

**UNITED STATES
DISTRICT COURT**

**REPORT
ON
MEDIATION**

1998

I. INTRODUCTION

This court began its mediation program in 1995 with the adoption of a “Mediation Plan.” Mediation was suggested by the court’s Civil Justice Reform Act Committee as a means to help overcome then-existing substantial backlogs on the civil docket. Despite a previous reluctance to embark into this area before completion of “pilot” projects around the country and their accompanying reports and recommendations, the court accepted the urging of the bar, and plunged.

The program is voluntary, and generally, cases that involve more than two parties, or are particularly complex are excluded. Cases identified for possible referral to mediation are identified by the magistrate judges supervising the scheduling of the docket, and they write counsel a letter inviting them to consider mediation. If counsel agree, the case is referred to either a private mediator or to a mediation center created under the State of Nebraska’s Office of Dispute Resolution. The case is generally stayed for a period of ninety days to accommodate the mediation, and if the mediation does not result in settlement, it is placed back on a trial schedule.

This report recaps the information we have about the court’s mediation program, both for the calendar year 1998 and in comparison to prior reporting periods. It sets forth the statistics that have been accumulated, as well as results of evaluations and follow-up surveys. It sets forth subjective comments that have been received about mediation in an effort to show additional effects of mediation and to identify parts of the program that should be improved or eliminated.

Since the initial adoption of the Mediation Plan in 1995 it has been marked by change. Without the benefit of expertise, experience, or a “legal culture” familiar with mediation or even alternative dispute resolution techniques generally, the court’s development of the program has been rather like inventing a contraption without a blueprint. The bar’s needs, the clients’ needs, the mediators’ needs, and the court’s needs were all sought, identified, and hopefully addressed at some point, but certainly not in the optimal fashion or order. Somewhat surprisingly, this hit-and-miss evolution appears to have been modestly successful. It has been accompanied by at least one significant measure of improvement over time: a greater rate of settlements. In addition, participants’ comments generally reflect favorable “consumer satisfaction.”

There are, of course, problems that continually appear, or in some cases, have dogged the program from its infancy. These are identified in the report, too, and continue to be the subject of serious consideration for change.

It is hoped that this information will be useful to those interested in an overview of this court’s foray into the realm of alternative dispute resolution, and helpful to those who hope to do so in the future.

II. STATISTICS

Period: October 1995 - December 1995

	Center	Private	Total
Referrals Pending Beginning of Period	0	0	0
Mediation Orders Entered	14	0	14
Mediation Orders Withdrawn	0	0	0
Settled Prior	3	0	3
Mediation Did Not Occur	0	0	0
Case Closed for Noncompliance w/Judge's Order	0	0	0
Referrals Pending End of Period	3	0	3
Total Actually Mediated	8	0	8
Cases Referred to Mediation by Division	Center	Private	Total
Omaha	4	0	4
Lincoln	10	0	10
North Platte	0	0	0
Total	14	0	14
Outcome of Mediated Cases	Center	Private	Total
Full Agreement	4	0	4
Partial Agreement	1	0	1
No Agreement	3	0	3
Total	8	0	8
Summary of No\Partial Agreement, After Closure	Center	Private	Total
Joint Motion to Dismiss	3	0	3
Plaintiff Motion to Dismiss	1	0	1
Judgment Entered w/o Trial or Settlement	0	0	0

Set for Trial	0	0	0
Transfer to Bankruptcy	0	0	0
Trial Held	0	0	0
Total	4	0	4

Period: January 1996 - December 1996

	Center	Private	Total
Referrals Pending Beginning of Period	3	0	3
Mediation Orders Entered	59	7	66
Mediation Orders Withdrawn	8	0	8
Settled Prior	6	1	7
Mediation Did Not Occur	0	0	0
Closed for Noncompliance w/Judge's Order	0	0	0
Referrals Pending End of Period	9	1	10
Total Actually Mediated	39	5	44
Cases Referred to Mediation by Division	Center	Private	Total
Omaha	9	3	12
Lincoln	42	3	45
North Platte	8	1	9
Total	59	7	66
Outcome of Mediated Cases	Center	Private	Total
Full Agreement	12	4	16
Partial Agreement	1	0	1
No Agreement	26	1	27
Total	39	5	44
Summary of No/Partial Agreement, After Closure	Center	Private	Total

Joint Motion to Dismiss	20	1	21
Plaintiff Motion to Dismiss	2	0	2
Judgment Entered w/o Trial or Settlement	1	0	1
Set for Trial	1	0	1
Transfer to Bankruptcy	0	0	0
Trial Held	3	0	3
Total	27	1	28

Period: January 1997 - December 1997

	Center	Private	Total
Referrals Pending Beginning of Period	9	1	10
Mediation Orders Entered	38	23	61
Mediation Orders Withdrawn	2	0	2
Settled Prior	0	3	3
Mediation Did Not Occur	0	1	1
Closed for Noncompliance w/Judge's Order	0	0	0
Referrals Pending End of Period	9	4	13
Total Actually Mediated	36	16	52
Cases Referred to Mediation by Division	Center	Private	Total
Omaha	6	1	7
Lincoln	26	17	43
North Platte	6	5	11
Total	38	23	61
Outcome of Mediated Cases	Center	Private	Total
Full Agreement	11	5	16
Partial Agreement	3	0	3
No Agreement	22	11	33

Total	36	16	52
Summary of No\Partial Agreement, After Closure	Center	Private	Total
Joint Motion to Dismiss	13	8	21
Plaintiff Motion to Dismiss	1	1	2
Judgment Entered w/o Trial or Settlement	1	0	1
Set for Trial	2	0	2
Transfer to Bankruptcy	1	0	1
Trial Held	7	2	9
Total	25	11	36

Period: January 1998 - December 1998

	Center	Private	Total
Referrals Pending Beginning of Period	9	4	13
Mediation Orders Entered	30	35	65
Mediation Orders Withdrawn	8	0	8
Settled Prior	3	1	4
Mediation Did Not Occur	1	4	5
Closed for Noncompliance w/Judge's Order	0	0	0
Referrals Pending End of Period	5	6	11
Total Actually Mediated	22	28	50
Cases Referred to Mediation by Division	Center	Private	Total
Omaha	4	7	11
Lincoln	24	20	44
North Platte	2	8	10
Total	30	35	65
Outcome of Mediated Cases	Center	Private	Total

Full Agreement	10	14	24
Partial Agreement	0	0	0
No Agreement	12	14	26
Total	22	28	50
Summary of No\Partial Agreement, After Closure	Center	Private	Total
Joint Motion to Dismiss	7	9	16
Plaintiff Motion to Dismiss	0	0	0
Judgment Entered w/o Trial or Settlement	1	0	1
Set for Trial	3	5	8
Transfer to Bankruptcy	0	0	0
Trial Held	1	0	1
Total	12	14	26

III. EVALUATIONS

At the conclusion of each mediation referred through the mediation centers, the parties and lawyers are asked to complete an evaluation form. A copy of the evaluations are attached in the appendix. For the mediations in 1998 these forms have been tabulated, and the results of important questions are set out in the table below. The opinions expressed are in gradients of “1” (“Excellent!”), “2” (“Good”), “3” (“Adequate”), “4” (“Poor”) and “5” (“Terrible!”). Although the questions asked differ slightly as between the forms for attorneys and those used for parties and insurance representatives, the results are roughly comparable for certain questions, as set forth.

Parties’ Opinions of Centers’ Mediations:

Question	Average Weighted Answer
“How fair was the mediation process?”	1.95
“During the mediation session, how was your opportunity to express your views?”	1.68
“How well were the issues important to you identified and discussed during the session?”	2.14
“How was the mediator at understanding your interests and needs in this dispute?”	1.77
“How was the mediator at remaining neutral?”	1.82
“With what level of respect did the mediator treat you?”	1.23
“Overall, how would you rate the mediation process in your case?”	2.41

Attorneys' Opinions of Centers' Mediations:

Question	Average Weighted Answer
"How fair was the mediation process?"	1.64
"How was the mediator at understanding your client's legal positions in the case?"	1.84
"How was the mediator at remaining neutral?"	1.59
"With what level of respect did the mediator treat you?"	1.35
"Overall, how would you rate the mediation process in this case?"	2.27

These scores reflect both cases in which settlement was reached and those in which no settlement was reached. While evaluations were not received for each of the cases mediated, these results are overall quite positive. One irony in these scores is that despite some attorneys' comments criticizing mediators for their lack of knowledge of the law applicable to the case, the attorneys' average weighted "score" to that question was 1.84, that is, between "excellent!" and "good." Another observation is that the lowest average weighted score (of those tabulated) appears to be the "overall" rating, from both attorneys and parties.

MEDIATION SAVED TIME AND MONEY:

Evaluation forms completed by the parties and attorneys in mediations conducted through the mediation centers¹ asked them to assess how much, if any, time and money was saved by settling at the mediation. Excluding the "high" and "low" figures, the average "guesstimate" of time saved per case during the reporting period was 72.5 hrs (by attys). Again, excluding the "highs" and "lows," the average "guesstimates" of money saved per case were \$20,700 (attys) and \$6,000 (parties). While not scientific, these are significant.

¹ No comparable evaluations were completed for "private" mediations.

MEDIATION HELPED THE PARTIES “FEEL GOOD” ABOUT THE RESOLUTION OF THEIR DISPUTE:

In addition, many of the evaluation forms, especially from parties, expressed appreciation for the opportunity to be heard by impartial mediators, whether or not they reached a settlement in the mediation sessions. (See Appendix). This intangible cannot be measured objectively, but reflects the fairness and respect with which the participants felt they were treated during mediation. These generally-favorable comments reflect positively on the lawyers, the lawyer-mediators, the court, and the judicial system.

THE “EMPTY CHAIR”

Unfortunately, evaluation forms were not distributed to parties and attorneys in mediations performed in “private” referrals. Therefore, these numbers and comments are incomplete for the program as a whole. They stand by themselves without comparison figures on the “private” mediations. Thus, there is no comparison as to, for example, whether parties felt they were treated fairly and respectfully, were pushed into accepting settlement proposals they did not really want to accept, or appreciated the mediation techniques used by the “private” mediators. While there is both positive and negative feedback on the mediations done through the centers, there is no comparator on the “private” side. It is not known, therefore, whether, on the whole, the parties and lawyers would agree in their evaluations of these different referral mechanisms, nor, if they do agree generally, whether either the “centers” or the “private” mediations, as a class, could be said with any confidence to be “better” than the other. In the future such an evaluation system should be devised and utilized for comparison purposes, as well as to examine the entirety of the picture.

IV. FOLLOW-UP SURVEYS

Survey questionnaires were sent to counsel in the 22 cases (for the period January 1, 1998 through December 31, 1998) which did not settle at the mediations, but which DID settle before trial, 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 37 attorneys in 20 cases. Results are below:

TOTAL ***RESPONSES***: 37

	“Because Of”	“In Spite Of”	“No Impact” ²	Total
CENTERS	10	2	4	16
PRIVATE ³	12	2	7	21
TOTAL	22	4	11	37

CASES REPORTED ON⁴: 20

CENTERS	6	2	3	11
PRIVATE	7	1	1	9
TOTAL	13	3	4	20

² A typographical error in the survey (“no impact” was typed “on impact,” which was sometimes interpreted as “an impact”), these responses required interpretation.

³ It should be noted that at least some of the “private” mediations were conducted by mediators who have been trained and approved in accordance with the court’s Mediation Plan.

⁴ When both sides responded in the same case and disagreed as to the effects of the mediation, the comments were considered, and the “least favorable” rating was usually taken for the whole “case,” unless the comments revealed something that clearly indicated a more favorable result, unknown to the other side.

MEDIATION “CAUSED” SETTLEMENT IN 74% OF THE CASES MEDIATED:

Adding, for the same period (January 1 - December 31, 1998), the cases settled at the mediations (24) and those later settled “because of” the mediation (13) yields 37 of the 50 cases actually mediated (74%) were settled directly because of the mediation program. Calculated according to Centers/Private, the rates are: Centers: 16/22 = 72.7%; Private: 21/28 = 75%.

Effects of Mediation on Settlement, 1998:

	Cases Mediated	Settled AT Mediation	Settled Because of Mediation	Total (cases)	Percentage of Cases Mediated
Centers	22	10	6	16/22	72.7%
Private	28	14	7	21/28	75%
Totals	50	24	13	37/50	74.0%

In addition, four cases were settled after the entry of the mediation reference order but before the scheduled mediation. It is not known what effect (if any) the impending mediation had on settlement in those cases, but it would not seem likely to have been negative. Finally, it should be noted that of the total of the 50 cases actually mediated, only one case had been tried and only eight cases remained set for trial at the end of the period.

THE NEGATIVES

There were only three cases in the survey in which counsel reported that mediation actually hampered settlement efforts. The comments accompanying those three cases and the “no impact” opinions are set out in the appendix. They indicate that counsel attributed the “failures” to reach settlement to (1) the mediators being perceived as failing to aggressively pursue settlement; (b) the mediators being perceived as inexperienced in the substantive area of the law of the case or with federal trial practice⁵; or (3) lack of preparation by the lawyers and/or parties. Another theme of the comments on these cases, and thus, another possible reason for the “failures,” is (4) lawyers’ disenchantment with or lack of understanding of “interest-based” mediation.

⁵ Ironically, while this “theme” is heard repeatedly, several of the mediators who received very favorable evaluation comments have little experience litigating in federal court, and one of the most “successful” has no experience at all litigating in federal court.

V. COMPARISON TO PRIOR PERIODS:

The number of settlements attributed to mediations in 1998 is a substantial improvement in the rates of settlements occurring in mediated cases over prior reporting periods. Although the number of cases being referred remains relatively small (and maybe too small to make statistically sound conclusions in these respects), the rates of settlement DURING the mediations have increased. The number of “full agreements” reached AT the mediation table for the three full years of reports, 1996, 1997, and 1998, the rates are 36%, 31%, and 48%, respectively.

Adding the number of cases later settled “because of” the mediations, it can be seen that mediation has begun to have a much more significant effect on settlement as the program continues.

Settlements Reached During Mediation Sessions, Comparison

	Settlements Reached During Mediation Session Oct., 1995 - Dec., 1997	Settlements Reached During Mediation Session Jan., - Dec., 1998
Centers	(27/83) = 32.5%	(10/22) = 45.5%
Private	(9/21) = 42.9%	(14/28) = 50.0%
Totals	(36/104) = 34.6%	(24/50) = 48.0%

Settlements “Caused” by Mediation, Comparison

	Settlements “Caused” by Mediation, Percent of Cases Mediated Oct., 1995 - Dec., 1997	Settlements “Caused” by Mediation, Percent of Cases Mediated Jan. - Dec., 1998
Centers	(41/92) = 44.6%	72.7%
Private	(11/18) = 61.1%	75%
Totals	(52/110) = 47.3%	74%

TRENDS:

One “trend” that emerges from the figures is the drastic increase in the number of referrals to “private” mediators over the course of the program. In the first quarter of the program no such referrals were made. In 1996 only 7 of 66 mediation referral orders were to private mediators; in 1997 23 of 61 such orders were to private mediators. In 1998, however, a majority of the referral orders, 35 of 65, were to private mediators. This certainly reflects a preference among trial lawyers for the services of private mediation over the less evaluative, more facilitative methods utilized in mediations through the mediation centers. It is not known, however, whether it reflects the preferences of their clients. This information should be obtained.

Another aspect which is apparent for the three-year duration of the program is the dominance of the Lincoln division of the court as the source of most of the mediation referral orders. Because the program is totally voluntary on the part of the bar and parties, and because the participants may freely choose a private mediator if they prefer private mediation, this may reflect less willingness by the Omaha bar to engage in mediation of their cases in federal court; if so, the reasons for this reticence should be determined. This disparity could also reflect the promotion of mediation being carried out by the sitting magistrate judge in Lincoln, who issues most of the orders. Since more of the approved mediators live and practice in Omaha, this trend leaves those mediators with significantly fewer opportunities to receive referrals from the court. While some of them apparently do engage in private mediations independently, if there is no mediation reference order entered by the court, those mediations are not counted in these statistics or reports. It remains to be seen whether the Omaha approved mediators are losing mediation skills from lack of use, or whether they are becoming disenchanted with the program because of few referrals. Partly to address these concerns, the mediation centers have been authorized to “borrow” mediators from outside their respective geographical areas, thus permitting Omaha mediators to take cases from other areas of the state.

VI. CONCLUSIONS

The court’s mediation program has shown dramatic improvement in its rate of settlements of mediated cases in 1998. Its usefulness in any given case can be debated, but the program statistics demonstrate that mediation has caused settlements in civil cases, some settlements that would not have otherwise been reached. Further, the evaluations received from parties and lawyers whose cases were mediated through referral to the mediation centers indicate that for many of these settlements, the mediations saved the parties significant amounts of money and time. Additional experience for the mediators and additional education of lawyers and parties will likely be necessary to improve on these settlement rates substantially.

To the extent that criticism of the mediation centers’ approach to mediation has resulted from mediators passively accepting parties “posturing” as their final negotiating

positions, it may not be the “interest-based” model, but rather the passive utilization of it by the mediators which is at fault. Additional training and experience is necessary in this area. To the extent that the criticism is from the mediators refusing to evaluate claims, it is programmatic; the court in its Plan has specifically instructed the centers’ mediators not to evaluate claims. Though mediators may question the parties and counsel about the identified strengths and weaknesses of their cases, or even evaluate the negotiations at hand between the parties, evaluation of claims is not the function of this program. Evaluation of claims may be available to parties through the auspices of “private” referrals for mediation, through court-supervised settlement conferences, or perhaps through the future development of an “early neutral evaluation” program, but the court does not endorse so-called “evaluative” mediation methods.

On October 30, 1998 the President signed the Alternative Dispute Resolution Act of 1998, requiring every federal district court to implement ADR programs for all but specifically exempted civil cases. As of this writing there are no administrative guidelines or regulations regarding the implementation of this legislation. The mediation program currently in place in this district appears to comply with the Act’s requirements, but further evaluation at this time is premature.

After 39 months in existence as of the end of 1998, the court’s program for mediation--both the court’s referrals to the mediation centers and referrals to “private” mediators of the parties’ own choosing--has shown itself to be a viable alternative to the court’s own settlement efforts. In a jurisdiction whose “legal culture” did not include any ADR experience, this is significant.

It has also been demonstrated however, that mediation is not appropriate for all cases. Its usefulness in any given case may be the product of not only the type of case, but also the mediation model used, the mediator’s skill and credibility with the parties and lawyers, the level of preparation of the lawyers and parties, the personal relationships at the table, and a host of other factors. These factors, and the “mix” of them, are matters that cannot be accurately predicted. Instead, they must be observed, carefully considered, and, hopefully, utilized positively during the mediation itself. This imprecision and unpredictability will prevent mediation statistics from ever being “100 percent” if settlement rate is the only measure of “success” utilized. Achieving a rate of settlement “success” that is “viable” may be the only realistic goal. There is no “standard” on this point, but certainly a 74% settlement rate must be regarded as “viable.” In this program it appears that a level of “viability” has been reached, with added benefits--shown in the evaluation results from those mediations performed by the mediation centers, and assumed in the “private” mediations--of money savings, time savings, and the perception among parties that they have been heard and treated with fairness and neutrality.

VII. THE FUTURE

In 1999 it is anticipated that a “Memorandum of Understanding” will be executed by the court, the Office of Dispute Resolution, and the mediation centers concerning the

mechanics of the referral process, identification of mediators, and other procedures. There is a need for uniformity and clarity, and the MOU will hopefully provide it.

The approved mediators will have their annual workshop on July 30, 1999 to review operation of the program and learn more mediation skills and techniques. This meeting provides mediators an opportunity to compare experiences and to have input on identifying areas for changes to the program. The skills portion of the workshop is being conducted by an experienced mediator who is the director of a private mediation service in this region of the country.

The third "Fed/Med" training will be held in the fall of 1999 for attorneys to be trained in the methods of interest-based mediation and become approved mediators for the court. This is the first federal mediation training on the new, extended training requirement of 24 hours, as opposed to the 15 hours previously required by the Plan. The trainer, like those in the past, is affiliated with the Center for Public Resources, a consortium of organizations devoted to alternative dispute resolution based in New York City. It is anticipated that with more attorneys becoming approved to mediate, there will be a greater ability to "match" the mediator's individual legal experience with the particular kind of case being referred.

It is expected that the passage of the Alternative Dispute Resolution Act of 1998 may impact this program somewhat, but just how that may be remains to be seen. The court appears to be essentially in compliance with the Act through the existence and development of this program, but until more specific regulations or guidelines are adopted by the Administrative Office of the United States Court, it is unclear whether any substantial changes will be required.

Also planned in 1999 is revision of the evaluation forms used and an extension of their use to private mediations. This will hopefully permit a more complete evaluation of the program and some comparison as between private and centers' mediations. Accompanying this change will also be a computerized mechanism in the clerk's office to facilitate record keeping.

Finally, 1999 will bring the creation of the first "renewal" application forms for mediators who were approved in 1995. This will be our first experience in evaluating individual mediators who wish to be reapproved, beginning in 2000.

APPENDIX

1. EVALUATION QUESTIONNAIRES

2. PARTIES' COMMENTS RECEIVED ON EVALUATION FORMS

The evaluation forms were distributed only to participants in the mediations held through the auspices of the mediation centers. The comments received from the parties, including insurance company claims representatives, appear below:

In Cases That Did Settle During the Mediation Session:

"Very objective approach--positive approach--good attitude--very interested in assisting clients to develop a solution--"

"Lawyer did not provide evaluative comments--just active listening."

"Mediator spent too much time in opening comments and questions about defendants' position; ran risk of both sides going into defensive posture and not getting into actual settlement talk."

"I was very impressed with the professionalism in both mediators; friendly, pleasant to talk to. Thank you!"

"I believe this is an excellent, effective process at achieving resolution."

In Cases That Did Not Settle During the Mediation Session:

"Mediation is best when the mediator will explain the downside of each party's case."

"Why did we meet? As Mr. _____ referred an early inquiry to defendants to cancel."

"I wished that the mediators were one a lawyer and another one was regular citizen to find out how my case would have been seen from both points of view (legal and jury)."

3. ATTORNEYS' COMMENTS RECEIVED ON EVALUATIONS

As above, these are comments made immediately following the mediation session(s) in only the cases referred through the mediation centers.

In Cases That Did Settle During the Mediation Session:

_____ Mr. _____ and Mr. _____ worked very hard to assist my clients as participants, not just as litigants. My clients and I were impressed with their professionalism and dedication to this process. Thank You.”

In Cases That Did Not Settle During the Mediation Session:

“Hopefully will help reach a settlement later even though no agreement reached at the actual time of mediation.”

“I thought both mediators did a nice job. They were fair to both sides. The parties were simply too far apart on the views of the case and each of the parties are too distinct to reach a successful conclusion at this time.”

“Mediation was not worthwhile in this case because defendant did not have coporate representative present.”

“This is considered just a start.”

“Mediator did a good job. Parties views are significantly different. Probably not an appropriate case for mediation.”

“The mediators were mindful of the amount of time, energy, and effort [that] was necessary for the parties to meet. They facilitated open discussion very well.”

“It was very good to have a mediator who knew the law!”

“I would have preferred more of an advisory role to force the parties to recognize their weaknesses/strengths—at least with parties separately. I would like to hear a third party (independent) view of the case to make sure we are being realistic.”

“_____ was a very good mediator.”

“The defense made no meaningful settlement offer--the process was thereby thwarted.”

4. LAWYERS' COMMENTS RECEIVED IN FOLLOW-UP SURVEY

The survey requested attorneys to comment on the effects of the mediation in their case, as well as their views on "interest-based" mediation. Those comments follow.

Centers: "Because Of":

"Case settled when the insurance company realized it had substantial exposure. I do not believe the insurer understood its risk until the mediation. . . . The mediation did not settle because the mediator believed he lacked the authority to make the parties really give their respective settlement positions. The insurance company's best offer at the mediation was \$3,900. Shortly after we walked out, we received a call from the partner of the attorney who represented the insurer at the mediation. He apologized for the way the mediation went, and the case settled after a few days. This could have been avoided with a stronger mediator."

"Some progress was made towards settlement. The parties also understood each other better. When a later opportunity for settlement arose, the case settled quickly. . . . Meeting allowed the parties to assess the factors that drove the other party's demands."

"The parties were able to discuss the strengths/weaknesses of their respective cases. Parties arrived at 'bottom dollar' numbers. There was \$5,000 difference in the parties' positions at the end of the mediation. . . . It made both parties more clearly understand the other's position and the strengths and weaknesses of their own cases."

"I believe the mediation was successful in this case because it allowed counsel for the United States to personally interact with the plaintiff. Although the mediation did not result in an immediate settlement, mediation did allow the plaintiff to become more comfortable with defense counsel which facilitated settlement in this matter. The mediation was important in allowing the plaintiff to understand that the defendant was attempting to reach a fair and just settlement in this case. Plaintiff's frustration from dealing with the Dept. of Veterans Affairs was alleviated because the plaintiff could obtain more direct answers from agency counsel and from counsel for the United States which I believe had a direct bearing on the eventual settlement of this case."

Centers: "In Spite Of":

"A four-hour mediation session was a 'waste of time.' The mediators assigned to the case knew little or nothing regarding discrimination laws which were at the center of the dispute. Three hours were spent educating the mediators. The mediators did little but listen. Mediators assigned to case should have some

understanding of the issues which impact the type of case involved in the mediation proceedings. Without such knowledge, or even an understanding of what is involved in trying a case in federal court, a mediator has no ability to point out strengths and weaknesses of the parties' positions and other factors which impact a decision to settle a case.

"I thought the location of the mediation center in a lawyer's office was curious. The mediator assigned to the case was a lawyer from the firm which provided the center its space. While this is not always a problem, there must be a tendency to utilize a lawyer from that firm regardless of whether they are appropriate mediators for the type of case being mediated.

"The whole process was a negative one. I think that opposing counsel would agree."

"I discovered (after mediation) facts about the plaintiff company that revealed association with criminal enterprise. Plaintiff's attorney recognized the problems this created for his client and dismissed the lawsuit (with a nominal settlement).

Centers --"No Effect":

"Brought range closer together. The mediation caused both parties and legal counsel for both parties to sit down in one room and air differences, arguments and positions. But mediation at the local mediation center did not seem to me to be very effective in comparison to court-supervised settlement conferences where the magistrate judges usually engage in a candid assessment of exposure and issues in separate meetings with parties, and ask difficult questions designed to get the parties to more critically analyze their positions and settlement posture. Court supervised settlement conferences are much more effective. Do not need a mediator to merely shuttle proposals back and forth between parties. I can appreciate why a number of local lawyers in employment area will not use the mediation center for mediation."

"Mediation in this case was ineffective simply because the other side refused to participate once the mediation started. It wasn't a problem with the process."

"Plaintiff and his attorney had an unreasonable expectation at mediation which was done early in this case. After extensive discovery, Plaintiff accepted the offer we had made six months earlier at the mediation. . . . I think mediation is a great tool for resolving cases. The ability of the mediator is a significant factor in whether a case is settled."

"I believe the mediation did contribute to the ultimate settlement. . . . It narrowed the issues and fine-tuned the settlement discussions."

Private -- "Because Of":

“While the case did not settle during the mediation, I believe the mediation had a beneficial effect in that the parties were able to meet each other and share their respective positions. The case settled several months after the original mediation and, in my judgment, the mediation did cause both parties to ‘soften’ their respective positions, thereby making the case easier to settle at a later date. . . . In comparing private mediation versus the mediation that was conducted by the Court [in a different case of the same type involving this attorney], I believe the latter was more effective because bringing the parties (and counsel) into chambers and into the courthouse has a somewhat sobering effect on the process, making it more likely that the case will be resolved during the mediation. . . . As out-of-town counsel, my practice is of course limited in your jurisdiction. Nevertheless, I am a firm believer in the mediation process and hope that the ADR program continues. I believe mediation is particularly effective in employment discrimination cases where oftentimes, the parties need to ‘vent’ and once that process has occurred the case is more likely to settle.”

“The initial mediation was useful to discuss realistic case values which were initially rejected. After passage of time, the parties began to accept the case values discussed initially and the case was resolved by a subsequent mediation with the same mediator, John Miller.”

[same case as above]: “Due to the unyielding positioning of both parties, the [first] mediation was not successful and was adjourned after approximately 1 ½ hours. As the case progressed and the deadlines for the taking of depositions approached, the parties realized that another attempt at mediation might be fruitful, and . . . at the second mediation, the case was resolved. The mediation process, although somewhat drawn out in this particular instance, proved to be quite beneficial. Each party was made aware of the various weaknesses and strengths of their case. The additional facts which came to light in the first mediation had a profound effect upon the attitudes and positions of the parties as the second mediation progressed. Both sides were able to re-evaluate the value of the case and come to a workable solution. Mediation definitely had an impact upon the ability of the parties to reach a settlement.”

“The mediator was very good at identifying the process and allowing the parties to see what the litigation process could lead to. It was good to get the parties face to face. Although neither party came to the level on the day of the mediation it definitely helped.”

[same case as above]: “Mediation resulted in a firm demand and offer. We simply fine-tuned what we accomplished at mediation. . . . Mediation allowed my clients to better understand the plaintiff’s position and that resulted in a shift in my client’s settlement position from what it had been prior to mediation. . . . In this case, ‘interest-based’ mediation was useful, because the parties had an ongoing relationship that would continue after the case, and therefore had interests other than money. However, interest-based mediation, in my experience, is useful in a relatively small number of cases. In most cases, which have by definition wound

their way through administrative agencies and/or the courts, by the time of mediation, the real and only interest is money. Interest-based mediation, as I understand it, tends to explore the parties' real interests in resolving conflict. While that may be effective in certain cases involving ongoing relationships (employer/employee; student/administrators; neighbors) it tends to ignore the fact that a lot of these cases really involve money. I have rarely had difficulty in reaching agreement in mediation on non-monetary issues; reaching agreement on money is another matter. I went through the Federal Court Mediation Training and felt it focussed on the interest-based model of mediation almost exclusively, which I don't believe is always the most effective approach. Those mediators who are most in demand follow an interest-based approach when necessary, but recognize that it's not always the most effective approach and isn't suited to every case."

"It helped put everything in perspective. We found out how intractable the plaintiff was. My client, over my objection, settled! It was a case that had liability issues."

[same case as above]: "The parties were able to more clearly assess the position of the other party due to mediation. Settlement of this case was always about money and both sides were intransigent in their positions despite the best efforts of counsel. . . . I believe that this is a very valuable process and would have been effective at the first stage of mediation had the parties been a little less vested in their respective positions. I believe the mediator was extremely skilled and think this was a valuable process."

[same case as above]: "Mediation helped to 'close the gap' as such. Plaintiff became more realistic about value of the case."

"Although the case was not settled during mediation, it was settled as a result of the mediation. One county commissioner attended the mediation with me and had full settlement authority. However, she still wanted to go back to the other commissioners before final settlement. . . . I think mediation is beneficial especially in employment cases which many times may have resulted in lawsuits because of poor communication between the employer and employee. In our case I think it may have been beneficial for the employee to see that we do take these cases seriously and that county commissioners are concerned about their employees."

"Settlement is sometimes an ongoing process. Often the case doesn't settle at the mediation but enough progress is made so that the case eventually settles. . . . I believe [interest-based mediation] is a good concept which works best if both parties are truly interested in settling the case."

Private--"In Spite Of":

"No effect to mediation because defendant refused to negotiate. . . . The failure of the mediation caused the plaintiff to harden his position and hurt settlement options."

However, in the past I have found mediations to be an expeditious way of exploring settlement in lawsuits.”

[same case as above]: This was a slow and painful process. The mediation helped bring the parties within striking distance of a settlement. . . . [Interest-based mediation] is a useful concept but needs cooperation from both sides to be successful.”

Private–“No Effect”:

“Insurance claims adjuster and defense attorney arrived at the mediation conference with the attitude that they were not about to change their position one iota. The conference ended with the question from some being, ‘Why did we come here?’”

[same case as above]: “I believe the mediation hearing and the mediators opinions encouraged the plaintiff to become more reasonable in her demand. (The defendant’s offer at mediation was ultimately the settlement figure, as I recall). . . . I am luke-warm toward mediation unless very capably done. John Miller is good. You [magistrate judges] are excellent.”

[same case as above]: “My client and her husband gained realistic insights that I and co-counsel had been unable to communicate.”