is enforceable."), *aff'd o.b.*, 195 N.J. 230 (2008).
51. *Id.* at 265.
52. In the Civil Division, all Track I, II, and III cases, along with those Track IV cases designated by the managing judge shall be arbitrated. R. 4:21A-1(a). Cases not subject to mandatory arbitration, may voluntarily undertake arbitral review, upon a written stipulation of the parties. R. 4:21A-1(b). Finally, parties may request their matter be removed from mandatory arbitration prior to the issuance of the mandatory arbitration notice. R. 4:21A-1(c). In the Family Division, R. 4:21A-1(f) states arbitration is governed by R. 5:1-5.
53. Pressler and Verniero, Current N.J. Court Rules, note 2 to R. 4:21A-9 (2018), (suggesting professional negligence and products liability matters are excluded from the court's mandatory arbitration program).
54. Of particular note is the necessity of a clear, knowledgeable and voluntary waiver of a right to a jury trial as mandated by *Atalese, supra*, 219 N.J. at 442-44. *See, e.g., Noren v. Heartland Payment Sys.*, 448 N.J. Super. 486 (App. Div. 2017) (discussing the requirements for arbitration agreements jury waivers in an action for violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14)), *vac'd on other grounds*, __ N.J.__ (Jan. 12, 2018).
55. *Minkowitz, supra* 433 N.J. Super. at 139.
56. *Ibid.*
57. *Ibid.*
58. R. 1:40-3(d)(1)(A) and (B).
59. *Ibid.*
60. *Ibid.*
61. *Minkowitz, supra*, 433 N.J. Super. at 147 ("Absent a specific agreement clearly defining and accepting the complementary dispute professional's roles, dual roles are to be avoided.").
62. *Id.* at 142 ("[W]e conclude the differences in the roles of these two types of dispute resolution professionals necessitates that a mediator, who may become privy to party confidences in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral factfinder necessary to conduct a binding arbitration proceeding."). It also is noted Assembly Bill No. 254, pre-filed for the 2018 legislative session, seeks to amend the UAA, by allowing an arbitrator to assume the role of a mediator, but specifically prohibiting an arbitrator who undertakes mediation from resuming the role of arbitrator "unless an agreement by the parties to the arbitration proceeding permits the arbitrator to resume the role of arbitrator." Failure to comply with this provisions results in a basis to vacate the arbitrator's award.
63. *Minkowitz, supra*, 433 N.J. Super. at 142.