

MEDIATION PLAN

FOR THE

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

(As amended, December 1, 1997)

1. Purpose. It is the purpose of the court to provide mediation services with resultant savings in time and expenses to litigants and the court without sacrificing the quality of justice to be rendered or of the right of the litigants to trial in the event a voluntary settlement satisfactory to the parties is not achieved through the mediation procedure.

2. Designation of Civil Cases for Mediation. Any district, magistrate, or bankruptcy judge may by order refer a case to mediation when the judge finds that the nature of the case and the amount in controversy, together with the information available regarding the possibility of settlement make resolution of the case by mediation a practical possibility within the

purposes noted above. Such cases may include, but are not limited to:

- (a) Employment cases in which the parties have not previously engaged in conciliation proceedings;
- (b) Cases involving policy or practice questions that lend themselves to negotiation regarding actions or procedures to be taken in the future;
- (c) Cases in which the parties are involved in an on-going relationship which will continue after the resolution of the litigation;
- (d) Cases in which the litigation costs are high in relation to the amount in controversy;
- (e) Cases in which the amount in controversy is determined to be less than \$100,000; and
- (f) Cases to which the United States is a party and the parties to the litigation have not previously engaged in negotiations, work-out arrangements, or similar efforts.

3. Procedure for Referral to Mediation.

- (a) As soon as practicable after all defendants have answered the complaint, the court shall, after conferring with the parties and/or counsel by mail or otherwise, determine whether to designate the case for mediation.

(b) At such time as the judge decides to refer the case to mediation, he or she shall enter an order which shall may stay all further proceedings in the case, pending the outcome of the mediation, and refer the case to one of the regional mediation centers established under the Nebraska Dispute Resolution Act, or, alternatively, to a private mediator or mediation service selected by the parties.

(c) The order of referral shall require all parties or their fully authorized representatives, and counsel, to attend the mediation session scheduled by the mediation center. Failure of a party, an attorney, or a fully authorized representative of a party to attend the mediation session shall be cause for the imposition of sanctions against the offending party and/or counsel.

(d) Any party may file an objection to the reference of the case to mediation, not later than seven working days following the filing of the order described in subparagraphs (b) and (c), above. The objection may: challenge the reference in toto if the party views the dispute as wholly inappropriate for mediation; challenge some lesser aspect of the reference, such as particular substantive matters or procedure; or alternatively, state that the parties have, themselves, selected a mediator other than one to be obtained through the auspices of the Nebraska Office of Dispute

Resolution to which the mediation should be referred.

The objection shall set forth the bases for the objection and in addition, if it is directed to some specific substantive matter or procedure, shall propose alternative provisions in the order which would, if adopted, resolve the objection to the satisfaction of the objecting party. Any such proposal shall first have been discussed in person or by telephone with opposing counsel or parties, unless such a discussion is shown to be impossible. Unless all parties are shown to have agreed to the objector's proposal, as soon as practicable after the filing of an objection, the judge shall confer with counsel and/or the parties in an attempt to resolve the objection so the mediation can take place. Such resolution may include making the subject of the objection itself a subject for mediation as a preliminary matter during the mediation session. If such conference resolves the disagreement raised by the objection, the judge shall enter an amended order in accordance with that resolution. If after such conference the judge is unable to resolve the objection to facilitate the mediation, he or she shall withdraw the order referring the case to mediation. During the pendency of the objection, the order of reference shall be automatically stayed.

4. Procedure for Mediation.

- (a) Within twenty days of the entry of the order of referral, counsel for the parties shall confer with the staff of the mediation center to secure a date for the mediation session. The mediation center shall determine the date, time and place of the mediation session, taking into consideration the convenience of all persons attending.
- (b) The mediation center shall select a mediator from among those mediators who are qualified to serve as the mediator in the referred case. Such mediator shall meet all criteria required to qualify as a mediator under the Nebraska Dispute Resolution Act, and, in addition, shall meet the criteria set forth in paragraph 6, below.

The mediator selected may be disqualified if found to have a conflict of interest or if, for any other reason, one or more of the parties establishes that the mediator cannot be expected to be impartial. Any request for replacement of the selected mediator shall be made to the mediation center. The mediator may, prior to the mediation session request or require counsel and/or the parties to supply him or her with information about the case, including material documents, exhibits and statements concerning the

dispute and any prior attempts to resolve it. The parties may be required to engage in some settlement negotiations prior to the mediation session and to report to the mediator on such negotiations.

(c) The mediation session shall be held no later than sixty days following the entry of the order of referral, unless all parties agree to a continuance, in which case the mediation session shall be held no later than ninety days following the entry of the order of referral. At the mediation session counsel for the parties and the parties themselves may be required to present information reasonably necessary for the mediator to understand the issues presented and the interests of the parties in settlement.

(d) The mediator shall conduct an orderly settlement negotiation with the parties and their counsel, identifying issues, generating options, and proposing solutions to the dispute. The mediator shall be impartial and shall not express his or her own opinions or make any determination or recommendations as related to the case. The mediator may discuss with counsel and the parties their (i.e. parties' and counsel's) views on the likelihood of success at trial, their views on the amounts of any possible or expected recovery, their assessment of strengths and weaknesses of each side's

legal positions, and their assessment of each side's non-legal interests applicable in the dispute. The mediator may, if qualified, impart information to counsel and the parties concerning similar cases, may question counsel and the parties concerning any of these subjects, and may otherwise encourage counsel and the parties towards settlement. The mediator shall not give legal advice, nor disclose his or her own opinions on the merits of the claims or the "value" of such claims if the case were to be tried, but may provide assessments of the negotiations as they proceed and may recommend to the parties and counsel that they consider offering proposals that address particular interests which, in the mediator's opinion, hold promise for culminating in an agreement. Except as may be specifically provided herein, the mediation session shall be conducted in accordance with the Nebraska Dispute Resolution Act, Neb. Rev. Stat. §§25-2901, et. seq., as existing at the time of the mediation proceedings.

(de) The mediation session(s) constitute settlement negotiations. Notwithstanding the provisions of Rule 408, Fed. R. Evid., all statements made by the parties relating to the substance or merits of the case, whether written or oral, made only during the course of

the mediation proceeding shall be deemed to be confidential and shall not be admissible in evidence for any reason in the trial of the case, should the case not settle. This provision does not preclude admissibility in other contexts, such as pertaining to a motion for sanctions regarding the mediation.

(e_f) Within five working days of the conclusion of the mediation process, the mediation center shall report to the clerk of the appropriate court whether the case has been settled, whether a partial resolution has been reached, and whether the fees for the mediation have been paid by the parties responsible for them, and if not, the amount of unpaid fees and the responsible party or parties. Information about the substance of the parties' agreement shall not be provided without their consent.

(f_g) The mediator shall also report to the court any actions or omissions by any of the participants in the mediation which, in the opinion of the mediator, may violate the terms of the mediation referral order or this Plan. Such report shall be provided in camera to the judge who signed the mediation referral order, or, in the event that judge is to preside over a nonjury trial of the case, to another judge designated by that judge or by the Chief Judge. If the judge to whom the

report is given concludes that inquiry should be had
into whether the reported actions or omissions should
result in sanctions, he or she may order further
proceedings for that purpose, including an evidentiary
hearing if necessary, and enter appropriate orders
effectuating the purposes of this Plan; any related
pleadings filed or proceedings held shall be in camera.

(g) In the event the case has not settled, the clerk shall notify the assigned district, magistrate, or bankruptcy judge for the purpose of the entry of an order restoring it to the active docket of the court, including trial.

(i) In the event the mediation fees, or some portion thereof, have not been paid, the clerk shall note such fees, and such fees shall be included in the computation of any judgment entered in the case, unless the clerk has been notified by the mediation center prior to the entry of judgment that such fees have been paid.

5. Fees for Mediation. The cost of the mediation service shall be borne by the parties to the mediation session at the rate established in conjunction with the mediation center, not to exceed \$100.00 per hour total, which can be divided equally or on some pro rata basis as decided by the parties. At the conclusion

of the mediation proceeding the mediation center shall present a payment request to the parties attending and their counsel. In the event one or more of the parties is proceeding in forma pauperis, the mediation fees of that party may, upon proper application and approval under NELR 67.4, be paid from the Federal Practice Fund, unless the mediated settlement includes payment of that party's mediation fee by another party.

6. Mediators; Qualifications.

(a) The clerk of the district court shall create a list of persons who have applied and meet the requirements to serve as mediators under this Plan. A current list of such persons shall be maintained in the offices of the clerk and shall be made available to counsel and the public upon request.

(b) An individual may serve as a mediator if he or she has qualified as a mediator under the requirements of the Nebraska Dispute Resolution Act, and, in addition:

(I) is an attorney in good standing in the state of Nebraska and in this court; and

(ii) has been admitted to practice law in any state for at least five years; and

(iii) has, prior to receiving the training required by the following subparagraph, demonstrated by his or her past experience

practicing law or otherwise sufficient proficiency
in litigation, negotiations, or dispute resolution
that in the judgment of the Mediation Subcommittee
of the Federal Practice Committee or the Nebraska
Office of Dispute Resolution he or she is able to
command respect and credibility in the mediation
process; and

(iv) has satisfactorily completed not fewer than 15 24 hours of specialized training in mediating cases in federal court, and satisfactorily completed such additional supplemental training as required by the court; and

(iv) has completed at least three mediations supervised by an experienced mediator; and

(vi) agrees to accept cases referred pursuant to this Plan and to abide by the provisions of this Plan and the orders of the court, including the limitations on fees, in such cases; and

(vii) agrees to act as a co-mediator in cases referred pursuant to this plan.

(c) A person desiring to serve as a mediator shall complete an application provided by the clerk of the district court which states in detail the applicant's experience as a mediator, including mediating disputes which were, at the time of the mediation, in litigation; the applicant's

training; and the subject matter areas in which the applicant claims particular expertise or in which the applicant has significant experience. In addition, the applicant shall, upon acceptance of the application by the court, take the oath or affirmation below:

"I, _____, do solemnly swear/affirm that I do meet the qualifications required by the Mediation Plan for the United States District Court for the District of Nebraska, and that I will promptly, faithfully and impartially discharge the duties of mediator in accordance with the Mediation Plan for the United States District Court for the District of Nebraska, applicable laws of the State of Nebraska, and the rules and orders of this court."

Approval shall be effective for a period of five years, and reapplication shall be required after each five-year approval period. Subsequent applications shall require satisfactory performance in mediations referred pursuant to this Plan, as shown by the evaluation(s) submitted pursuant to paragraph 8 of this Plan. No fee shall be charged by the clerk for initial applications; however, the clerk may charge a nominal fee to cover administrative expenses for processing subsequent applications. The clerk shall promptly provide to the Nebraska Office of Dispute Resolution the names and addresses of mediators who have

been approved pursuant to this plan, together with the expiration date of the approval period.

The court may require a mediator to attend additional training or rescind or suspend its approval of a mediator for good cause, after affording the mediator an opportunity to respond to any claim or request that such action be taken.

(d) When exceptional circumstances warrant, an individual who does not meet the requirements of subparagraphs (b) and (c) of this paragraph may be approved as a mediator in a particular case with the consent of the parties and the approval, by order, of the judge.

(e) Two co-mediators may be assigned in a particular case in accordance with the joint request of the parties or the request of the mediation center or, and the approval, by order, of the judge, alternatively, at the discretion of the mediation center to which the case has been referred pursuant to this plan. Only one of such co-mediators need meet the criteria in (b) above, but both must be qualified under the Nebraska Dispute Resolution Act.

7. Mediators; Requirements. An attorney-mediator shall meet the requirements of applicable ethical standards established by the Nebraska Office of Dispute Resolution and in addition, shall:

- (a) clearly inform the parties of the attorney-mediator's role as a mediator, including the confidentiality of the process, and of the fact that there is no attorney-client privilege or relationship between the attorney-mediator and any party;
- (b) assist the parties in defining the issues of the dispute;
- (c) advise and encourage unrepresented parties to seek independent legal advice before executing any settlement agreement drafted by the attorney-mediator;
- (d) not have personally represented any of the parties before in any matter,;
- (e) not be, and not have been, affiliated with any firm or professional corporation or association which has represented any of the parties in any matter during the five years preceding the entry of the mediation referral order unless, after full disclosure of such representation, the parties and counsel agree to the mediator presiding at the mediation (For purposes of this provision "parties" includes insurance companies involved in the dispute being mediated);
- (ef) not have any financial or other interest of any kind in any organization or entity which is a party or related to a party to the case;

(fg) not hold any position, interest, or relationship to any party which might reasonably provide any basis for the mediator's impartiality to be questioned;

(gh) not hold any personal interest, bias, or prejudice for or against any party or any party's attorney(s);

(hi) not represent any of the parties for a period of at least six months following the conclusion of the mediation, but after that time period may represent one of the parties **only in a** matters that **is** are clearly distinct from the mediated issues;

(ij) withdraw as mediator if any of the requirements of this paragraph is not met or if any of the parties so requests and makes a showing that one or more of the requirements in paragraph 6(b), above, or any of the conditions of this paragraph, no longer is satisfied. Upon withdrawal the attorney-mediator shall not act or continue to act, in any capacity, on behalf of any of the parties in the matter that was the subject of the mediation.

Nothing in this paragraph restricts or applies to the activities of attorneys representing **clients** parties in the case being mediated **negotiation or mediation process**.

8. Evaluation. At the conclusion of the mediation process for each case the clerk of the district court shall, in cooperation with the mediation centers, measure the effectiveness of the

mediation program in terms of satisfaction of the parties and the attorneys involved, as well as savings to the parties in time and money, in comparison to litigating the case to ultimate disposition. The clerk shall report to the judges of the court on relevant statistics and evaluative measures regarding cases referred to mediation, on or about the second January 1st following implementation of the mediation plan, and annually thereafter. Such reports shall include copies of related correspondence received from parties, attorneys, mediators, mediation center personnel, or other interested persons concerning the mediation program. Copies of the report shall be delivered to the members of the Federal Practice Committee, which may further evaluate the program and propose changes to the judges in accordance with its findings.