

United States District Court



**REPORT
ON
MEDIATION**

2003

I. INTRODUCTION

2003 Developments

The number of mediations of federal cases, both with and without mediation reference orders, fell in 2003. In 2002 the number of mediations was higher than in the past, but this apparently was a temporary “spike,” as the number fell back in 2003 to the average of past years. As will be seen from the statistics, even though the overall number of cases mediated was not great, the settlement rate continues to rise.

There were no changes in the Mediation Plan during 2003, but three changes were proposed. The first proposed change in the Plan, pending at the end of the year, was to reduce expenditures for training. With input from mediators and the Federal Practice Committee, it was proposed to limit the “Fed-Med” training, required of all our approved mediators, to no more frequently than once every three years, and to limit the “Federal Mediators’ Workshop” to no more frequently than every two years. These changes¹ are not likely to affect the program negatively, because the last training sessions were not “full.” It is hoped that by spacing out these training offerings the money spent will be better utilized.

The second proposal, also pending at the end of the year, was to change the Plan to allow Federal Practice Fund monies to pay mediation expenses of parties who are represented by counsel but who do not have the funds to pay their share of the mediation fees. Upon application to the assigned judge, such parties can have their portion of the fee advanced; if the case is concluded with any payment made to that party, the advance is to be repaid to the Federal Practice Fund.

The third change proposed in the Plan was to redraft paragraph 4(d) to more accurately reflect a mediator’s authority to assist the parties in generating options and discussing their views on the merits of the case. (The Plan as amended is on the court’s web site).

Court Staff

Kathy Griess continues to be the court's ADR Coordinator. She monitors the referral process and the progress of mediated cases. She also administers the application process for mediators, evaluations, statistics, and the surveys utilized in this report. Magistrate Judge Piester continues as the court's ADR Administrator.

¹ These changes were adopted by the Nebraska Judicial Council in January, 2004.

Training

From its beginning in 1995, the mediation program has relied upon trained lawyers for its approved mediators: Lawyers because it was believed mediators trained in law would, perhaps more easily than others, build rapport with mediating parties and their attorneys; trained because there was then no “culture” of mediation in Nebraska, and it was thought mediation would be accepted sooner if mediators had at least basic facilitation skills. The court approves Nebraska lawyers who have previously qualified as mediators in accordance with the Nebraska Dispute Resolution Act or who have had other comparable experience. Building from that level, the court requires an additional 24 hours of mediation skills training designed around typical disputes in federal courts (“Fed-Med”), including instruction in ethics, in order to be approved to mediate federal cases.

The court has also offered periodic one-day “workshops” for approved mediators. These have been almost annual meetings in which an outside mediation expert has conducted a “skills clinic” and an “ethics update” for mediators, and the attendees have an opportunity to discuss the program and discuss common experiences and challenges. One of these workshops was held on October 3, 2003. The presenter was a very experienced mediator, Mr. David Batson, Senior Alternative Dispute Resolution Specialist for the Conflict Prevention and Resolution Center of the U.S. Environmental Protection Agency. Approximately 25 approved mediators attended the meeting, and the evaluations were uniformly very high.

Because of the limitations in funding discussed above, there will be no training programs sponsored by the court in 2004.

“Nothing about the mediation advanced the settlement of this case. At best, the mediation was neutral - actually it was very counter productive. The mediator did not allow the party to communicate at all; he started the session with a long speech about how disillusioned he was with litigation & what a waste of time & \$ attorneys & courts are - this set a very negative tone; he misstated our position and attitude to plaintiffs and only after we had a candid discussion w/the plaintiffs did we start to make progress toward settlement. This was absolutely the worst mediation session I have ever been involved in or heard about. I am supportive of the mediation process and used it successfully in Federal District Court in Nebraska in previous litigation. I would do it again, but never with this same mediator.”

–Comment from an attorney after a mediation by a non-approved mediator did not settle the case “at the table.”

II. MEDIATION STATISTICS

Period: January - December 2003

| | Mediator Approved | Mediator Not Approved | Total |
|--|-------------------|-----------------------|-----------------------|
| Referrals Pending Beginning of Period | 2 | 1 | 3 |
| Mediation Orders Entered | 8 | 12 | 20 |
| Mediation Orders Withdrawn | 0 | 0 | 0 |
| Settled Prior to Mediation Session | 0 | 0 | 0 |
| Referrals Pending End of Period | 1 | 3 | 4 |
| Total Cases Mediated (With MRO) ² | 9 | 10 | 19 |
| Cases Mediated (No MRO) | 19 | 17 | 36³ |
| Total Cases Mediated | 28 | 27 | 55 |
| | | | |
| Mediation Reference Orders, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 3 | 3 | 6 |
| Lincoln | 5 | 8 | 13 |
| North Platte | 0 | 1 | 1 |
| Total | 8 | 12 | 20 |
| | | | |
| Cases Mediated Without MRO, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 15 | 11 | 26 |
| Lincoln | 1 | 3 | 4 |
| North Platte | 3 | 3 | 6 |
| Total | 19 | 17 | 36 |

² "MRO" means "Mediation Reference Order."

³ Some mediations take place without the entry of a mediation reference order. These cases are counted when they are reported by the attorneys to have settled or when there is a final pretrial conference. If a mediated case ends by involuntary dismissal or summary judgment, however, the court is not automatically informed of the fact or results of that mediation. Thus, there could have been more "No-MRO" mediations than appear in this report.

| | | | |
|--|-------------------|-----------------------|-------|
| Outcome of Mediated Cases (MRO) | Mediator Approved | Mediator Not Approved | Total |
| Full Agreement | 6 | 6 | 12 |
| No/Partial Agreement | 3 | 4 | 7 |
| Outcome of Mediated Cases (No MRO) | | | |
| Full Agreement | 15 | 11 | 26 |
| No/Partial Agreement | 4 | 6 | 10 |
| Total | 28 | 27 | 55 |
| | | | |
| Summary of No/Partial Agreement, After Closure | Mediator Approved | Mediator Not Approved | Total |
| Trial Settings Pending Beginning of Reporting Period | 4 | 20 | 24 |
| No or Partial Agreement, This Period (from above) | 7 | 10 | 17 |
| Settled | 5 | 10 | 15 |
| Judgment Entered Without Trial or Settlement | 2 | 1 | 3 |
| Transfer to Bankruptcy | 0 | 0 | 0 |
| Trials Held During Reporting Period | 3 | 0 | 3 |
| Trial Settings Pending at End of Reporting Period | 1 | 19 | 20 |

“Prior to and at the beginning of the mediation, I did not think that settlement would occur. We were just too far apart. But through the persistence and tactfulness of the mediator, we were able to reach a win/win solution to our dispute. I was frankly surprised that we reached settlement.”

–Comment from a party in a case mediated by an approved mediator which was settled “at the table.”

FOLLOW-UP SURVEYS

It is commonly thought that even a "failed" mediation (that is, one that does not end in settlement "at the table") may spawn fruitful settlement discussions in the future. To evaluate that hypothesis, survey questionnaires were sent to counsel in the 15 cases mediated in 2003 which did not settle at the mediations, but which DID settle later, to determine if the settlements occurred "because of" the mediation, "in spite of" the mediation, or if the mediation had "no impact" on settlement. Responses were received from 28 attorneys in 15 cases:

TOTAL **RESPONSES**:

| MEDIATOR | "Because Of" | "In Spite Of" | "No Impact" | Total |
|--------------|--------------|---------------|-------------|-------|
| APPROVED | 4 | 0 | 1 | 5 |
| NON-APPROVED | 15 | 1 | 7 | 23 |
| TOTAL | 19 | 1 | 8 | 28 |

CASES REPORTED ON:⁴

| MEDIATOR | "Because Of" | "In Spite Of" | "No Impact" | Total |
|--------------|--------------|---------------|-------------|-------|
| APPROVED | 3 | 0 | 1 | 4 |
| NON-APPROVED | 9 | 0 | 2 | 11 |
| TOTAL | 12 | 0 | 3 | 15 |

This pattern of very few cases being settled after a mediation "in spite of" the mediation has been consistent over the life of the mediation program,⁵ but particularly for the last four years. Thus, even if cases do not settle "at the table" during a mediation, there is little likelihood that mediation would harm settlement prospects.

⁴ It should be noted that in the "cases reported on," there were some "split" responses received, e.g. one lawyer indicating "in spite of" and the other, "no impact." In those instances the comments were used to determine where the case should be classified, with the stronger of the opinions expressed guiding the decision. When there were no comments on either rating, or the comments were of equal "intensity," the case was put in the "no impact" column.

⁵ The numbers of cases settled after an unsuccessful mediation, in which the attorneys said the case settled later "in spite of" the mediation are as follows:

| | |
|-----------------------------------|-----------------------------------|
| 1998: 3 of 20 later settled cases | 2001: 0 of 9 later settled cases |
| 1999: 4 of 15 later settled cases | 2002: 2 of 16 later settled cases |
| 2000: 2 of 13 later settled cases | 2003: 0 of 15 later settled cases |

III. CONCLUSIONS FROM THE NUMBERS

1. MEDIATION "CAUSED" SETTLEMENT IN 91% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (38) and those later settled "because of" the mediation (12) yields a total of 50 of the 55 cases actually mediated (91%) were settled directly because of the mediation program:

Effects of Mediation on Settlement, 2003:

| Mediator | Cases Mediated | Settled AT Mediation | Settled "Because of" Mediation | Total Cases Settled | Effective Rate of Settlement |
|--------------|----------------|----------------------|--------------------------------|---------------------|------------------------------|
| Approved | 28 | 21 | 3 | 24 | 86% |
| Non-Approved | 27 | 17 | 9 | 26 | 96% |
| Totals | 55 | 38 | 12 | 50 | 91% |

2. THE NUMBER OF TRIALS IN POST-MEDIATION CASES⁶ CONTINUES TO BE SMALL:

There were 41 post-mediation cases tracked in 2003 (24 still pending trial at the beginning of the year, plus the 17 mediated in 2003 without settlement). Of these 41, only three cases have been tried, and 20 remained set for trial at the end of the year. In the last six years (January 1, 1998 through December 31, 2003), there were 343 cases mediated, and 124 of those cases were not settled "at the table." Of all these cases, only 16 cases have later gone to trial, again with 20 cases remaining set for trial at the end of 2003. The highest number of trials of post-mediation cases in one year was six in 2000.

" Mr. _____'s insistence that we come to mediation in spite of the plaintiff's desire to withdraw was critical . We didn't reach an agreement that day, but the session was the catalyst for a global settlement reached one week later. Mr. _____'s objectivity and commitment to pursuing the "right" settlement was a great help."

-Comment from a party after a mediation by an approved mediator that did not settle "at the table."

⁶ "Post-mediation cases" are those that did not settle during the mediation itself.

3. IN 2003 APPROVED MEDIATORS HAD MORE “SUCCESS” SETTLING CASES “AT THE TABLE,” AND NON-APPROVED MEDIATORS REACHED MORE SETTLEMENTS ATTRIBUTABLE TO THE MEDIATION.

The number of mediations and rates of settlement, divided according to whether or not the mediator was approved by the court, are below:

| 2003 | Approved | Non-Approved | Overall Totals |
|----------------------------|-------------|--------------|----------------|
| Total Cases Mediated | 28 | 27 | 55 |
| Cases Settled In Mediation | 21 75% | 17 63% | 38/55 69% |
| Effective Settlement Rate | 24/28 = 86% | 26/27 = 96% | 50/55 = 91% |

The differences in results as between approved and non-approved mediators has fluctuated over the last three years, the only years results were so calculated.⁷ Those results are below:

| | Approved Mediator | | | Non-Approved Mediator | | | Totals | | | |
|----------------------------|-------------------|--------------|--------------|-----------------------|--------------|--------------|--------------|--------------|--------------|-----------------------------|
| | 2001 | 2002 | 2003 | 2001 | 2002 | 2003 | 2001 | 2002 | 2003 | Overall 2001 – 2003 |
| Cases Mediated | 25 | 27 | 28 | 24 | 43 | 27 | 49 | 70 | 55 | 174 |
| Cases Settled In Mediation | 18/25 72% | 19/27 70% | 21/28 75% | 13/24 54% | 20/47 47% | 17/27 63% | 31/49 63% | 39/70 56% | 38/55 69% | 108/174 62% |
| Effective Settlement Rate | 19/25 76% | 24/27 89% | 24/28 86% | 16/24 67% | 26/43 60% | 26/27 96% | 35/49 71% | 50/70 71% | 50/55 91% | 135/174 78% ⁸ |

⁷ In years before 2001 the statistics were divided by whether the mediator was contacted through a mediation center or directly by the parties, not by whether the mediator was approved by the court. Since 2001 the statistics have distinguished mediators by their approved/non-approved status and counted the results accordingly.

⁸ The overall (that is, for all mediations) “Effective Settlement Rates” for prior years were as follows: 1998: 74%; 1999: 64%; 2000: 90%; and Overall for the period 1998 -2000: 62%. (See, 2000 Annual Report, p.9).

OTHER COMPARISONS TO PRIOR PERIODS:

Number of Cases Mediated: The number of mediations (55) was about average. In the past six years the number of mediations in federal cases has hovered around fifty per year; except for 2002 when there were seventy mediations.

Number of Mediation Reference Orders: There were only twenty MROs entered in 2003. This is a substantial decrease from previous years. Combined with the average number of mediated cases, this means that more attorneys are seeking out mediation services without the involvement of the court. If the attorneys do not want to stay the progression of the case during the pendency of the mediation, they have no need to seek an MRO; however, when the court enters an MRO, it helps to follow the case and tabulate the results of the mediation. Most, if not all, mediations are probably being tabulated, however, by court staff requesting information about mediation at final pretrial conferences and at the time the court is notified of a settlement.

Geography: Most mediation reference orders continue to emanate from Lincoln. This has been consistent over the course of the program.⁹ However, there were more mediations without MRO's in Omaha cases, effectively balancing the two venues in cases actually mediated.

Number of Approved Mediators: At the end of 2003 there were 45 approved mediators. This is up from 36 at the end of 2002.

"The case was not settled at mediation because it took longer than time allotted for the actual mediation. The mediator continued working on the case to get the insurance carriers to participating in the settlement."

-Comment from attorney after a mediation by a non-approved mediator which did not settle "at the table."

⁹ 1998: 65 orders: Lincoln: 44; Omaha: 11; North Platte: 10.
1999: 67 orders: Lincoln: 41; Omaha: 20; North Platte: 6.
2000: 63 orders: Lincoln: 39; Omaha: 17; North Platte: 7.
2001: 63 orders: Lincoln: 48; Omaha: 13; North Platte: 3.
2002: 38 orders: Lincoln: 26; Omaha: 11; North Platte: 1.

IV. EVALUATIONS

After each mediation the participants were asked to complete an evaluation form, judging various aspects of their mediation from 1 (Excellent!) to 5 (Terrible!). (Copies of the evaluation forms are in the Appendix). They were asked to mail it back to the court. Averaged responses to some of the questions are set forth in the table below.¹⁰

| EVALUATION QUESTION | PTY-APP | PTY-NON | ATTY APP | ATTY NON | OVERALL |
|--|---------|---------|----------|----------|---------|
| "How was the mediator at remaining neutral?" | 1.00 | 1.25 | 1.25 | 1.60 | 1.27 |
| "During the mediation session, how was the mediator-- ...at giving you opportunities to express your views?" | 1.16 | 1.25 | 1.12 | 1.00 | 1.13 |
| "...at understanding your/your client's interests and needs in the dispute?" | 1.16 | 1.25 | 1.37 | 1.00 | 1.19 |
| "...at allocating appropriate time for the mediation?" | 1.16 | 1.00 | 1.25 | 1.25 | 1.16 |
| "...at treating you with fairness and respect?" | 1.00 | 1.00 | 1.12 | 1.00 | 1.03 |
| "How well were the legal issues of the case identified and discussed during the session?" | 1.16 | 1.42 | 1.62 | 2.00 | 1.55 |
| "Overall, how would you rate the mediation process in your case?" | 1.83 | 1.37 | 1.87 | 1.60 | 1.66 |
| "From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?" | 1.50 | 1.28 | 1.75 | 1.60 | 1.53 |
| "How efficient was the procedure of court referral and arranging the mediation session?" | 1.66 | 1.50 | 1.87 | 2.00 | 1.75 |

Attorneys' evaluations of their mediations were not as positive as parties' and insurers' evaluations of them. However, none of these scores is negative; the weakest scores were on questions regarding discussion of "legal issues in the case" and "procedure of court referral," and those still averaged "good."

¹⁰ "PTY-APP" means "Parties and Insurers-Approved Mediators." "PTY NON" means "Parties and Insurers-Non-Approved Mediators." "ATTY APP" means "Attorneys-Approved Mediators." "ATTY NON" means "Attorneys-Non-Approved Mediators." "OVRL AVE" means "Overall Average."

Interestingly, the participants' perceptions of the quality of the mediation and the mediator did not depend on whether or not the case settled "at the table." Classed by whether the case settled at the mediation, the evaluations yielded these averages:

| EVALUATION QUESTION | CASE DID SETTLE IN MEDIATION SESSION | | | CASE DID NOT SETTLE IN MEDIATION SESSION | | |
|--|---|------|------|---|------|------|
| | PRTY | ATTY | AVE | PRTY | ATTY | AVE |
| "How was the mediator at remaining neutral?" | 1.14 | 1.33 | 1.23 | 1.14 | 1.42 | 1.28 |
| "During the mediation session, how was the mediator-- "...at giving you opportunities to express your views?" | 1.14 | 1.00 | 1.07 | 1.28 | 1.14 | 1.21 |
| "...at understanding your/your client's interests and needs in the dispute?" | 1.14 | 1.16 | 1.15 | 1.28 | 1.28 | 1.28 |
| "...at allocating appropriate time for the mediation...?" | 1.00 | 1.20 | 1.10 | 1.16 | 1.28 | 1.22 |
| "...at treating you with fairness and respect?" | 1.00 | 1.00 | 1.00 | 1.00 | 1.14 | 1.07 |
| "How well were the legal issues of the case identified and discussed during the session?" | 1.33 | 1.83 | 1.58 | 1.28 | 1.71 | 1.49 |
| "Overall, how would you rate the mediation process in your case?" | 1.28 | 1.50 | 1.39 | 1.85 | 2.00 | 1.92 |
| "From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?" | 1.28 | 1.66 | 1.47 | 1.50 | 1.71 | 1.60 |
| "How efficient was the procedure of court referral and arranging the mediation session?" | 1.40 | 2.16 | 1.78 | 1.71 | 1.71 | 1.71 |

The scores on both of these tables are slightly less favorable than those of a year ago, but the 2002 scores were the best in the history of the program. Given the small number of mediations, there does not appear to be enough difference to be significant.

Would these settlements have eventually occurred anyway, without mediation? This question is asked on the evaluation questionnaires. Unfortunately, there were too few responses to make any sense of them statistically. Hopefully in the future, participants will be more willing to complete this question.

“If you reached full settlement, in your view would the case have settled later without mediation?”

| Attorneys “Yes” | Attorneys “No” | Attorneys- “Maybe” or “Unsure” | Parties/Insurers “Yes” | Parties/Insurers “No” | Parties/Insurers “Maybe” or “Unsure” |
|--------------------|-------------------|---|---------------------------|--------------------------|---|
| | | | | | |

Does mediation save time or money? Participants were also asked to state if they thought their mediation saved them time and/or money in resolving the case when and how they did, and if so, how much. Again, there were too few of these “guesstimates” to average,¹¹ although the numerical grade responses to the questions indicate some perception of savings.

| EVALUATION QUESTION | PRTY | ATTY | OVERALL AVERAGE |
|---|-------------------|-------------------|-------------------|
| “To what extent do you think the mediation saved you money in resolving this case?” | 2.14 | 1.80 | 1.97 |
| “Please ‘guesstimate’ how much money saved” | Too few responses | Too few responses | Too few responses |
| “To what extent do you think mediation saved you time in resolving this case?” | 1.28 | 1.60 | 1.44 |
| Please ‘guesstimate’ how much time saved, i.e. hours of attorney time” | Too few responses | Too few responses | Too few responses |

QUALITATIVE INTANGIBLES. It is commonly believed that mediation causes parties to feel that they have been “heard” by a neutral person, thereby creating a perception of fairness not achieved in “traditional” negotiations. By drawing the parties into active involvement in the negotiation process, mediation gives them greater control over how their dispute is ended.

This “involvement, control, and fairness” factor is reflected by the responses to the five questions evaluating the mediator's neutrality, giving parties the chance to express their views, treatment of the parties, understanding their “interests and needs” in the case, and the extent to which the legal issues were discussed. These indicators have consistently been positive over the course of the program.

¹¹ Money Saved--Attorneys: Only three estimates were received.
 Money Saved--Parties/Insurers: Only two estimates were received.
 Time Saved--Attorneys: Only three estimates were received.
 Time Saved--Parties/Insurers: Only three estimates were received.

V. CONCLUSIONS

There continue to be low numbers of federal cases mediated.

The past year's statistics indicate that mediation caused or accelerated settlements in 91 % of the cases mediated. The "effective settlement rate" (the total of mediations resulting in settlements "at the table" or later "because of" the mediation) has gone up and down over the existence of the program, but the overall average for the entire seven-year period is 65%.¹²

In 2003, while a good number of participants thought mediation saved them time and/or money, we do not have that quantified.

Participants' opinions of their mediation experience indicate it does foster a perception of fairness, involvement, and control among parties.

There are a few mediators, both approved and not approved, who seem to be the leaders in attracting federal cases for mediation. Thus, our statistics are not as "broad-based" as they would be were the cases spread more evenly among mediators. The "market" drives the selection of mediators, and the selection process is a complicated mixture of factors, unique in many cases.

"Although this was my first use of a mediator in a federal court case, I would rate Mr. _____ higher than other mediators I have used, based upon his preparation beforehand and his ability to comprehend the issues."

-Comment from attorney after a mediation by an approved mediator in a case that settled "at the table."

¹² For the seven-year period, of 385 cases mediated there were 250 settlements attributable to mediation. The previous highest "effective settlement rate" was 90% in 2000; the lowest was 47% for the first period of the program's existence, the 18-month period ended 12/31/97.

VI. FUTURE OUTLOOK

The court's criminal caseload is burgeoning. Criminal trials often require postponing scheduled trials in civil cases. It is sometimes months before a civil case, once passed over for trial, is actually called for trial. Mediation appears to be one viable means to help ameliorate this situation, but to be effective, the mediation resource must be used. Despite efforts by the magistrate judges to encourage mediation during their planning conferences with lawyers, the low numbers persist.

Recent decreases in the relative number of civil cases, together with the lack of judicial resources available to address them, may provide a test to see just how viable mediation is as an alternative to litigation. Theoretically, if mediation is viable, its use should increase, allowing the court to keep abreast of the caseload despite its inability to try many civil cases. On the other hand, if it is not viable, parties and lawyers will more likely be content to let their civil cases drag on through the inevitable delays caused by the growing criminal caseload.

The court has contributed to the development of mediation as a useful alternative dispute resolution technique in Nebraska. The statistics accumulated over the course of the court's program do demonstrate that mediation is definitely worthy of consideration in civil cases. Whether mediation continues or even expands will depend upon the acceptance of the bench and bar and the continuing competence and fairness of mediators.

“The mediator was honest and took the time with me and my lawyer to explain legal issues that I did not understand. He exhibited extreme genuine honesty and I did not at all feel discomfort, which I did expect prior to attendance. The above was extremely important to me.”

–Comment from a party after a mediation by an approved mediator in a case that settled “at the table.”

APPENDIX

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1. QUARTERLY STATISTICS, 2003

The following pages are the "raw" quarterly and annual statistics for calendar year 2003.

Period: January - March 2003

| | Mediator Approved | Mediator Not Approved | Total |
|---|-------------------|-----------------------|-----------------|
| Referrals Pending Beginning of Period | 2 | 1 | 3 |
| Mediation Orders Entered | 3 | 5 | 8 |
| Mediation Orders Withdrawn | 0 | 0 | 0 |
| Settled Prior to Mediation Session | 0 | 0 | 0 |
| Referrals Pending End of Period | 1 | 0 | 1 |
| Total Cases Mediated (With MRO) ¹³ | 4 | 6 | 10 |
| Cases Mediated (No MRO) | 4 | 3 | 7 ¹⁴ |
| Total Cases Mediated | 8 | 9 | 17 |
| | | | |
| Mediation Reference Orders, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 1 | 1 | 2 |
| Lincoln | 2 | 3 | 5 |
| North Platte | 0 | 1 | 1 |
| Total | 3 | 5 | 8 |
| | | | |
| Cases Mediated Without MRO, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 4 | 2 | 6 |
| Lincoln | 0 | 0 | 0 |
| North Platte | 0 | 1 | 1 |
| Total | 4 | 3 | 7 |

¹³ See Footnote 2.

¹⁴ See Footnote 3.

| | | | |
|--|-------------------|-----------------------|------------------|
| Outcome of Mediated Cases (MRO) | Mediator Approved | Mediator Not Approved | Total |
| Full Agreement | 2 | 4 | 6 |
| No/Partial Agreement | 2 | 2 | 4 |
| Outcome of Mediated Cases (No MRO) | | | |
| Full Agreement | 3 | 1 | 4 |
| No/Partial Agreement | 1 | 2 | 3 |
| Total | 8 | 9 | 17 |
| | | | |
| Summary of No/Partial Agreement, After Closure | Mediator Approved | Mediator Not Approved | Total |
| Trial Settings Pending Beginning of Reporting Period | 4 | 20 | 24 ¹⁵ |
| No or Partial Agreement, This Period (from above) | 3 | 4 | 7 ¹⁶ |
| Settled | 0 | 5 | 5 |
| Judgment Entered Without Trial or Settlement | 0 | 0 | 0 |
| Transfer to Bankruptcy | 0 | 0 | 0 |
| Trials Held During Reporting Period | 0 | 0 | 0 |
| Trial Settings Pending at End of Reporting Period | 7 | 19 | 26 |

¹⁵ Of the 24 trial settings that were pending at the beginning of the reporting period, 4 of those cases settled during this period.

¹⁶ Of the 7 cases that were mediated during the 1st quarter of 2003 and had no agreement, 1 case settled later in this period.

Period: April - June 2003

| | Mediator Approved | Mediator Not Approved | Total |
|---|-------------------|-----------------------|-----------------------|
| Referrals Pending Beginning of Period | 1 | 0 | 1 |
| Mediation Orders Entered | 2 | 2 | 4 |
| Mediation Orders Withdrawn | 0 | 0 | 0 |
| Settled Prior to Mediation Session | 0 | 0 | 0 |
| Referrals Pending End of Period | 2 | 0 | 2 |
| Total Cases Mediated (With MRO) ¹⁷ | 1 | 2 | 3 |
| Cases Mediated (No MRO) | 2 | 4 | 6¹⁸ |
| Total Cases Mediated | 3 | 6 | 9 |
| | | | |
| Mediation Reference Orders, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 1 | 0 | 1 |
| Lincoln | 1 | 2 | 3 |
| North Platte | 0 | 0 | 0 |
| Total | 2 | 2 | 4 |
| | | | |
| Cases Mediated Without MRO, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 2 | 2 | 4 |
| Lincoln | 0 | 2 | 2 |
| North Platte | 0 | 0 | 0 |
| Total | 2 | 4 | 6 |

¹⁷ See footnote 2.

¹⁸ See footnote 3.

| | | | |
|--|-------------------|-----------------------|------------------|
| Outcome of Mediated Cases (MRO) | Mediator Approved | Mediator Not Approved | Total |
| Full Agreement | 1 | 2 | 3 |
| No/Partial Agreement | 0 | 0 | 0 |
| Outcome of Mediated Cases (No MRO) | | | |
| Full Agreement | 2 | 3 | 5 |
| No/Partial Agreement | 0 | 1 | 1 |
| Total | 3 | 6 | 9 |
| | | | |
| Summary of No/Partial Agreement, After Closure | Mediator Approved | Mediator Not Approved | Total |
| Trial Settings Pending Beginning of Reporting Period | 7 | 19 | 26 ¹⁹ |
| No or Partial Agreement, This Period (from above) | 0 | 1 | 1 ²⁰ |
| Settled | 2 | 4 | 6 |
| Judgment Entered Without Trial or Settlement | 0 | 0 | 0 |
| Transfer to Bankruptcy | 0 | 0 | 0 |
| Trials Held During Reporting Period | 1 | 0 | 1 |
| Trial Settings Pending at End of Reporting Period | 4 | 16 | 20 |

¹⁹ Of the 26 trial settings that were pending at the beginning of the reporting period, 6 of those cases settled during this period and 1 case went to trial.

²⁰ There was one case that was mediated during the 2nd quarter of 2003 and had no agreement. That case went to trial and a mistrial was declared, so it was placed back in the "Trial Settings Pending at End of Reporting Period" and was not counted as a "Trial Held."

Period: July 2003 - September 2003

| | Mediator Approved | Mediator Not Approved | Total |
|---|-------------------|-----------------------|-----------------|
| Referrals Pending Beginning of Period | 2 | 0 | 2 |
| Mediation Orders Entered | 0 | 3 | 3 |
| Mediation Orders Withdrawn | 0 | 0 | 0 |
| Settled Prior to Mediation Session | 0 | 0 | 0 |
| Referrals Pending End of Period | 0 | 3 | 3 |
| Total Cases Mediated (With MRO) ²¹ | 2 | 0 | 2 |
| Cases Mediated (No MRO) | 7 | 2 | 9 ²² |
| Total Cases Mediated | 9 | 2 | 11 |
| | | | |
| Mediation Reference Orders, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 0 | 0 | 0 |
| Lincoln | 0 | 3 | 3 |
| North Platte | 0 | 0 | 0 |
| Total | 0 | 3 | 3 |
| | | | |
| Cases Mediated Without MRO, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 6 | 1 | 7 |
| Lincoln | 1 | 0 | 1 |
| North Platte | 0 | 1 | 1 |
| Total | 7 | 2 | 9 |

²¹ See footnote 2.

²² See footnote 3.

| | | | |
|--|-------------------|-----------------------|------------------|
| Outcome of Mediated Cases (MRO) | Mediator Approved | Mediator Not Approved | Total |
| Full Agreement | 2 | 0 | 2 |
| No/Partial Agreement | 0 | 0 | 0 |
| Outcome of Mediated Cases (No MRO) | | | |
| Full Agreement | 4 | 2 | 6 |
| No/Partial Agreement | 3 | 0 | 3 |
| Total | 9 | 2 | 11 |
| | | | |
| Summary of No/Partial Agreement, After Closure | Mediator Approved | Mediator Not Approved | Total |
| Trial Settings Pending Beginning of Reporting Period | 4 | 16 | 20 ²³ |
| No or Partial Agreement, This Period (from above) | 3 | 0 | 3 ²⁴ |
| Settled | 2 | 0 | 2 |
| Judgment Entered Without Trial or Settlement | 0 | 0 | 0 |
| Transfer to Bankruptcy | 0 | 0 | 0 |
| Trials Held During Reporting Period | 2 | 0 | 2 |
| Trial Settings Pending at End of Reporting Period | 3 | 16 | 19 |

²³ Of the 20 trial settings that were pending at the beginning of the reporting period, none of those cases settled during this period and 1 case went to trial.

²⁴ Of the 3 cases that were mediated during the 3rd quarter of 2003 and had no agreement, 2 cases settled later in this period and 1 case went to trial.

Period: October - December 2003

| | Mediator Approved | Mediator Not Approved | Total |
|---|-------------------|-----------------------|------------------------|
| Referrals Pending Beginning of Period | 0 | 3 | 3 |
| Mediation Orders Entered | 3 | 2 | 5 |
| Mediation Orders Withdrawn | 0 | 0 | 0 |
| Settled Prior to Mediation Session | 0 | 0 | 0 |
| Referrals Pending End of Period | 1 | 3 | 4 |
| Total Cases Mediated (With MRO) ²⁵ | 2 | 2 | 4 |
| Cases Mediated (No MRO) | 6 | 8 | 14²⁶ |
| Total Cases Mediated | 8 | 10 | 18 |
| | | | |
| Mediation Reference Orders, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 1 | 2 | 3 |
| Lincoln | 2 | 0 | 2 |
| North Platte | 0 | 0 | 0 |
| Total | 3 | 2 | 5 |
| | | | |
| Cases Mediated Without MRO, by Division | Mediator Approved | Mediator Not Approved | Total |
| Omaha | 3 | 6 | 9 |
| Lincoln | 0 | 1 | 1 |
| North Platte | 3 | 1 | 4 |
| Total | 6 | 8 | 14 |

²⁵ See footnote 2.

²⁶ See footnote 3.

| | | | |
|--|-------------------|-----------------------|------------------|
| Outcome of Mediated Cases (MRO) | Mediator Approved | Mediator Not Approved | Total |
| Full Agreement | 1 | 0 | 1 |
| No/Partial Agreement | 1 | 2 | 3 |
| Outcome of Mediated Cases (No MRO) | | | |
| Full Agreement | 6 | 5 | 11 |
| No/Partial Agreement | 0 | 3 | 3 |
| Total | 8 | 10 | 18 |
| | | | |
| Summary of No/Partial Agreement, After Closure | Mediator Approved | Mediator Not Approved | Total |
| Trial Settings Pending Beginning of Reporting Period | 3 | 16 | 19 ²⁷ |
| No or Partial Agreement, This Period (from above) | 1 | 5 | 6 ²⁸ |
| Settled | 1 | 1 | 2 |
| Judgment Entered Without Trial or Settlement | 2 | 1 | 3 |
| Transfer to Bankruptcy | 0 | 0 | 0 |
| Trials Held During Reporting Period | 0 | 0 | 0 |
| Trial Settings Pending at End of Reporting Period | 1 | 19 | 20 |

²⁷ Of the 19 trial settings that were pending at the beginning of the reporting period, one case settled during this period.

²⁸ Of the 6 cases that were mediated during the 4th quarter of 2003 and had no agreement, 1 case settled later in this period and 5 cases remain pending for trial.

2. EVALUATIVE COMMENTS, 2003

A. PARTIES' COMMENTS ON EVALUATION FORMS

The evaluation forms were distributed to participants in the mediations held through the auspices of approved federal mediators as well as the non-approved mediators. The comments received from the parties and insurance company claims representatives appear below:

In Cases That Did Settle During the Mediation Session (Approved Mediator):

"The mediator was honest and took the time with me and my lawyer to explain legal issues that I did not understand. He exhibited extreme genuine honesty and I did not at all feel discomfort, which I did expect prior to attendance. The above was extremely important to me."

"Prior to and at the beginning of the mediation, I did not think that settlement would occur. We were just too far apart. But through the persistence and tactfulness of the mediator, we were able to reach a win/win solution to our dispute. I was frankly surprised that we reached settlement."

"Thank you for ending this dispute for me. I am so grateful it is all over now. I can move forward with my life. Very good mediator!!! Thanks again."

In Cases That Did Settle During the Mediation Session (Non-Approved Mediator):

"Mr. _____ is an excellent mediator. This case may not have settled but for his efforts."

"I respect _____'s abilities, he is the best!"

In Cases That Did Not Settle During the Mediation Session (Approved Mediator):

"Mr. _____'s insistence that we come to mediation in spite of the plaintiff's desire to withdraw was critical. We didn't reach an agreement that day, but the session was the catalyst for a global settlement reached one week later. Mr. _____'s objectivity and commitment to pursuing the "right" settlement was a great help."

In Cases That Did Not Settle During the Mediation Session (Non-Approved):

“_____ does a great job. We could not get this case settled. Hopefully, we will get the case settled in the future.”

“Mr. _____ was very kind. My expectations were a bit different than reality. I thought there would be more question/answer stuff. It might be helpful to know if both sides REALLY want to mediate, and not just go through the motions. Please note this was only my perception and not necessarily the reality. However, Mr. _____ handled it all with extreme calmness which was reassuring.”

“Very good job!”

B. ATTORNEYS’ COMMENTS RECEIVED ON EVALUATIONS

In Cases That Did Settle During the Mediation Session (Approved):

“I have completed this on behalf of the United States and myself as counsel. I recommend Mr. _____ highly!”

“_____ just keeps getting better and better at ADR!”

“May be a little too close to plaintiff counsel’s firm due to # times he has mediated matters. Good appearance & demeanor. Did not demonstrate any specialized knowledge of labor & employment law matters; nevertheless was effective. Only difficulty was the court failed to stay court proceedings until after mediation as parties requested.”

“_____ is one of the better mediators I know.”

“Not possible to know how much money and time saved since will never know what might have happened if we went to trial. _____ is excellent!”

“Although this was my first use of a mediator in a federal court case, I would rate Mr. _____ higher than other mediators I have used, based upon his preparation beforehand and his ability to comprehend the issues.”

In Cases That Did Settle During the Mediation Session (Non-Approved):

“\$150/hour is the standard rate for mediators. It is probably higher than most mediators receive in their practices.”

“Defendant does not believe plaintiffs came to mediation with an open mind. Several weeks before mediation, Plf’s attorney indicated that he would decide the settlement amount without regard to the mediator’s thoughts. There was a \$90,000 worker’s compensation lien not represented at mediation.”

“Mr. _____ did an excellent job in bringing the parties together, and particularly so with the worker’s comp subrogation lien holder, to get the case settled.”

“_____ does a great job. He is by far the best mediator in this area. His ability to relate to the parties and his honest assessment of their positions works wonders!”

“Initially, I thought the mediation was moving too slowly, but great leaps were made toward the end that would ultimately settle the case.”

“_____ did a great job.”

In Cases That Did Not Settle During the Mediation Session (Approved):

“I would be happy to use Mr. _____ again as a mediator.”

“Case settled approximately 1 week after mediation. In my opinion, while we were not successful the day of the mediation, the case/matter would not have been resolved without the groundwork laid at the mediation session (even getting the plaintiff to attend). Mr. _____ was very effective as mediator.”

“_____ did an excellent job. The failure of the mediation was not his fault. I would use _____ again if the need arises.”

“This is a very tough case to mediate. _____ did a great job trying to move it forward. The claimant was intractable and not prone to settle. _____ tried very hard to point out the obvious reasons to settle.”

In Cases That Did Not Settle During the Mediation Session (Non-Approved):

“Case was not settled. Parties were much too far apart. Mediator cut to the chase, which saved time and money.”

“I wish Mr. _____ would have leaned on the parties a little more. I know he didn’t lean on us very hard and we were about \$50K different. I think a little more pressure from him would have been helpful to resolve the case.”

“Case did not settle because mediation occurred too early.”

"I have been through dozens of mediations and I really thought this was an effective mediator and an effective mediation session. That sounds odd in that the case did not get settled but I believe that to be the case."

3. LAWYERS' COMMENTS RECEIVED IN FOLLOW-UP SURVEY

Approved: "Because Of":

"Made the parties realize the relatively small damages that were available and the resources that the EEOC could bring to bear on my client."

"The case settled entirely because of mediation. Mr. _____ was able to assist the parties in coming to an agreement that could not be finalized the day of the mediation because of some outstanding Medicare medical lien issues. His specific suggestions with respect to those issues were adopted by the parties, the Medicare lien issues were resolved, and a prompt agreement to settle the case was finalized."

"The parties were able to determine each side's respective positions in the mediation. The case did not actually get mediated because we needed to try and get an agreement with one of the subrogation carriers that had an interest in the matter. We were unable to make this agreement prior to the mediation. I think the mediation did allow each side to evaluate their positions and talk about realistic settlement amounts."

"Allowed the plaintiff to explain to defendant what needed to be done differently in regards to sexual harassment complaints. The gap in the parties' settlement positions was narrowed as a result of the mediation."

"Judge Jaudzemis is personally responsible for this settlement. Her work with the plaintiff was the most important factor in this resolution. Her work was outstanding."

"I am convinced that without having had the mediation forum within which we began this latest round of settlement discussions, it is highly unlikely that the matter would have been successfully resolved at the time it did. My client had entered into the mediation process with the hope that some settlement could be effectuated. It was not necessary to 'convince' the Station of the merits of mediation. I do believe, however, that the efforts of the mediator had the effect of bringing some new perspectives to Ms. _____, which ultimately facilitated the matter being resolved."

"During mediation plaintiff was unwilling to change her original demand, even though the mediator was effective in pointing out pros and cons of her case. After leaving the mediation session, plaintiff called me while I was traveling back to Des Moines and indicated willingness to compromise at the amount counsel had suggested. She was firm in that position and defendant agreed to settlement at that figure."

Approved: "In Spite Of":

"This plaintiff left after defendant's first offer - no chance to resolve."

Approved: "No Effect":

"My client would not settle for the amount the defendant offered at mediation. She tripled her settlement value by going to trial & settling shortly before trial. Mediation is great, but I don't believe it was the mediation process which factored in this case. Perhaps the defendant was affected by talking & seeing the plaintiff close up. I don't know but I am satisfied that mediation is a good process."

Non-Approved: "Because Of":

"The mediation session ended after a brief exchange of proposals but the mediation was helpful in getting the parties to start talking."

"Mr. _____ was forced by the mediator to face the weaknesses of his case. Mr. _____ & other defendants were forced to face how badly they wished to avoid spending a week in trial in Nebraska. A week after mediation they agreed on a dollar amount."

"We could speak directly to plaintiff, not through her lawyer, who was the most difficult lawyer I have had to deal with (of course this is pure opinion!)"

"Identified parties' positions. Used this as basis to settle just prior to trial."

"Other side came to mediation without any meaningful authority to settle the case, in violation of the mediation order. I believe opposing counsel forced his client to settle within the next few weeks out of fear that the court would sanction their behavior."

"The case was not settled at mediation because it took longer than time allotted for the actual mediation. The mediator continued working on the case to get the insurance carriers to participating in the settlement."

"The mediation was extremely helpful in the resolution of this case. Without the assistance of _____ as mediator, I doubt that this lawyer from Philadelphia representing a client from North Platte, could have convinced his client that [defendant] was being fair. It is my belief that absent mediation, this case would have gone to trial and at the end of the day, the plaintiff would have gotten less and my client would have spent more...."

"The mediation set the ground work for the subsequent settlement. "

“Mediator stayed in contact. As trial approached parties got more serious about settlement. I think it involved the defendant more than plaintiff.”

Non-Approved: "In Spite Of":

“Nothing about the mediation advanced the settlement of this case. At best, the mediation was neutral - actually it was very counter productive. The mediator did not allow the party to communicate at all; he started the session with a long speech about how disillusioned he was with litigation & what a waste of time & \$ attorneys & courts are - this set a very negative tone; he misstated our position and attitude to plaintiffs and only after we had a candid discussion w/the plaintiffs did we start to make progress toward settlement. This was absolutely the worst mediation session I have ever been involved in or heard about. I am supportive of the mediation process and used it successfully in Federal District Court in Nebraska in previous litigation. I would do it again, but never with this same mediator.”

“Mediation is generally the preferable means of resolving cases where liability can be established. However, we chose an independent mediator that was not approved on the Court’s list who found one of the defense attorneys too abrasive and combative to continue the mediation. Accordingly it was the mediator that ultimately terminated the mediation which we negotiated successfully without assistance. It is my understanding that the mediator did, however, make it quite clear to the defendant and his attorneys how, in his opinion, a jury would view this case and the potential damages. This may have assisted in resolution of the case but that is purely speculative. We would encourage continuance of the program with strong encouragement to use court-approved mediators.”

“Defendants had no real interest in settling the case and just wanted to be in the same room as plaintiff to intimidate her. Note: our mediator was not a federal certified mediator. Made it worse in fact. I moved for sanctions against defendants for failing to mediate in good faith.”

“I personally believe that we (the parties) were hurt by the mediator. I don’t think he contributed much to the process. I think a better mediator would have gotten the case settled.”

Non-Approved: "No Effect": (no comments).

3. EVALUATION QUESTIONNAIRES

FORM 1: EVALUATION OF MEDIATION—ATTORNEYS

Name of Case: _____ Number of Hours in Session(s): _____

Mediator(s): _____

Date, Place of Mediation Session(s): _____

I am: _____ plaintiff(s) attorney
_____ defendant(s) attorney

This mediation resulted in:
_____ full settlement of case
_____ partial settlement
_____ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
 2. How was the mediator at explaining mediation? 1 2 3 4 5
 3. During the mediation session(s), how was the mediator at:
 - a. Giving you opportunities to express your views? 1 2 3 4 5
 - b. Understanding your client's interests and needs in this dispute? 1 2 3 4 5
 - c. Treating you with fairness and respect? 1 2 3 4 5
 4. How was the mediator at remaining neutral? 1 2 3 4 5
 5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
 6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5
- _____ Moved too quickly _____ Moved too slowly _____ Paced right

7. If you reached full or partial agreement,

a. To what extent was the mediator responsible for it? 1 2 3 4 5

b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5

c. Please "guesstimate" how much money saved: \$ _____

d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5

e. Please "guesstimate" how much time saved: _____ hours of attorney time

8. If you reached full settlement, in your view, would the case have settled later without mediation? _____ yes _____ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? ___Too High ___Too Low ___ About Right

13. How helpful was it that the mediator was a lawyer? ___Very ___Somewhat ___ Not

COMMENTS: _____

THANK YOU!!

FORM 2: EVALUATION OF MEDIATION--PARTIES AND INSURERS

Name of Case: _____ Number of Hours in Session(s): _____

Mediator(s): _____

Date, Place of Mediation Session(s): _____

I am: _____ plaintiff
_____ defendant
_____ plaintiff's insurer/subrogee
_____ defendant's insurer

This mediation resulted in:
_____ full settlement of case
_____ partial settlement
_____ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

- 1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
- 2. How was the mediator at explaining mediation? 1 2 3 4 5
- 3. During the mediation session(s), how was the mediator at:
 - a. Giving you opportunities to express your views? 1 2 3 4 5
 - b. Understanding your interests and needs in this dispute? 1 2 3 4 5
 - c. Treating you with fairness and respect? 1 2 3 4 5
- 4. How was the mediator at remaining neutral? 1 2 3 4 5
- 5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
- 6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5

____ Moved too quickly ____ Moved too slowly ____ Paced right

7. If you reached full or partial agreement,

a. To what extent was the mediator responsible for it? 1 2 3 4 5

b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5

c. Please "guesstimate" how much money saved: \$ _____

d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5

e. Please "guesstimate" how much time saved:
_____ hours of attorney time _____ hours of your time

8. If you reached full settlement, in your opinion would the case have settled later without mediation? ___ yes ___ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? ___ Too High ___ Too Low ___ About Right

13. How helpful was it that the mediator was a lawyer? ___ Very ___ Somewhat ___ Not

COMMENTS: _____

THANK YOU!!