

# **WESTERN DISTRICT OF TENNESSEE**

## **PLAN FOR ALTERNATIVE DISPUTE RESOLUTION in the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE**

Revised: March 1, 2014  
Effective: September 1, 2014

### **SECTION 1 – INTRODUCTION AND AUTHORITY**

#### **1.1 TITLE**

This is the Plan for Alternative Dispute Resolution in the United States District Court for the Western District of Tennessee (the “ADR Plan”).

#### **1.2 PURPOSE AND SCOPE**

- (a) Purpose. The United States District Court for the Western District of Tennessee (the “Court”) adopted this ADR Plan on March 1, 2014 (the “Effective Date”), to make available to civil litigants court-administered ADR interventions and processes designed to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation, without impairing the quality of justice or the right to trial.
- (b) Scope. This ADR Plan applies to civil actions pending or commenced on and after the Effective Date, except as otherwise indicated herein. The ADR Plan supplements this Court’s Local Rules of Civil Procedure, which shall remain in full effect for all cases.
- (c) Magistrate Judge Consent Cases. In cases where the parties have consented to jurisdiction by a Magistrate Judge under 28 U.S.C. § 636, the Magistrate Judge shall have the same powers as the District Court Judge originally assigned to the case.
- (d) Plan Administration.
  - (1) Staffing. The Court will utilize its current staff to assist in implementation of the ADR Plan.
  - (2) ADR Information and Guidelines. Further information about the ADR Plan is available at <http://www.tnwd.uscourts.gov> and also at the Court Clerk’s office.

## **SECTION 2 – OVERVIEW**

### **2.1 REFERRAL TO ADR**

- (a) New Cases. All civil cases filed on and after the Effective Date of the ADR Plan shall be referred automatically for ADR. Notice of the ADR requirements will be provided to all parties immediately upon the filing of a complaint and answer or a notice of removal. ADR intervention will be scheduled at the Rule 16 scheduling conference. Note: cases assigned to the administrative track and the pro se prisoner track, as defined by LR 16.2(b)(1) and (2), are exempt from automatic ADR referral.
- (b) Pending Cases. The assigned Judge on any pending civil case may, *sua sponte* or at a status conference, issue an order referring the case for ADR. The order shall specify a date by which the ADR intervention is to occur.

A pending case may also be referred for ADR by stipulation of all parties. Stipulations shall be filed and shall designate the specific ADR intervention the parties have selected, the time frame within which the ADR process will be completed and the selected Neutral. Stipulations are presumed acceptable unless the assigned Judge determines that the interests of justice are not served.

### **2.2 RELIEF FROM ADR REFERRAL**

- (a) Opting Out Motions. Any party may file, with the assigned Judge for that case, a motion to opt out of, or for relief from, ADR.
- (b) Motion. Opting Out Motions must be made within fourteen (14) days from (i) the date of the Rule 16 scheduling conference in new cases, or (ii) the date of a ADR referral order in pending cases.
- (c) Criteria. Opting Out Motions shall be granted only for good cause shown. Inconvenience, travel costs, attorney fees or other costs shall not constitute good cause. A party seeking relief from ADR must set forth the reasons why ADR has no reasonable chance of being productive.
- (d) Judicial Initiative. The assigned Judge may, *sua sponte*, exempt any case from the Court's ADR Plan.

### **2.3 VIOLATIONS OF THE ADR PLAN**

- (a) Report of Violation. A Neutral may report to the assigned Judge any failure to attend an ADR conference or to substantially comply with the ADR Referral Order.
- (b) Proceedings and Sanctions in Response to Report of Violation. Upon receipt of such a report, the Court may take whatever actions it deems appropriate, including issuing an

order to show cause why sanctions should not be imposed. Show cause hearings shall be conducted on the record, but under seal. If sanctions are imposed, objections thereto and any other comment thereon shall be filed with the Court within fourteen (14) days from the date of the notice of sanctions and contemporaneously served on all other counsel, unrepresented parties and the Neutral.

## **2.4 EVALUATION OF THE ADR PLAN**

The Courts ADR program will be evaluated as needed. Neutrals, counsel and parties shall promptly respond to any request from the Court for an evaluation of the ADR Plan. Responses will be used for research and monitoring purposes only. The sources of specific information will not be disclosed to the assigned Judge or in any report.

## **SECTION 3 – NEUTRALS**

### **3.1 NEUTRALS**

- (a) Neutral Panels. The Court shall maintain panels of Neutrals to serve the various interventions and processes under the ADR Plan. Membership on any panel is a privilege, not a right. The Court shall have the authority to establish qualifications for Neutrals, monitor their performance and withdraw any Neutral from a panel. Applications are available at the Court's website and from the Clerk's offices in Memphis and Jackson.
- (b) Private Neutrals. The parties may select a Neutral who is not a member of the Court's panel. Such selections are presumed acceptable unless the assigned Judge determines that the interests of justice are not served.
- (c) Qualifications and Training. The requirements for panel membership are specific to each intervention and process under the ADR Plan and are set forth in the corresponding sections below.
- (d) Oath. All persons serving as Neutrals shall take the oath or affirmation prescribed in 28 U.S.C. § 453.
- (e) Disqualification and Unavailability of Neutrals.
  - (1) Disqualification. A Neutral may be disqualified for bias or prejudice, pursuant to 28 U.S.C. § 144. A Neutral shall disqualify himself or herself in any case in which a justice, judge or magistrate judge would be disqualified pursuant to 28 U.S.C. § 455, subject to the waiver provision of 42 U.S.C. § 455(e).
  - (2) Notice of Recusal. A Neutral who discovers a circumstance requiring disqualification shall immediately notify all counsel, unrepresented parties and the Court. A new Neutral shall be selected by agreement of the parties or, in the event the parties are unable to agree, by the Court.

- (3) Objections to Selected Neutral. Prior to the issuance of an Order designating a Neutral, the Court will contact the selected Neutral who will review the case for possible conflicts. Following issuance of the Court's Order, a party who believes a disqualifying conflict exists should first confer with the Neutral. If the matter is not resolved by, for example, waiver or recusal, a motion and supporting affidavit shall be filed with the Court, within fourteen (14) days from the Court's Order, stating the facts and the reasons for the belief that a disqualifying conflict, bias or prejudice exists. In the event a conflict or other objection does not become apparent until after the ADR process has commenced, a motion for disqualification must be made at the earliest opportunity or the objection is waived.
- (4) Unavailability. A selected Neutral who later becomes unable to serve within the time period set forth in the Court's Scheduling or Referral Order shall notify all counsel, unrepresented parties and the Court. A new Neutral shall be selected by agreement of the parties or, in the event the parties are unable to agree, by the Court.

### **3.2 IMMUNITIES**

All persons serving as Neutrals in the Court's ADR Plan are performing quasi-judicial functions and are entitled to all the immunities and protections that the law accords to the performance of tasks integrally related to the judicial process, including settlement and alternative dispute resolution. See, e.g., *Mills v. Killebrew*, 765 F.2d 69 (6th Cir. 1985).

### **3.3 COMPENSATION OF NEUTRALS**

A Neutral's fees shall be shared equally by all separately represented parties, unless otherwise agreed by the parties or ordered by the Court.

## **SECTION 4 – APPROVED ADR PLAN INTERVENTIONS**

### **4.1 ADR INTERVENTIONS**

- (a) Options. The cases referred for ADR will proceed to Mediation. The parties, however, may also agree to pursue any further additional ADR options (e.g., arbitration) should they agree to do so.
- (b) Scheduling. The referral of a case to ADR does not delay or defer other dates established in the Scheduling Order and has no effect on the scheduled progress of the case toward trial.

## **4.2 SELECTING AN ADR INTERVENTION**

- (a) **New Cases.** Prior to the Rule 16 scheduling conference, counsel and any unrepresented parties shall confer about ADR as part of their discussion of “the possibilities for a prompt settlement or resolution of the case” pursuant to Fed. R. Civ. P. 26(f). Unless the parties agree to a different intervention (e.g., arbitration), it is presumed that they will participate in mediation. The parties shall attempt to agree upon a Neutral and, at the scheduling conference, shall be prepared to report on the outcome of their ADR discussion. The initial Scheduling Order shall include a deadline for the completion of ADR.
- (b) **Pending Cases.** In pending cases, all sua sponte referrals will be to mediation. Should the parties agree that a different ADR intervention is more appropriate to their case, they may submit a stipulation designating the specific ADR intervention selected, the time frame within which the ADR process will be completed and the identity of the Neutral. Stipulations must be filed within fourteen (14) days from the date of the ADR Referral Order and are presumed acceptable unless the assigned Judge determines that the interests of justice are not served.

## **4.3 MULTIPLE ADR INTERVENTIONS**

- (a) **Initial Intervention.** Generally, a first mediation session will be scheduled within twelve (12) weeks after the Rule 16 scheduling conference. The minimum duration for the first session is two (2) hours, but the parties are encouraged to spend additional time unless the Mediator agrees that additional time would not be productive.
- (b) **Additional Interventions.** If the initial mediation session is not successful in resolving the case, additional sessions or process will be scheduled as set forth below:
  - (1) **By the Mediator.** The Mediator will, in consultation with the parties, schedule subsequent sessions as needed to explore and evaluate the possibility of reaching a mutually acceptable resolution. It is anticipated that the parties will engage in at least two mediation sessions. Additional sessions must be conducted within the date for completion of ADR set forth in the Court’s Scheduling or Referral Order.
  - (2) **By Stipulation.** If, after the initial mediation session, the parties agree that an intervention other than mediation may be of benefit in resolving the case, they must submit a stipulation consistent with 4.2(b) and the stipulation will be presumed acceptable unless the assigned Judge determines that the interests of justice are not served.

#### **4.4 CONFIDENTIALITY**

Each of the interventions and processes under this ADR Plan shall be confidential as set forth in the corresponding sections below.

### **SECTION 5 – MEDIATION**

#### **5.1 DESCRIPTION OF MEDIATION AND ITS PROCESS**

Mediation, as detailed herein, is a flexible, non-binding, confidential process in which a qualified Neutral, the Mediator, facilitates resolution of the issues between the parties and assists with settlement discussions. Through various methods and techniques, the Mediator seeks to improve communication between the participants (parties, counsel, experts or whoever is included in the mediation); helps participants articulate their interests; helps participants understand the interests of the other participants, including their “opponent;” probes the strengths and weaknesses of each party’s legal positions; and helps generate and define options for a mutually agreeable resolution. The Mediator may engage in “reality checking,” but will not give an overall evaluation of the case unless requested by all the parties. The Mediator has no fact-finding or decision-making authority. The central tenet of mediation is that the parties find their own solutions, with the assistance of the Mediator. A hallmark of mediation is its capacity to go beyond traditional settlement discussions and explore creative outcomes responsive to the participants’ needs and interests. All parties and counsel are expected to participate in mediation in good faith.

#### **5.2 QUALIFICATIONS OF MEDIATORS**

- (a) Who May Qualify. Mediators may be attorneys or non-attorneys, with relevant experience. All Mediators, except Magistrate Judges, must successfully complete initial and periodic training as required by the Court. All Mediators, except Magistrate Judges, must have a minimum of forty (40) certified hours of training in the discipline of ADR. Nonattorneys must also complete a minimum of four (4) hours of training in federal court civil practice and procedure. To effectively assist ADR participants and the Court, Mediators must: • Be knowledgeable about civil litigation in federal court • Have strong mediation process skills and the temperament to listen effectively and facilitate communication between all participants and across “party” lines • Exhibit strong problem-solving skills and the ability to generate meaningful options to assist parties and other participants with settlement negotiations

#### **5.3 COMPENSATION OF MEDIATORS**

- (a) Mediators selected from the Court’s panel shall receive \$250/hour for the first two hours of the initial mediation session and up to two hours of preparation. Thereafter, such

mediators can charge the hourly rate agreed upon by the parties. Private Mediators selected pursuant to 5.4(b) are not subject to these compensation rates.

- (b) Mediators may require that counsel and/or parties sign an agreement confirming the terms of retention and compensation.
- (c) Mediator fees shall be divided equally among all separately represented parties, unless otherwise agreed or ordered by the Court.
- (d) At the scheduling conference, a party who has been granted in forma pauperis status may apply to the court to be relieved of his or her obligation to pay a pro rata share of the Mediator's fee, in whole or in part. While all other parties shall continue to bear their pro rata portions of the fee, the court shall enter an order following the scheduling conference addressing whether the in forma pauperis party is relieved of their obligation in whole or in part and, if necessary, the source of payment for that portion.
- (e) A party who has not sought in forma pauperis status, but is financially unable to pay all or part of the pro rata share of the Mediator's fee, may move for a waiver of the fee requirement on a form provided by the Court.
- (f) All Mediation Panel members must accept at least one pro bono case or one reduced compensation case per year if assigned. Additional pro bono service is encouraged.

#### **5.4 SELECTION OF MEDIATOR**

- (a) Mediator Panel List. The Court shall maintain a list of trained Mediators. Each Mediator shall provide to the Court information on his or her area(s) of expertise and compensation rates.
- (b) Private Mediators. The parties may select a Mediator other than from the Court's Mediator list. Such selections are presumed acceptable unless the assigned Judge determines that the interests of justice are not served.
- (c) Selection.
  - (1) The parties shall have until the date of the Rule 16 scheduling conference in which to select a Mediator confirm the Mediator's availability and file a stipulation regarding their selection. The Clerk shall send a copy of the ADR Scheduling and/or Referral Order to the Mediator.
  - (2) If the parties fail to agree upon a Mediator before or during the Rule 16 scheduling conference, the Court shall select a Mediator for the case from the Court's Mediator list and shall issue an Order notifying the parties of the Mediator's identity.

- (d) Magistrate Judges Serving As Mediators/Neutrals. The assigned Judge may, *sua sponte*, refer the parties to a magistrate judge for judicially conducted ADR. Likewise, the parties, for good cause shown, may move the assigned judge to refer the case to a magistrate judge for judicially conducted ADR.

## **5.5 SCHEDULING AND LOCATION OF MEDIATION**

- (a) Scheduling. Promptly upon being selected, the Mediator shall conduct a telephone conference, jointly or separately, with counsel and any unrepresented parties, to fix the date and place of the mediation.
- (b) Timing. Unless otherwise ordered, a first mediation session shall be conducted within twelve (12) weeks after the Rule 16 scheduling conference. In pending cases, mediation shall be conducted in accordance with the ADR Referral Order.
- (c) Location. The mediation session shall be held in the U.S. Courthouse or the Mediator's office, unless otherwise agreed.

## **5.6 MEDIATION MEMORANDUM**

- (a) Time for Submission. No later than seven (7) days before the scheduled mediation session, each party shall submit to the Mediator a written "Mediation Memorandum."
- (b) Prohibition Against Filing. Mediation Memoranda shall not be filed and the assigned Judge shall not have access to them. They shall be subject to the confidentiality of the mediation process and treated as a document prepared "for settlement purposes only."
- (c) Content of Mediation Memoranda. Mediation Memoranda must not exceed ten (10) doublespaced pages and shall:
  - (1) Identify by name and title or status: (A) All person(s) with factual knowledge and/or settlement authority, who, in addition to counsel, will attend the mediation as a representative(s) of the party; and (B) Any other person(s) (including an insurer representative) whose presence might substantially improve the effectiveness of the mediation or the prospects of settlement;
  - (2) Concisely describe the parties' claims and defenses, addressing the parties' views of the key liability issues and damages, and discussing the key evidence;
  - (3) State the relief sought in the case and the basis for monetary calculations;
  - (4) Describe the current status of the case, including the status of any motions made;
  - (5) Describe the history and current status of settlement negotiations, including offers and counteroffers; and



- (6) Provide any other information that might be pertinent to resolution of the case, including possible settlement options and alternatives. Parties should include, along with the Mediation Memorandum, copies of documents that are likely to make the mediation more productive or materially advance settlement prospects.

## **5.7 COMMUNICATIONS WITH THE MEDIATOR**

After receiving Mediation Memoranda and submissions pursuant to Section 5.6, the Mediator may request additional information from any party or participant. The Mediator, at his or her discretion, may also discuss the case in confidence and ex parte with counsel, parties and/or representatives. The Mediator shall not disclose any confidential communication, including the Mediation Memoranda and submissions, without permission.

## **5.8 ATTENDANCE AND PARTICIPATION**

- (a) Parties. All named parties and their counsel are required to attend the mediation session(s) in person unless excused under 5.8(e) below.
- (1) Corporation or other entity. A party other than a natural person (e.g. a corporation or some other entity or association) satisfies this attendance requirement if represented by one or more persons, other than outside counsel, who have authority to settle and who are knowledgeable about the facts and circumstances of the case and the claims being made.
- (2) Government entity. A unit or agency of government satisfies this attendance requirement if represented by one or more persons who have, to the greatest extent feasible, authority to settle, and who are knowledgeable about the facts of the case, the agency's or unit's position, and the procedures and policies under which the agency or unit decides whether to enter into proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual shall also attend.
- (b) Counsel. Each party shall be accompanied at the mediation session by the attorney who will be primarily responsible for handling the trial of the matter and/or is most familiar with the matter at that stage of the proceeding. A party who is proceeding pro se may be accompanied by one non-attorney whom the party relies on for support and/or assistance.
- (c) Insurers. Insurer representatives are required to attend in person if their agreement is necessary to achieve a settlement, unless excused under 5.8(e) below.
- (d) Other Attendees. The Mediator may require the attendance of any other individual who appears reasonably necessary for the advancement of communication and resolution between the parties.

- (e) Request to be Excused. Any person who is required to attend a mediation session may be excused from attending in person only after showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. Not less than fourteen (14) days before the date set for the mediation, a person seeking to be excused must submit a letter to the Mediator with copies sent to all other counsel and unrepresented parties, which states:
  - (1) All considerations that support the request; and
  - (2) Whether the other party or parties join in or object to the request. Any party opposing the request shall submit a written statement of opposition no less than seven (7) days prior to the mediation. The Mediator shall promptly make a determination as to the necessity of the person's attendance and may require personal participation, permit participation by telephone, or excuse the person's presence altogether. The Mediator's decision shall be final.
- (f) Participation by Telephone. A person excused from appearing in person at a mediation session shall be available by telephone or otherwise be available as the Mediator may direct.

## **5.9 THE MEDIATION SESSION**

- (a) The first mediation session shall be a minimum of two (2) hours. The parties may, and are encouraged to, extend the length of the session.
- (b) The mediation session shall be conducted in accordance with the process described in detail by the Mediator during the opening of the mediation. The process may include, as appropriate and necessary, the following: • Mediator "opening statement" and introduction to the process and session • An opportunity to present each party's positions, claims and concerns • Joint sessions with all parties participating • Various "caucus" sessions in which the Mediator meets with one or more parties and/or their counsel, as the Mediator deems appropriate
- (c) The Mediator shall have discretion to structure the mediation so as to maximize the benefits of the process.
- (d) Any communications to the Mediator during a "caucus" shall not be disclosed by the Mediator to any other party without permission.
- (e) The mediation session shall be informal, and conducted with civility.

## **5.10 CONFIDENTIALITY IN MEDIATION**

- (a) Confidential Treatment. Mediation is confidential and private. No participant in the mediation process or any portion thereof may communicate confidential information acquired

during mediation without the consent of the disclosing party. There shall be no stenographic or electronic recording, e.g., audio or visual, of the mediation process.

- (1) All written and oral communications made in connection with or during the mediation session, any positions taken and any views of the merits of the case formed by any participant, including parties, counsel and the Mediator, are privileged and confidential.
- (2) There shall be no communication between the assigned Judge or designated Magistrate Judge and the Mediator regarding a case referred for mediation.
- (3) No communication made in connection with or during any mediation session may be disclosed or used for any purpose including impeachment in any pending or future proceeding in the Court.
- (4) The confidentiality of information disclosed during mediation does not prohibit or limit:
  - (A) the Court from collecting information relative to evaluation of the ADR program;
  - (B) the Mediator from reporting a failure to attend an ADR conference or to substantially comply with the ADR Referral Order;
  - (C) the Mediator from filing “Mediation Certification” forms pursuant to 5.11;
  - (D) a party from seeking to enforce a settlement agreement;
  - (E) a party from disclosing the final resolution and settlement reached unless, in the interest of justice, the parties have agreed to the confidentiality of same; or
  - (F) a participant from making such disclosures as are required by law.

## **5.11 CONTINUED MEDIATION AND REPORTS**

- (a) At the close of the initial mediation session, the Mediator and the parties shall jointly determine whether it would be appropriate and helpful to then schedule additional mediation. Follow-up could include, without limitation, written reports, telephonic discussions, negotiations between the parties with the Mediator available for assistance, or further mediation sessions.
- (b) Within seven (7) days after the close of each mediation session, and on the form “Mediation Certification” provided by the Court, the Mediator shall report to the Court

the date the session was held, whether the case settled in whole or in part and whether any follow up is scheduled. The Mediation Certification shall be file

\*\*\*

## **UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE**

### **Mediation Plan for Pro Se Civil Cases with Parties Granted In Forma Pauperis Status**

Effective September 1, 2014  
*Revised May 2015*

#### **1. INTRODUCTION**

The United States District Court for the Western District of Tennessee (“Court”) has adopted this “Mediation Plan for Pro Se Civil Cases with Parties Granted In Forma Pauperis Status” (hereinafter referred to as the “IFP Mediation Plan” or within this document as the “Plan”), which governs the mediation of civil cases in which one or more litigants are Pro Se or unrepresented parties who have been granted In Forma Pauperis (“IFP”) status by the Court. Portions of the Court’s ADR Plan may be incorporated by reference into this Plan, but in the event that provisions set forth herein conflict with provisions in the ADR Plan, the provisions set forth herein prevail as to Pro Se IFP mediations. Additional information about the Plan can be found at the Court’s website (<http://www.tnwd.uscourts.gov>) or at the Clerk of Court’s Office.

#### **2. PURPOSE AND OVERVIEW OF MEDIATION**

The purpose the Plan is to provide Pro Se IFP parties with a court-administered dispute resolution process offering quicker, less expensive and simpler alternatives to continued litigation. Mediation is a flexible, non-binding, confidential process in which a qualified Mediator facilitates resolution of the issues between the parties and assists with settlement discussions. Mediators are trained and qualified to: seek to improve communication between the participants; help participants explain their interests; assist participants in understanding the interests of the other participants; probe the strengths and weaknesses of each party’s legal positions; and help generate and define options for a mutually agreeable resolution. The Mediator has no fact-finding or decision-making authority and unless requested by all the parties will not give an overall evaluation of the case.

### **3. APPLICATION AND ADMINISTRATION**

This Plan is applicable to all civil cases with Pro Se IFP parties, including cases in which District Judges or Magistrate Judges are presiding. This Plan will be administered by the Clerk of Court's Office in regard to formulation, implementation, general administration, the assignment of Mediators, the payment of mediation fees, and statistical reporting. All new civil cases with Pro Se IFP parties shall be automatically assigned to mediation at the Rule 16 Scheduling Conference unless they are (a) cases being processed on the Administrative Track or (b) Pro Se Prisoner cases. Pending civil cases with Pro Se IFP parties may also be assigned to mediation by the Court at any time. Pending civil cases with Pro Se IFP parties cannot be referred to mediation by joint stipulation, even if all parties agree thereto, without a signed court order approving the referral.

### **4. BEING EXCUSED FROM OR "OPTING OUT OF" MEDIATION**

Any party in a Pro Se IFP civil case may file with the Court a motion to be excused from (opting out of) the mediation process. Such motions must be filed within fourteen (14) days following the Rule 16 Scheduling Conference in newly filed cases or within fourteen (14) days following the date of the mediation referral order in pending cases. In order to successfully opt out of mediation, the party filing an opt out motion must demonstrate to the Court that there are good reasons for not requiring mediation and that the mediation process has no reasonable chance of being successful.

### **5. COMPLYING WITH MEDIATION REQUIREMENTS**

All parties and counsel are expected to participate in mediation in good faith. Once ordered by the Court and if no opt out motion has been granted, it is mandatory for all parties to comply with mediation orders and requests issued by the Court and/or the Mediator. A party's failure to comply will be reported to the Court and sanctions, including financial penalties or dismissal of the lawsuit, may be imposed on the noncomplying party. As there is a deadline to challenge or respond to such sanctions, any Pro Se IFP party sanctioned by the Court should contact the Clerk of Court's Office for additional information related to appealing such sanctions.

### **6. APPOINTMENT OF MEDIATORS**

The Court maintains a Mediation Panel ("Panel") from which Mediators are selected by the Clerk of Court's Office to serve in Pro Se IFP civil cases. The qualifications and appointment of individuals to serve as Panel members is set forth in §5 of the Court's ADR Plan. The selection process is randomized and is conducted in accordance with policies and procedures approved by the Court, and it has been structured so that every Mediator serves in roughly the same number of cases. In regard to Pro Se IFP civil cases, no private Mediators will be used; only Panel members are eligible for appointment to a Pro Se IFP civil case. Further, even if all parties agree

that a particular Mediator would be desirable, case assignments are conducted solely through the Clerk of Court's automated selection process.

## **7. CHANGING MEDIATORS**

Assigned Mediators may be disqualified for bias and prejudice in regard to issues and/or parties in a case. A Mediator may, at any point in a case, remove himself or herself upon recognizing an inability to administer mediation in a fair and impartial manner or if the Mediator recognizes a conflict of interest in the assigned case. Aside from this sort of self-imposed removal, any party who believes that the assigned Mediator has a conflict of interest or exhibits bias or prejudice in a case may file a motion requesting removal of the Mediator. This motion must be filed within fourteen (14) days after the Mediator was assigned and must contain adequate documentation describing the alleged conflict of interest or exhibited bias or prejudice. If the evidence of a Mediator's conflict of interest, bias or prejudice surfaces at a later stage of the proceedings, the complaining party must file a motion to remove the Mediator as soon as the basis therefor materializes. Prior to filing any motion, a party desiring a change in Mediators must first contact the Mediator in order to raise this issue directly. A Mediator, if he or she concurs with the concern being raised, can elect to remove himself or herself in which case a motion is not needed. If the Mediator, however, declines to withdraw from the case a party still desiring to change Mediators would have to file the appropriate motion with the Court. The above removal process applies to newly filed cases as well as pending cases.

## **8. IMMUNITIES**

Mediators in Pro Se IFP civil cases are entitled to the same immunities set forth in §3.2 of the Court's ADR Plan.

## **9. COMPENSATION OF MEDIATORS (PRO SE IFP CIVIL CASES ONLY)**

The cost of mediation shall be shared equally by each of the parties in the case, including Pro Se IFP parties, unless otherwise ordered by the court. Mediators selected from the Court's Panel shall be compensated at the rate of \$250.00 per hour. Pro Se IFP civil case mediations are "capped" at four (4) hours of compensated time, including both the time needed for preparing as well as the time needed for conducting mediation. Mediators may motion the Court for both extended mediation sessions as well as for additional mediation sessions as set forth in §11 below. If a Mediator exceeds the 4-hour limitation or whatever additional time is authorized by the Court in either preparing for or conducting mediation, it will be treated as having been provided by the Mediator on a pro bono basis. Mediators in Pro Se IFP civil cases shall not require that counsel and/or parties sign an agreement confirming the terms of retention and compensation since compensation terms are set forth in this Plan. At the Rule 16 Scheduling Conference, a Pro Se party who has been granted IFP status may apply to the Court to be relieved of the obligation to pay his, her or their pro rata share of the Mediator's fee. Approval of such request shall be based on a Pro Se party's financial condition at that time. While all other

parties shall continue to bear their pro rata portions of the Mediator's fee, the Court shall enter an order following the Scheduling Conference indicating that Pro Se IFP parties have been relieved of the obligation to pay their share of the Mediator's fee and that their share shall be paid by the Clerk of Court from the Court's Pro Bono Expense Fund.

#### **10. MEDIATION IS THE EXCLUSIVE FORM OF INTERVENTION**

While there are several forms of alternative dispute resolution techniques, mediation is the only approved intervention in Pro Se IFP civil cases. The parties in these cases have no option to pursue alternative resolution processes even if they are in agreement as to a particular alternative.

#### **11. MEDIATION SESSIONS: DURATION AND ADDITIONAL SESSIONS**

The initial mediation session should be held within twelve (12) weeks following the Rule 16 Scheduling Conference. Pro Se IFP mediation sessions (excluding the Mediator's preparation time) are expected to last two (2) hours on average though some will be concluded earlier and some might last longer. Mediation sessions exceeding two hours will require prior approval of the Court pursuant to a written motion by the Mediator requesting an extended time frame unless the Mediator is providing the extended time on a pro bono basis. Likewise, additional mediation sessions beyond the initial one will require prior approval of the Court pursuant to a written motion by the Mediator requesting additional mediation sessions unless the Mediator is providing additional mediation sessions on a pro bono basis. Motions for extended or additional sessions must be supported by written memoranda demonstrating good cause for approving supplemental services.

#### **12. CONFIDENTIALITY**

All meetings, proceedings and materials, if any, submitted to a Mediator under this Plan shall be treated as a confidential communication.

#### **13. OVERVIEW OF THE MEDIATION PROCESS**

##### **A. MEDIATION MEMORANDUM (*PRIOR TO MEDIATION SESSION*)**

Unless the Mediator specifically instructs the mediation parties otherwise, no later than seven (7) days before the initial scheduled mediation session, each party shall submit to the Mediator a written "Mediation Memorandum." Mediation Memoranda shall not be filed in the case docket and the assigned Judge shall not have access to them. As stated in §12 above, they shall be subject to the confidentiality of the mediation process and treated as a document prepared "for settlement purposes only." Parties should include, along with the Mediation Memorandum, copies of documents that are likely to make the mediation more productive or materially advance settlement prospects. Mediation Memoranda must not exceed ten (10) double-spaced pages and shall contain the following information:

- \* Identify by name all person(s) with factual knowledge and/or settlement authority, who, in addition to counsel, will attend the mediation as a representative(s) of the party;
- \* Concisely describe the parties' claims and defenses, addressing the parties' views of the key liability issues and damages, and discussing the key evidence;
- \* State the relief sought in the case and the basis for monetary calculations;
- \* Describe the current status of the case, including the status of any motions made;
- \* Describe the history and current status of settlement negotiations, if any, including offers and counteroffers; and
- \* Provide any other information that might be pertinent to resolution of the case, including possible settlement options and alternatives.

In recognition of the fact that the content outlined above might be too complex for pro se parties to provide, Mediators have the authority to set the requirements for these Memoranda on a case-by-case basis.

## **B. COMMUNICATIONS WITH THE MEDIATOR**

After receiving the Mediation Memoranda, the Mediator may request additional information from any party or participant. The Mediator, at his or her discretion, may also discuss the case in confidence and ex parte (meaning that discussions can be conducted with one party without any other party being present) with counsel, parties and/or representatives. The Mediator shall not disclose any confidential communication, including the Mediation Memoranda and submissions, without prior permission from the party making such disclosures.

## **C. ATTENDANCE AND PARTICIPATION**

### **1. Persons Required To Attend Mediation Sessions**

All named parties and their counsel, if any, are required to attend mediation session(s) in person unless excused by the Mediator. Government agencies, corporations and other business entities satisfy the attendance requirement if represented by one or more persons, other than outside counsel, who have authority to settle and who are knowledgeable about the facts and circumstances of the case and the claims being made. Parties shall be accompanied at the mediation session by the attorney who will be primarily responsible for handling the trial of the matter and/or is most familiar with the matter at that stage of the proceeding. Pro Se IFP parties may, but are not required to, be accompanied by one non-attorney whom the party relies on for support and/or assistance. The Mediator may require the attendance of any other individual or



representative, such as an insurance company agent, who appears reasonably necessary for the advancement of communication and resolution between the parties.

## **2. Requesting To Be Excused From Mediation Sessions**

Any person who is required to attend a mediation session may be excused from attending in person only after showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. Not less than fourteen (14) days before the date set for the mediation, a person seeking to be excused must submit a letter to the Mediator with copies sent to all other counsel and unrepresented parties explaining the necessity for being excused. The Mediator shall promptly make a determination as to the necessity of the person's attendance and may thereafter require personal participation, permit participation by telephone, or excuse the person's presence altogether. The Mediator's decision shall be final.

### **D. THE MEDIATION SESSION**

As previously noted, the mediation session for Pro Se IFP civil cases shall be two (2) hours in duration unless otherwise approved by the court. The Mediator shall have discretion to structure the mediation so as to maximize the benefits of the process. The mediation session shall be informal, and conducted with civility, and as also previously noted mediation is confidential and private. No participant in the mediation process or any portion thereof may communicate confidential information acquired during mediation without the consent of the disclosing party, and there shall be no stenographic or electronic audio or visual recording of the mediation process. The confidentiality of information disclosed during mediation does not, however, prohibit or limit: the Court from collecting information relative to evaluation of the Mediation program; the Mediator from reporting a failure to attend mediation sessions or comply with applicable court orders; the Mediator from filing any mediation reports or forms; a party from seeking to enforce a settlement agreement; a party from disclosing the final resolution and settlement reached unless, in the interest of justice, the parties have agreed to the confidentiality of same; or any participant from making such disclosures as are required by law.

### **E. MEDIATION FORMS AND REPORTS (*AFTER MEDIATION SESSION*)**

At the close of the initial mediation session, the Mediator and the parties shall jointly determine whether it would be appropriate and helpful to request the Court to provide additional mediation sessions. Within seven (7) days after the close of each mediation session, and on the "Mediation Certification" form provided by the Court, the Mediator shall report to the Court the date the mediation session was held, whether the case settled in whole or in part and whether any additional sessions are recommended and if so, the reasons. If such additional sessions are recommended the motions referred to in §11 above should be filed with the court. The "Mediation Certification" shall be filed under seal in the case docket.



## UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE

---

### INTRODUCTION AND OVERVIEW: ADR PLAN AND MEDIATION PROGRAM

---

The U.S. District Court for the Western District of Tennessee (“the Court”) adopted a new alternative dispute resolution plan (“the ADR Plan”) on March 1, 2014 with an effective date of September 1, 2014.

#### **Which cases will be assigned to ADR resolution?**

Pursuant to the ADR Plan, all civil cases (with limited exceptions) filed on or after September 1, 2014 will be automatically referred for ADR resolution. Further, the assigned Judge in any civil case pending as of September 1, 2014 may issue an order, sua sponte or in collaboration with counsel at a status conference or at any other time, referring a civil case for ADR resolution.

#### **Why are civil cases being assigned to ADR resolution?**

Using court-administered ADR techniques and processes to resolve legal disputes affords civil litigants the opportunity for quicker, less expensive and potentially more satisfying solutions than continuing with litigation, which is usually more protracted, more expensive and often more acrimonious. Properly conducted mediation generally goes beyond the typical settlement discussion process because it enhances communication among the parties and allows the participants to explore more creative outcomes to better meet the parties’ needs and expectations. While mediation will be the primary ADR intervention used under the Court’s ADR Plan, several other techniques can be employed; what is most important is that the parties mutually agree on the ADR process that they will use in their particular case.

#### **When will ADR Neutrals (generally mediators) be appointed by the Court?**

If the parties are able to jointly select a mutually agreed upon mediator, then mediation or whatever other ADR process the parties agree to will be conducted in accordance with the ADR Plan. The mediator jointly selected by the parties may be but need not be one currently appointed to the Court’s Mediation Panel. In other words, using a Panel Mediator is not mandatory so long as the parties are in agreement with the selection. If, however, the parties cannot agree upon the selection of a mediator within the required timeframe, the Court will appoint one and in those instances, every appointment will be made from the Court’s Mediation Panel.

#### **Who pays for the cost of ADR intervention?**

Pursuant to the ADR Plan, the parties will equally share the cost of mediation or whatever other ADR process is used. If the parties have been able to agree upon a particular mediator and process, they will share the cost unless the Court orders otherwise. In some instances, however, one or more parties will be unable to financially bear the cost of mediation. The ADR Plan sets forth procedures for addressing the needs of underfunded pro se litigants. The point here is that the cost of mediation or other ADR techniques should not be an obstacle to fully participating in this Court-administered ADR program.

**Who is qualified to  
serve as a mediator?**

Attorneys and non-attorneys who have the required ADR discipline training (a minimum of 40 certified hours) and who can point to adequate relevant experience are eligible to serve as mediators. All mediators, other than Magistrate Judges, must have received this required training and must complete periodic retraining in order to continue serving as mediators. It should also be noted that non-attorneys are required to satisfactorily complete four hours of additional training in federal court civil practice and procedures.

Individuals interested in serving on the Court's Mediation Panel should submit the "Application for Appointment to Mediation Panel". A digital copy of the application can be found on the Court's website: <http://www.tnwd.uscourts.gov> or picked up in print form at the Clerk of Court's Office in Jackson or Memphis. A completed application form can be mailed, emailed or faxed back to the Clerk of Court for processing and submission to the Court.

Applicants seeking appointment to the Court's Mediation Panel will be evaluated by the Court for possible appointment. Appointments will be made on a rolling basis in order to ensure that there will be an adequate number of mediators. The Court has not yet determined the exact number of mediators that will serve on the Mediation Panel, nor has it set the duration of appointments or the process for reappointing or removing mediators for cause or on a periodic basis. These and other features of the program will be publicized once adopted by the Court.

**To what sorts of civil cases  
will mediators be appointed?**

A unique feature of this ADR Plan is that through the application process potential mediators will clearly indicate to the Court the types of cases and areas of law for which they feel unqualified or simply do not want to serve as mediators. Panel mediators will not be required to serve on cases or work in areas of law for which they have requested exemption.

**How will mediators  
be appointed to cases?**

The Clerk of Court's Office has developed a computer-based program that will randomly select mediators. The algorithm used in this program has been designed so as to balance the number of cases that will be assigned to each mediator. The Mediation Panel will be subdivided into an Eastern Division Panel (for Jackson cases) and a Western Division Panel (for Memphis cases) and the computer-based assignment system tracks them independently in terms of balancing out case appointments.

**How can you learn more  
about this ADR Plan and Becoming a Mediator?**

We urge you to review the ADR Plan in its entirety before applying to serve as a mediator. There are many details not covered in this overview material. The entire ADR Plan can be found on the Court's website to read online or print for future reference. If you have specific questions about becoming a mediator or just want to know more about the ADR Plan feel free to contact the Court's Mediation Coordinator, Venita Griffin, at: [venita\\_griffin@tnwd.uscourts.gov](mailto:venita_griffin@tnwd.uscourts.gov).



Prepared by:

Office of the Clerk of Court  
U.S. District Court  
Federal Building, RM-242  
167 North Main Street  
Memphis, TN 38103

901-495-1200