MEDIATION PLAN
FOR THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

AS AMENDED
JUNE 7, 2022

1. Purpose.

It is the purpose of the court to encourage and facilitate mediation services to save litigants and the court time and expense without sacrificing the quality of justice to be rendered or the right of litigants to trial in the event a voluntary settlement satisfactory to the parties is not achieved through mediation.

2. Designation of Civil Cases for Mediation.

Any district, bankruptcy, or magistrate 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 ongoing 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.

Cases may be referred for mediation to mediators formally approved by this court, or to mediators not formally approved by this court, or to private mediation services, or through mediation centers affiliated with the Nebraska Office of Dispute Resolution (hereinafter, "mediation centers").

3. Procedure for Referral for Mediation by an Approved Mediator.

(a) The clerk of the court shall make available to counsel, the parties, and the public the names and addresses and other appropriate information of those attorneys who, as a result of training, experience, and compliance with the requirements of this Plan, have been approved to mediate cases in this court. The list shall be made available on the court's public web page, together with other appropriate information concerning the mediators' training and experience as mediators.

(b) When a case has been selected by a judge as possibly appropriate for mediation, he or she shall contact counsel and any parties proceeding pro se by mail or otherwise to suggest mediation and provide information about this Plan. Alternatively, counsel and such parties may confer with one another regarding mediation. If any of the parties is unable to pay the expenses of mediation, counsel for that party, or the party if proceeding *pro se*, may apply to the judge for approval to incur mediation expenses reimbursable from the Federal Practice Fund. Such application shall be made in accordance with the Amended Plan for the

Administration of the Federal Practice Fund and the Federal Practice Committee; it may be made *ex parte* and *in camera* if disclosure of the application would compromise that party's negotiation strategy. If it is agreed that the case should be mediated, counsel shall select a mediator who is satisfactory to all parties and/or counsel. Counsel may also ask the court or any mediation center to designate an approved mediator.

(c) Once the mediator has been selected, counsel shall make arrangements for the mediation session in accordance with that mediator's procedure. Counsel shall then inform the referring judge of the name and address of the mediator who has been selected, the date of the scheduled mediation, and whether the parties prefer to stay progression of the case (including discovery deadlines, conferences, rulings on motions, and the like) pending the outcome of the mediation.

(d) At such time as the judge decides to refer the case to mediation, the judge shall enter an order ("Mediation Reference Order") which refers the case to the mediator selected by the parties, and may stay all further proceedings in the case, pending the outcome of the mediation, in accord with the agreement of the parties. The clerk shall send or otherwise provide to the mediator a copy of the Mediation Reference Order.

(e) The Mediation Reference Order shall require all parties or their fully authorized representatives, and counsel, to attend the mediation session scheduled by the mediator. 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.

(f) Any party may file an objection to the judge's reference of the case to mediation, not later than seven working days following the filing of the Mediation Reference Order. The objection may challenge the reference for any reason. 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 Mediation Reference Order. During the pendency of the objection, the Mediation Reference Order shall be automatically stayed.

4. Procedure for Mediation; Mediator Approved by this Court.

(a) In the event the mediator selected is found to have a conflict of interest or if, for any other reason, one or more of the parties establish that the mediator cannot be expected to be impartial, a request for replacement of the selected mediator shall be made to the opposing parties or counsel. If a replacement is not agreed to by all parties, the matter shall be brought before the referring judge.

(b) Prior to the mediation session the mediator may 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 settlement negotiations prior to the mediation session and to report to the mediator on such negotiations.

(c) The mediator shall conduct an orderly settlement negotiation with the parties and their counsel, helping the parties identify issues, generate options, and propose solutions to the dispute. The mediator shall be impartial. The mediator shall not give legal advice. The mediator may discuss with counsel and the parties their (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 discuss with counsel and the parties any of these subjects, and may otherwise encourage counsel and the parties towards settlement. The mediator shall not purposely disclose his or her own opinions on the merits of the claims, nor opine on the "value" of the claims if the case were to be tried. The mediator may, however, provide assessments of the process of the negotiations and may recommend to the parties and counsel that they consider offering types of 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.

(d) 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, however, such as pertaining to a motion for sanctions regarding the mediation.

(e) Within five working days of the conclusion of the mediation process, the mediator shall report to the clerk of the 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. No information about the substance of the parties' agreement nor about the negotiating positions of the parties during the mediation shall be disclosed without their consent.

(f) 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 Reference Order or this Plan. Such report shall be provided *in camera* to the judge who signed the Mediation Reference 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 *sealed or in camera*, respectively.

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

5. Fees for Mediation; Approved Mediator.

The cost of the mediation shall be borne by the parties to the mediation session at the rate negotiated by counsel and the mediator, plus mileage expenses if the mediator is required to travel. The fee shall be divided equally unless otherwise agreed by the parties. At the conclusion of the mediation the mediator or mediation center shall present a payment request to the parties attending and their counsel. In the event any of the parties is proceeding *in forma pauperis*, or is unable to pay that party's portion of the mediation fees and has applied for approval for payment of such fees from the Federal Practice Fund, that party may request the chief judge to approve the mediation fees in accordance with applicable local rules and the Amended Plan for the Administration of the Federal Practice Fund and the Federal Practice Committee, unless the mediated settlement includes payment of that party's mediation fee by another party. If the mediation expenses of such a party will be or have been paid by another party as part of the mediated settlement, counsel for that party shall so notify the office of the referring judge, who shall, in turn, so notify the clerk to remove the amount as a pending expense of the Fund.

6. Procedure for Mediation; Mediator Not Approved by This Court.

(a) In the event the parties and counsel choose to proceed to mediation before a mediator or other neutral facilitator (the "neutral") who has not been approved by this court in accordance with this Plan, they shall be requested by the court to proceed in good faith in accordance with that neutral's chosen procedures. The neutral may be requested by the court to distribute evaluation forms to counsel and the parties and to provide statistical information. This court may not, however, impose on such neutral the training, ethical, qualitative, or procedural requirements of this Plan; nor enforce the neutral's procedures through the use of sanctions or otherwise; nor approve, adopt, require, or prohibit any fee or mediation practice used by such neutral; nor enforce or assist in the enforcement of any contract for payment of fees.

(b) In the event that counsel choose to mediate or negotiate their case before such a neutral, counsel shall inform the assigned judge of the identity and address of the chosen neutral, the date of the mediation or negotiation, and whether they prefer that the case be stayed (including discovery deadlines, conferences, rulings on motions, and the like) pending the outcome of the mediation or negotiation. The judge shall enter a Mediation Reference Order which may stay the case from proceeding for some period of time until the mediation or negotiation has been completed, and otherwise provide for the referral to that neutral. The clerk shall send or otherwise provide a copy of the order to the selected neutral.

(c) When the procedure utilized by the parties and their selected neutral has been completed, plaintiff's counsel shall notify chambers of the completion of the mediation procedure and whether the case has settled. If the case has not settled, the referring judge shall reinstate the case to the active docket and enter an appropriate scheduling order.

7. Approved Mediators; Qualifications.

(a) 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 affirms that he or she:

(i) Is an attorney in good standing in the state of Nebraska and in this court;

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

(iii) Has either represented a client in at least five federal court cases, at least one of which has culminated in a trial that proceeded to verdict or judgment, OR represented a client in at least five trials to verdict or judgment in state courts;

(iv) Has demonstrated by his or her past experience practicing law or otherwise sufficient proficiency in litigation, negotiations, or dispute resolution that he or she is able to command respect and credibility in the mediation process;

(v) Has satisfactorily completed not fewer than 24 hours of specialized training in mediating cases in federal court, and satisfactorily completed such additional supplemental training as may be required by the court or has other comparable mediation experience; 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 in such cases.

(b) A person desiring this court's approval as a mediator shall complete an application provided by the clerk of the 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 re-application shall be required after each five-year approval period. Subsequent applications shall require satisfactory performance in mediations referred pursuant to 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 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.

(c) When exceptional circumstances warrant, an individual who does not meet the requirements of subparagraphs (a) and (b) 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.

(d) Two co-mediators may be assigned in a particular case in accordance with the joint request of the parties or the request of the mediator and the approval, by order, of the judge. Only one of such co-mediators need meet the criteria in (a) above, but both must be qualified under the Nebraska Dispute Resolution Act.

8. Approved Mediators; Ethical Requirements.

An approved mediator shall meet the requirements of applicable ethical standards established by the Nebraska Supreme Court, and 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);

(f) 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;

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

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

(i) 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 in matters that are clearly distinct from the mediated issues;

(j) 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 7(a), 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 8 restricts or applies to the activities of attorneys representing parties in the case being mediated.