

United States District Court



**REPORT  
ON  
MEDIATION**

**2006**

# I. PROGRAM OVERVIEW

2006 marked the eleventh year of the mediation program. There have been considerable changes in the program over these years. This report will not attempt to review all of the historical developments of the program. Previous reports, especially 2004 and 2005, provide detailed historical context. This report attempts to review recent changes in the program and the effects of those changes.

## **Program Revisions in 2005-2006**

2005 showed decreases in use of the program. That falling off was the subject of considerable discussion among the judges, lawyers, and the Federal Practice Committee. In August 2005 Magistrate Judge Piester enlisted the help of approved and non-approved mediators, the Federal Practice Committee, the law schools, the Office of Dispute Resolution, and others interested in mediation in determining why so few federal cases were being mediated and what, if anything should be done about that. After a half-day meeting, the group reached consensus on several conclusions, among them:

- The overall goal of the court's mediation program should be to reduce the court's civil caseload and workload by providing litigants an informal, effective, prompt, and less expensive alternative to litigation to resolve their disputes, while preserving an enhanced sense of fairness to the parties, and ensuring access to the court's formal litigation functions when necessary.
- Because "lawyers will follow the judges," the district, bankruptcy, and magistrate judges MUST support the program and actively encourage parties to mediate their disputes; without such active support, actions by others will be ineffective in increasing use of mediation.
- Some types of cases should be put on a track that includes an "almost mandatory" mediation, in the sense that the court's management "default" should be "to mediate" unless the parties opt *out*, instead of the present "not to mediate" unless the parties opt *in*.
- There is a need to educate judges, lawyers, mediators and the public on all aspects of Alternative Dispute Resolution, including skills training for lawyers acting as advocates as well as mediators or neutrals, and the ethical requirements of applicable statutes.
- The court should continue to require of its approved mediators some threshold of experience, education, and training in skills and ethics, and should continue to offer training for mediators, both initial and "continuing mediator education," especially regarding ethics.

From these premises the group formulated a specific set of action proposals to be promoted to the Federal Practice Committee and through them, to the judges of the court. The Federal Practice Committee's subcommittee appointed to address the matter reported their proposals at its meeting in October in conjunction with the Eighth Circuit Judicial Conference. The Judicial Council for the District of Nebraska (comprised of the district's judges and unit executives) adopted a proposal to request further input on the proposals by Arthur Pearlstein, Executive Director of the Creighton Law School's Werner Institute. Professor Pearlstein accepted the invitation, and reported back to the Judicial Council at its meeting in January, 2006.

Professor Pearlstein proposed changing the pretrial progression order to encourage lawyers to mediate. Those proposals were referred to a committee consisting of Chief Judge Bataillon and the three magistrate judges. The committee conferred and decided to adopt several of the Pearlstein proposals. The Judicial Council approved a new pretrial progression order at its April 2006 meeting.

The pretrial progression process has changed to include the following:

- Magistrate judges will include in initial progression orders the court's "expectation" that the lawyers and parties explore mediation
- The lawyers in a case will be required to report to the court their compliance with the court's expectation that they discuss mediation with their clients and opponents prior to the planning conference at which a trial date is determined
- Planning conferences will be postponed until the mediation report described above has been received
- Planning conferences may be postponed until the parties have reported that they have exchanged settlement proposals
- The court will send educational materials regarding mediation with its annual assessment notices
- During planning conferences magistrate judges will inquire as to the lawyers' and parties' willingness to mediate the case, and if there is no good reason not to mediate, will require a subsequent report on their efforts to schedule a mediation
- All trial judges will encourage mediation and settlement negotiations at every stage of the case

- Judges may require clients to attend and participate in planning conferences in person or by phone
- The court may request that experienced mediators allow other mediators to observe their mediation with the parties' consent
- The court may offer or participate with others in offering training to lawyers on "how to represent your client in mediation"
- The court will re-start its mediation training agenda

## II. MEDIATION STATISTICS, 2006

### A. Raw Numbers

Period: January - December 2006

	Mediator Approved	Mediator Not Approved	Total
Referrals Pending Beginning of Period	2	5	7
Mediation Orders Entered	20	20	40
Mediation Orders Withdrawn	0	1	1
Settled Prior to Mediation Session	1	3	4
Referrals Pending End of Period	2	5	7
Total Cases Mediated (With MRO) <sup>1</sup>	19	16	35
Cases Mediated (No MRO)	8	7	15 <sup>2</sup>
<b>Total Cases Mediated</b>	<b>27</b>	<b>23</b>	<b>50</b>
Mediation Reference Orders, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	6	9	15
Lincoln	13	8	21
North Platte	1	3	4
<b>Total</b>	<b>20</b>	<b>20</b>	<b>40</b>

---

<sup>1</sup> "MRO" means "Mediation Reference Order."

<sup>2</sup> Some mediations take place without entry of a mediation reference order. They 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 always informed of the fact or results of that mediation, so there could have been more "No-MRO" mediations than appear in this report.

Cases Mediated Without MRO, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	7	6	13
Lincoln	1	1	2
North Platte	0	0	0
Total	8	7	15
Outcome of Mediated Cases (MRO)	Mediator Approved	Mediator Not Approved	Total
Full Agreement	13	12	25
Partial Agreement	0	0	0
No Agreement	6	4	10
Outcome of Mediated Cases (No MRO)			
Full Agreement	6	6	12
No/Partial Agreement	2	1	3 <sup>3</sup>
Total	27	23	50
Summary of No/Partial Agreement, After Closure	Mediator Approved	Mediator Not Approved	Total
Trial Settings Pending Beginning of Reporting Period	0	14	14
No or Partial Agreement, This Period (from above)	8	5	13
Settled	3	2	5
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	2	1	3
Trial Settings Pending at End of Reporting Period	3	16	19

---

<sup>3</sup> Because of the inherent authority in tracking “No MRO” cases (see Note 2, above), there could have been more cases that had “no” or “partial” agreements.

## B. Follow-up Surveys

Survey questionnaires were sent to counsel in the five cases mediated in 2006 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 attorneys in the five cases:

### **TOTAL RESPONSES:**

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	4	1	0	5
NON-APPROVED	2	1	1	4
TOTAL	6	2	1	9

### **CASES REPORTED ON:**

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	3	0	0	3
NON-APPROVED	1	1	0	2
TOTAL	4	1	0	5

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,<sup>4</sup> 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.

---

<sup>4</sup> 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

1999: 4 of 15 later settled cases

2000: 2 of 13 later settled cases

2001: 0 of 9 later settled cases

2002: 2 of 16 later settled cases

2003: 0 of 15 later settled cases

2004: 2 of 10 later settled cases

2005: 2 of 6 later settled cases

2006: 1 of 5 later settled cases

### III. OBSERVATIONS FROM THE NUMBERS

#### A. MEDIATION "CAUSED" SETTLEMENT IN 82% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (37 ) and those later settled "because of" the mediation (4) yields a total of 41 of the 50 cases actually mediated (82%) were settled directly because of the mediation program.

#### Effects of Mediation on Settlement, 2006:

Mediator	Cases Mediated	Settled AT Mediation	Settled "Because of" Mediation	Total Cases Settled	Effective Rate of Settlement
Approved	27	19	3	22	81%
Non-Approved	23	18	1	19	83%
Totals	50	37	4	41	82%

#### B. THE PATTERN OF FEW TRIALS IN POST-MEDIATION CASES<sup>5</sup> CONTINUES:

There were 27 post-mediation cases tracked in 2006 (14 still pending trial at the beginning of the year, plus the 13 mediated in 2006 without settlement). Of these 27, only 3 cases have been tried, and 19 remained set for trial at the end of the year. In the last nine years (January 1, 1998 through December 31, 2006), there were 453 cases mediated, and 154 of those cases were not settled "at the table." Of all these cases, only 25 cases have later gone to trial, again with 19 cases remaining set for trial at the end of 2006. The highest number of trials of post-mediation cases in one year was six in 2000.

#### C. IN 2006 APPROVED AND UNAPPROVED MEDIATORS HAD ROUGHLY THE SAME RATES OF SETTLING CASES "AT THE TABLE":

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

---

<sup>5</sup> "Post-mediation cases" are those that did not settle during the mediation itself.

2006	Approved	Non-Approved	Overall Totals
Total Cases Mediated	27	23	50
Cases Settled In Mediation	19 70%	18 78%	37/50 74%
Effective Settlement Rate	22/27 = 81%	19/23 = 83%	41/50 = 82%

The differences in results as between approved and non-approved mediators has fluctuated over the last five years, the only years results were so calculated.<sup>6</sup> Those results are in the next section.

#### D. OTHER OBSERVATIONS:

**Number of Cases Mediated:** The number of mediations (50) was average. In the past seven years the number of mediations in federal cases has hovered around fifty per year; except for 2002 when there were 70 mediations and 2005 when there were 29 mediations.

**Number of Mediation Reference Orders:** There were 35 MROs entered in 2006. This number is up from only 14 MROs entered in 2005. Compared with the average number of mediated cases, this means that more attorneys are seeking 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, and have no qualms about the need for sanctions if something goes wrong at the mediation, they have no need to seek an MRO. However, when the court enters an MRO, it helps the court follow the case and tabulate the results of the mediation. In addition, since the court “stands behind” the approved mediators with (a) greater willingness to require certain preparatory actions for mediations and (b) more authority to sanction parties and/or counsel if they do not abide by the order, obtaining an MRO is a good idea.

**Geography:** Most of the 2006 mediation reference orders emanated from Lincoln in 2006. There are more mediations without MRO’s in Omaha cases than Lincoln.

**Number of Approved Mediators:** At the end of 2006 there were 28 approved mediators. This is down from 35 at the end of 2005.

---

<sup>6</sup> 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.

## IV. HISTORICAL COMPARISONS

### A. EFFECTIVE SETTLEMENT RATES HAVE IMPROVED OVER TIME:

As shown in the table below, since the program's inception **557** cases have been mediated, and **332 (60%)** have settled "at the table," that is, during the mediation session, and the effective settlement rate was **74%**. Disregarding the first 27-month period of the program (counted in this tabulation as one year), for the nine-year period 1998-2006, of 453 cases mediated there were 296 settlements "at the table" (**65%**), and an effective settlement rate of **79%**. If one further restricts the comparison to the last six years, there were 201 of 297 cases settled "at the mediation table" (**68%**), and the effective settlement rate remains at **81%**. The highest "effective settlement rate" was 91% in both 2003 and 2004; the lowest was 50% for the first period of the program's existence, the 27-month period ended 12/31/97.

**Historical Settlement Rates, 1995 - 2006**

Year	Oct. 1995 - Dec. 1997	1998	1999	2000	Overall 1995-2006
Cases Mediated	104	50	56	50	557
Settled at Mediation	36/104 35%	24/50 48%	33/56 59%	41/50 82%	332/557 60%
"Effective" Settlement Rate	52/104 50%	37/50 74%	36/56 64%	45/50 90%	411/557 74%

Year	2001	2002	2003	2004	2005	2006	Overall 2001-2006
Cases Mediated	49	70	55	44	29	50	297
Cases Settled In Mediation	31/49 63%	39/70 56%	38/55 69%	33/44 75%	23/29 79%	37/50 74%	201/297 68%
"Effective" Settlement Rate	35/49 71%	50/70 71%	50/55 91%	40/44 91%	24/29 83%	41/50 82%	240/297 81%

**B. STATUS OF MEDIATOR DOES NOT SEEM TO SIGNIFICANTLY INFLUENCE SETTLEMENT RATES:**

Although the rates of settlement, both during the mediation and the effective settlement rates, have varied, there is no consistency as between “approved” mediators and “non-approved” mediators. Some years approved mediators appear to have higher settlement rates, and other years, non-approved mediators do. If one combines the number of settlements for the last six years, approved mediators settled 101 of 140 cases (**73%**) “at the table” and had a combined effective settlement rate of 117/140 (**84%**). Non-approved mediators settled 100 of 157 cases (**64%**) “at the table” and had a combined effective settlement rate of 123/157 (**78%**). While it is at least arguable that the record of settlements, both at the table and the effective settlement rate, is higher for approved mediators, the low number of cases mediated may render that difference statistically insignificant.

	Approved Mediator						Non-Approved Mediator					
Year	2001	2002	2003	2004	2005	2006	2001	2002	2003	2004	2005	2006
Cases Mediated	25	27	28	19	14	27	24	43	27	25	15	23
Cases Settled In Mediation	18/25 72%	19/27 70%	21/28 75%	13/19 68%	11/14 79%	19/27 70%	13/24 54%	20/43 47%	17/27 63%	20/25 80%	12/15 80%	18/23 78%
Effective Settlement Rate	19/25 76%	24/27 89%	24/28 86%	16/19 84%	12/14 86%	22/27 81%	16/24 67%	26/43 60%	26/27 96%	24/25 96%	12/15 80%	19/23 83%

## V. 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.<sup>7</sup>

EVALUATION QUESTION	PTY-APP	PTY-NON	ATTY APP	ATTY NON	OVERALL
"How was the mediator at remaining neutral?"	1.33	1.47	1.21	1.38	1.35
"During the mediation session, how was the mediator-- ...at giving you opportunities to express your views?"	1.10	1.41	1.21	1.10	1.21
"...at understanding your/your client's interests and needs in the dispute?"	1.25	1.71	1.25	1.31	1.38
"...at allocating appropriate time for the mediation?"	1.47	1.76	1.26	1.53	1.51
"...at treating you with fairness and respect?"	1.10	1.24	1.17	1.10	1.15
"How well were the legal issues of the case identified and discussed during the session?"	1.67	1.94	1.46	1.56	1.66
"Overall, how would you rate the mediation process in your case?"	1.50	1.82	1.43	1.31	1.52
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	1.58	1.81	1.62	1.53	1.64

If these numbers are statistically significant, attorneys' evaluations of their mediations were perhaps slightly more positive than those of parties' and insurers' evaluations, and non-approved mediators get about the same "grades" as approved mediators. Because of the small number of cases mediated, however, it is doubtful that these numbers are statistically sound. That said, these scores are generally consistent with evaluations received throughout the life of the program; that is, viewed historically, 2006 appears not to have been significantly different from the overall tallies for preceding years.

---

<sup>7</sup> "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."

Unlike prior years, the participants' perceptions of the quality of the mediation and the mediator appeared to be influenced slightly by 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?"	1.47	1.26	1.37	1.13	1.33	1.23
"During the mediation session, how was the mediator-- "...at giving you opportunities to express your views?"	1.27	1.13	1.20	1.13	1.22	1.18
"...at understanding your/your client's interests and needs in the dispute?"	1.47	1.29	1.38	1.38	1.22	1.30
"...at allocating appropriate time for the mediation...?"	1.62	1.47	1.55	1.38	1.00	1.76
"...at treating you with fairness and respect?"	1.20	1.13	1.17	1.13	1.22	1.18
"How well were the legal issues of the case identified and discussed during the session?"	1.90	1.55	1.73	1.38	1.33	1.36
"Overall, how would you rate the mediation process in your case?"	1.50	1.23	1.37	2.29	2.17	2.23
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	1.64	1.47	1.56	2.00	2.17	2.09
"How efficient was the procedure of court referral and arranging the mediation session?"	2.00	1.84	1.92	1.88	1.22	1.55

The scores on both of the sections on this table are slightly less favorable than those of a year ago. Again, however, 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.

**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. There were perhaps too few of these “guesstimates” to average meaningfully,<sup>8</sup> 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?”	2.33	1.77	2.05
“Please ‘guesstimate’ how much money saved”	\$90,573.33	\$35,473.68	\$59,782.35
“To what extent do you think mediation saved you time in resolving this case?”	1.86	1.45	1.65
Please ‘guesstimate’ how much time saved, i.e. “hours of attorney time”	77.23 hrs.	104 hrs.	94.84 hrs.

**QUALITATIVE INTANGIBLES.** Mediation often 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.

---

<sup>8</sup> Money Saved--Attorneys: 19 estimates (High of \$200,000 and low of \$1,000).  
Money Saved--Parties/Insurers: 15 estimates (High of 500,000 and low of \$600).  
Time Saved--Attorneys: 25 estimates (High of 250 hours and low of 5 hours).  
Time Saved--Parties/Insurers: 13 estimates (High of 200 hours and low of 4 hours).

## VI. CONCLUSIONS: 2006

- ✓ In 2006 mediation caused or accelerated settlements in **82%** of the cases mediated.
- ✓ The low number of federal cases mediated continues, however there was a small increase in the number of cases mediated. This is presumably due to the changed pretrial progression order.
- ✓ In 2006 a number of participants thought mediation saved them time and/or money, but so few participants evaluated that factor that the average was not calculated.
- ✓ Participants' opinions of their mediation experience indicate mediation does foster a perception of fairness, involvement, and control among parties.
- ✓ There continue to be 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 by the attorneys in each particular case, and the selection process is a complicated mixture of factors, unique in many cases.

## VII. OUTLOOK

The new pretrial progression procedures outlined in the first section of this report were not implemented until shortly after April of 2006. It is too early to determine whether this process will increase mediated settlements for cases filed in the district. However, it will undoubtedly impress upon the attorneys and the litigants the court's commitment to mediation in appropriate cases.

Chief Judge Bataillon has undertaken administration of the ADR program. He will oversee this fall's "Fed Med" training at the Creighton University School of Law's Werner Institute for Negotiation and Dispute Resolution. Members of the court and surrounding bar will be exposed to the finest mediation training available. It will underscore the social and economic benefits of mediation as well as effective mediation practice. He anticipates that this training along with the court's formal pretrial encouragement to mediate will improve the quality and quantity of mediation in the District.

---

# APPENDIX

1. EVALUATIVE COMMENTS, 2006 .....	i
2. EVALUATION QUESTIONNAIRE FORMS .....	vi

# 1. EVALUATIVE COMMENTS, 2006

## 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):

"Mr. \_\_\_\_\_ was very professional, thoroughly prepared, understood the issues, was succinct, humane, and a delight to work with!!!"

"I felt \_\_\_\_\_ did a great job with a difficult case to try to mediate."

"I felt pressured and coerced to reach a settlement during mediation as I was told because of the summary judgment I was very limited if my case went to court. As such there probably was a good chance I could lose and get zero dollars as a settlement. That came from both the mediator and the attorney who was supposedly representing my interests. I felt anyway I looked at it I was in a no win situation!"

"Great job. Very professional!"

"1<sup>st</sup> mediation as a 20+ year practicing attorney. Very helpful. Highest regards."

"Very satisfying! \_\_\_\_\_ did a great job at making sure nobody left until all avenues of settlement were explored and exhausted."

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

"\_\_\_\_\_ did an exceptional job in bringing a very difficult matter to resolution."

"\_\_\_\_\_ was excellent for this case. I would recommend him highly for future difficult and intellectual complex cases."

"Good job by \_\_\_\_\_."

"\_\_\_\_\_ did a nice job."

"Excellent experience—the case settled where it should have."

"\_\_\_\_\_ did a great job of keeping the facts prioritized."

“The mediator did what he said he would do. He found our bottom dollar figure and the defendant’s top figure.”

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

“Disappointed in the plaintiff attorney’s negotiation tactics and lack of good faith in attempting to resolve it today.”

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

“Mr. \_\_\_\_\_ was very effective at distilling the issues. He was thoughtful, challenging, and realistic in his approach.”

“This was a difficult case. The other side never made a good faith proposal and seemed to not have come to the mediation with any real desire to settle. Mr. \_\_\_\_\_ cannot be faulted for that. He did his best and I’m sure he gave a good effort in trying to persuade Defendant to make a proposal.”

**B. ATTORNEYS’ COMMENTS ON EVALUATION FORMS**

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

“\_\_\_\_\_ always does a great job as a mediator. I highly recommend him.”

“\_\_\_\_\_ deserves his reputation as about the best mediator around.”

“Mr. \_\_\_\_\_ did an outstanding job.”

“\_\_\_\_\_ is great! Excellent; works hard; stays neutral; gets great results.”

“This case presented a unique and specialized claim under § 301 of the Labor Management Relations Act (LMRA). Mr. \_\_\_\_\_’s experience and background in this area, and with this specific claim (type of claim) was invaluable, in fact instrumental, in getting the plaintiff and his counsel to assess and understand the significant hurdles faced by plaintiff in furthering his claim or getting to trial, i.e. this was not a personal injury claim, and should not have been approached as such by the plaintiff.”

“\_\_\_\_\_ did an excellent job.”

“Nice job by Mr. \_\_\_\_\_.”

“\_\_\_\_\_ did an excellent job with a trying plaintiff. Because of the treatment we had received by the company, he had some anger, which is not translated into money in these types of cases (ERISA).”

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

“\_\_\_\_\_ does a great job always!”

“\_\_\_\_\_ proved once again that he is one of the best mediators around.”

“The mediation’s main purpose was to convince a very stubborn plaintiff that he did not have a great case. The mediator did a great job with that—without the mediator, the plaintiff never would have settled.”

“\_\_\_\_\_ had a great demeanor. It was helpful in pushing the other side to settle.”

“Mr. \_\_\_\_\_ is an excellent mediator and we would use him again.”

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

“\_\_\_\_\_ does a fabulous job. Both cases he has mediated for me involved either a difficult attorney or a difficult plaintiff (this one), and although we did not settle, we made a lot of progress. I would use him again in a minute – especially in employment cases.”

“It was a pleasure working with Mr. \_\_\_\_\_. My client was difficult but he tried.”

“The Defendants violated the Court’s Mediation Reference Order by coming into the negotiations with a fraction of the required authority and announced at 11:30 a.m. that the Defendant’s representative would be leaving, what was to have been an all day mediation, at 1:30 p.m. This followed on a unilateral demand that the mediation be postponed because the representative had an internal company meeting. The Plaintiff agreed out of professional courtesy after being assured by Defendant’s counsel that Defendant was acting out of good faith. The Defendants were not acting in good faith at the mediation. None of this was the mediator’s fault.”

“Gave up too early. \_\_\_\_\_ is a good mediator—I assume he could see early the case was not going to settle. It was a frustrating experience.”

“\_\_\_\_\_ is an outstanding mediator. He has an excellent style and understanding of the law and case issues. The reason the case did not settle was the lack of good faith of plaintiff’s counsel.”

“Mr. \_\_\_\_\_ did an excellent job and the mediation process helped give my client some perspective. The mediation failed because one of the defendants refused to move from its initial position, not because of any issues involving the mediator.”

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

“ \_\_\_\_\_ did a fine job and is not to be blamed for the parties’ failure to settle.”

**C. ATTORNEYS’ COMMENTS RECEIVED IN FOLLOW-UP SURVEY**

Approved: "Because Of":

“I believe mediation was able to set the tone for the ultimate resolution of our claim. Preparing for our mediation forced us to graphically chart our facts and figures and analyze our strengths and weaknesses. I believe that part of the reason an earlier resolution could not be accomplished was the apparent very limited authority the defendant’s counsel had to settle this matter at the mediation meeting. Dollar resolution was accomplished in subsequent phone conversations in which several points made during the mediation meeting were reiterated. While the parties remained firm in their positions, the prospect of one side or the other winning outright became bleak. I think that the attorneys had an opportunity at mediation to ‘size one another up’ and determine that the case was not going to be won on the strength of the attorney’s abilities alone.”

“The mediation was helpful in explaining the litigation process. I generally think mediation is very useful at the right time.”

“Plaintiff walked out of the mediation after about 4-5 hours, but the positions of the parties at the time mediation terminated made it possible to resolve the matter within weeks.”

“The mediation helped the parties understand the strengths and weaknesses of their cases.”

Approved: "In Spite Of":

“The mediation influenced my client because of the low offer and her perception that the mediator was ‘one of the guys.’ The mediation only last 2 ½ hours and was not fruitful. I generally believe mediation to be helpful. It was not at all helpful on this case. We did get the matter settled in a range that the mediator assured us they would never go.”

Approved: "No Effect":

No comments received.

Non-Approved: "Because Of":

“Plaintiff offered to settle for an amount at mediation. The parties continued to think after mediation. We settled for an amount very close to Plaintiff’s number about 3 weeks after the mediation. Very valuable.”

“Although we were not able to reach an agreement on the day of the actual mediation, we did narrow our differences dramatically and frame the parameters of settlement. Without doing this, and learning more about the strengths and weaknesses of the plaintiff’s case, we would not have reached settlement prior to trial.”

Non-Approved: "In Spite Of":

“At mediation plaintiff delivered ultimatums including a position that they would not stay unless the offer was over \$x,xxx,xxx. It made discussions a nonstarter. The mediator realized that this attitude made matters difficult, but seemed at a loss to recommend alternatives. My client spent money that could have been used to settle in defending the case in the period following mediation. In short, plaintiff got less money in settlement because of the expenses incurred in defense of the action following mediation.”

Non-Approved: "No Effect":

“The initial mediation was conducted at the \_\_\_\_\_ firm. The parties had not conducted many, if any, depositions at that time. Thus, the parties viewed their litigation risks and potential recoveries quite differently. This defeated the mediation effort. However, once all the discovery was completed, including depositions of fact and expert witnesses, I believe defendant more accurately realized its litigation risk and paid the number that \_\_\_\_\_ would have been willing to accept at the mediation.”

## 2. EVALUATION QUESTIONNAIRE FORMS

### 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!!