

**State Bar Association of North Dakota
Joint Alternative Dispute Resolution Committee**

Robert J. Udland
Chair

October 27, 2011

North Dakota Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

Re: Proposed Appellate Mediation Rule and Protocol

Dear Justices:

Enclosed with this letter are a draft Appellate Mediation Rule and Protocol proposed for your consideration by the Joint Committee on Alternative Dispute Resolution. This proposal applies only to family law and probate appeals.

This proposal was submitted to the Board of Governors of the State Bar Association of North Dakota for review and comment as required by Section 3.B. of Administrative Rule 43. The Board of Governors opposes the proposal, primarily because of its mandatory nature.

The Committee met to consider the Board of Governors' position, and moved to forward the proposal to the Court despite the Board's opposition. It is the Committee's opinion that no mediation will occur under this proposal if appellees in the affected cases have the option to reject mediation. The proposal is designed to relieve parties of the mediation requirement when only issues of law are presented.

The Joint Committee on Alternative Dispute Resolution submits this proposal for the Court's consideration. If there are any questions, please don't hesitate to contact me.

Sincerely,



Robert J. Udland, Chair
Joint Committee on Alternative Dispute Resolution

c: SBAND Board of Governors

N.D.R.App.P. 5 – Appellate Mediation Program

1 **(a) Eligible Cases.** Only final and appealable judgments and orders in the following types of
2 cases will be eligible for participation in appellate mediation:

3 (1) divorce cases involving property or spousal support;

4 (2) any case involving parenting rights, residential responsibilities or support of minor
5 children; and

6 (3) any case involving the probate or administration of any estate.

7 Upon the request of either party, a case that meets the Appellate Mediation Program criteria will
8 be referred to mediation. In those cases where the issues raised are limited to a question of law,
9 a party may request an order from the court exempting them from the Appellate Mediation
10 Program by filing a motion and affidavit with the Clerk of the Supreme Court.

11 **(b) Time to Request Mediation.** Any party contemplating appeal may forward a request for
12 mediation to the Family Mediation Program Administrator, identified in North Dakota Supreme
13 Court Administrative Order 17, no later than 60 days after the service of notice of entry of
14 judgment or order in any of the cases identified in subsection a. The request must be
15 simultaneously served on every party under N.D App. P. 25. The time for filing a notice of
16 appeal under N.D App. P 4 is not affected by any request or assignment for mediation.

17 **(c) Screening and Assignment of Mediator.** The Family Mediation Program Administrator
18 shall determine whether a case meets the requirements for eligibility and appropriateness for
19 mediation. Once a case has been approved for appellate mediation, the Family Mediation
20 Program Administrator shall forward a Notice of Mediation to counsel, any unrepresented party,
21 and the Clerk of the Supreme Court. The Notice of Mediation shall identify the mediator who has

22 been assigned, and a deadline for completion of the mediation.

23 **(d) Appellate Mediators.** Any lawyer qualified as an appellate mediator under North
24 Dakota Rules of Court 8.9 may be assigned to mediate.

25 **(e) Time Limitations/Period for Mediation.** The mediation must be completed within 45
26 days of the assignment of an appellate mediator.

27 **(f) Transcripts and Appellate Briefs.** Ordering of Transcript and Filing of Briefs. In order
28 to expedite the mediation process and spare the parties as much initial expense as possible, the
29 ordering of the transcript in respect to cases eligible for and assigned for mediation, shall be
30 extended to a date fifteen (15) days from the filing of the notice of appeal.

31 **(g) Extensions/Tolling.** The time for filing briefs is not automatically tolled pending
32 mediation. In cases in which mediation has been requested, any motions for enlargement of time
33 for briefs must be filed with the clerk of the Supreme Court under N.D App. P 26(b).

34 **(h) Mediation Outcome.** In appeals settled in whole or in part pursuant to this rule, a
35 stipulation of the parties shall be filed with the Supreme Court, within 5 days of completion of
36 the mediation, requesting the court to enter an appropriate order, which may include voluntary
37 dismissal under N.D App. P 43. In appeals not settled and terminated from mediation, briefing
38 and oral argument will proceed under the rules. In those cases settled by mediation prior to the
39 filing of a notice of appeal, the requesting party is responsible for filing any appropriate
40 document with the district court.

41 **(i) Confidentiality.** Statements and comments made during mediation conferences and in
42 related discussions, and any record of those statements, are confidential and shall not be
43 disclosed by anyone (including the Family Mediation Program Administrator, counsel, or the
44 parties; and their agents or employees) to anyone not participating in the appellate mediation

45 process. Mediators shall not be called as witnesses, and the information and records of the
46 Family Mediation Program Administrator shall not be disclosed to judges, staff, or employees of
47 any court.

1 **Appellate Mediation Protocol**

2

3 **Purpose:**

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5 To improve the lives of families who appear before the court by trying to resolve disputes
6 through mediation in order to minimize family conflict, encourage shared decision-making, and
7 support healthy relationships and communication among family members.

8

9 **Objectives:**

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11 (1) To support improved family decision-making and to promote agreement and compromise
12 vs. further litigation and competition;

13 (2) To improve access to mediation by providing funding;

14 (3) To improve post litigation family problem-solving and communication capacities by
15 reestablishing communication through mediation;

16 (4) To decrease litigation costs for litigants;

17 (5) To create incentives to pursue mediation including flexibility to negotiate critical issues
18 without judicial intervention;

19 (6) To determine best practices for family mediation in North Dakota;

20 (7) To improve rural access to post litigation mediation services, as well as access by
21 underprivileged and minority persons;

22 (8) To work with the domestic violence services community in order to assess risk and
23 provide services where appropriate; and to ensure proper protections are put in place and
24 mediators are well-trained in signposts, risks, and exit planning strategies;

25 (9) To reduce post-decree litigation and conflict in family cases; and

26 (10) To help the public, judiciary, and bar become more aware of the benefits and nature of
27 the mediation process.

28

29 **Policies & Procedures:**

30 This program is created under the auspices of the North Dakota Supreme Court. The Court has
31 appointed the Joint Committee on Alternative Dispute Resolution and the Subcommittee on
32 Appellate Mediation to collaborate on the program and provide guidance.

33

34 **1) Program Management:**

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36 a. The Family Mediation Program Administrator, identified in North Dakota Supreme Court
37 Administrative Order 17, will manage and oversee the operation of the program under the
38 auspice of the North Dakota Supreme Court.

39 b. The University of North Dakota Conflict Resolution Center will offer assistance to the
40 program as needed by providing expertise, professional assistance, training and
41 education. Compensation will be negotiated as required.
42

43 2) **Research and Evaluation:** The program will include evaluation components.
44

45 3) **Implementation Model for Appellate Mediation:** Any party contemplating appeal may
46 forward a request for mediation to the Family Mediation Program Administrator, no later than 60
47 days after the service of notice of entry of judgment or order in any final and appealable
48 judgments and orders in the following types of cases:

49 a. divorce cases involving property or spousal support;

50 b. any case involving parenting rights, residential responsibilities or support of minor
51 children; and

52 b. any case involving the probate or administration of any estate.
53

54 The request must be simultaneously served on every party under N.D App. P 25. The time for
55 filing a notice of appeal under N.D App. P 4 is not affected by any request or assignment for
56 mediation.

57 **Exclusions:** The Family Mediation Program Administrator shall not refer proceedings where a
58 current domestic violence protection order or other order for protection between the parties
59 currently exists. In these cases, the court shall not proceed with mediation except in unusual
60 cases where:

61 a. Mediation is requested by the victim of the domestic violence or sexual abuse, and an
62 exception to the order of protection is made by the court;

63 b. The mediation is provided by a mediator trained to address the needs and safety of victims
64 where domestic violence is at issue;

65 c. The victim of domestic violence is provided the opportunity for separate meetings during the
66 mediation, and to mediate using separate rooms if they choose;

67 d. The mediation takes place in a courthouse or other building where security measures are in
68 place; and

69 e. The victim has an advocate or support person of their choice in the mediation.

70 4) **Mediation and Orientation:** The Appellate Mediation Program will automatically provide
71 up to 6 hours of combined pre-mediation orientations and mediation. Mediators will be

72 compensated at the rate of \$170/hour with a cap of \$1020 per case. The Appellate Mediation
73 Program requires that:

74 The parties will individually attend a pre-mediation orientation and screening with a designated
75 mediator, and at least one joint mediation session. The program will provide up to 6 hours of
76 mediation without charge to the parties. Should the parties require additional sessions, they may
77 purchase mediation from the mediator. Parties may also apply to the Administrator for additional
78 mediation sessions and may apply for a fee waiver or sliding scale fee should they qualify based
79 upon economic factors. If the parties qualify for a fee reduction and have been approved for
80 additional mediation, any "gap" between \$170/hour and their ability to pay will be paid to the
81 mediator under this program.

82 **5) Court Procedures:** Upon the receipt of a request for appellate mediation, the Family
83 Mediation Program Administrator shall determine whether a case meets the requirements for
84 eligibility and appropriateness for mediation. Once a case has been approved for appellate
85 mediation, the Family Mediation Program Administrator shall forward a Notice of Mediation to
86 counsel, any unrepresented party, and the Clerk of the Supreme Court. The Notice of Mediation
87 shall identify the mediator who has been assigned, and a deadline for completion of the
88 mediation.

89

90 a. The mediation must be completed within 45 days of the assignment of an appellate mediator.

91

92 b. Ordering of Transcript and Filing of Briefs. In order to expedite the mediation process and
93 spare the parties as much initial expense as possible, the ordering of the transcript in respect to
94 cases eligible for and assigned for mediation, shall be extended to a date fifteen (15) days from
95 the filing of the notice of appeal.

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97 c. The time for filing briefs is not automatically tolled pending mediation. In cases in which
98 mediation has been requested, any motions for enlargement of time for briefs must be filed with
99 the clerk of the Supreme Court under N.D App. P 26(b).

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101 d. Upon request of the mediator, the parties should each supply to the mediator, at least 2 days
102 before the scheduled conference, a "Mediation Statement," no more than 4 pages in length. The
103 statement should include: (1) a brief history of the litigation, (2) the history of any efforts to
104 settle the case, including any offers or demands, (3) a summary of the parties' legal positions, (4)
105 the present posture of the case, including any related litigation, and (5) any proposals for
106 settlement. The Mediation Statement must **not** be filed in the office of the Supreme Court clerk.
107 Telephonic mediation may be used if all parties and the mediator agree.

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109 **6) Selection of Mediators:** Any lawyer qualified as an appellate mediator under North Dakota
110 N.D App. P of Court 8.9 may apply to be added to the roster of appellate mediators and will be

111 approved by the Family Mediation Program Administrator. Mediators must carry malpractice
112 insurance that covers their mediation practice.

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114 **7) Mediation Assignment:** Mediators will be assigned cases by the Family Mediation Program
115 Administrator and will manage cases assigned to them from orientation and screening through
116 conclusion of mediation.

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118 **8) Conflicts of Interest & Bias:** A mediator may not be removed unless the mediator and/or the
119 parties' petition the Family Mediation Program Administrator based upon bias or conflicts of
120 interest. Parties and attorneys may not request a change of mediator unless they present clear
121 evidence of bias or conflict of interest.

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123 **9) Confidentiality:** Statements and comments made during mediation conferences and in
124 related discussions, and any record of those statements, are confidential and shall not be
125 disclosed by anyone (including the Family Mediation Program Administrator, counsel, or the
126 parties; and their agents or employees) to anyone not participating in the appellate mediation
127 process. Mediators shall not be called as witnesses, and the information and records of the
128 Family Mediation Program Administrator shall not be disclosed to judges, staff, or employees of
129 any court.

130

131 **10) Mediation Outcome:** In appeals settled in whole or in part pursuant to this rule, a
132 stipulation of the parties shall be filed with the court, within 5 days of completion of the
133 mediation, requesting the court to enter an appropriate order, which may include voluntary
134 dismissal under e 43. In appeals not settled and terminated from mediation, briefing and oral N.D
135 App. P argument will proceed under the rules. In those cases settled by mediation prior to the
136 filing of a notice of appeal, the requesting party is responsible for filing any appropriate
137 document with the district court.

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139 **11) Closing:** At the close of every mediation case, the mediator and parties shall create a
140 written decision summary for the parties that notes any and all agreements made and uses the
141 parties' own language. The parties will have 5 business days to reconsider the decisions made in
142 mediation. If neither party files a written request to reconsider within 5 business days, the
143 mediator shall send a copy of the decision summary to the parties and their attorneys, along with
144 the Mediation Case Closing Form. (Form A).

145 a. At the close of every mediation case, the mediator and the parties will complete the required
146 evaluation forms and the mediator shall submit those to the Administrator along with closing
147 form, and the mediator's invoice form. The Mediator is responsible for collecting fees from the
148 parties if appropriate.

149 **12) Case Closing/Notification:** The mediator shall notify the Family Mediation Program
150 Administrator when a mediation case has concluded for any reason, and offer the following
151 reasons: 1) Agreement has been reached in whole or part; or 2) The parties were unable to reach
152 agreement. If the parties and the mediator believe more mediation sessions would help to resolve
153 the case, the parties and the mediator can join in a request for additional sessions that will be
154 paid by the parties on a sliding fee basis directly to the mediator.

155

PROPOSED CHANGES TO

RULE 8.9 ROSTER OF ALTERNATIVE DISPUTE RESOLUTION NEUTRALS

(a) Rosters of Neutrals. The State Court Administrator shall maintain and monitor a roster of neutrals for civil arbitration, civil mediation, and domestic relations/contested child proceedings mediation. Each roster must include the neutral's name, address, and credentials. Each roster must be updated and published on an annual basis and be available for inspection in the clerk of the district court's office. The State Court Administrator may establish a reasonable fee for placement on the roster and a reasonable yearly renewal fee.

(b) Qualifications. To be listed on a roster, a neutral shall provide the State Court Administrator (*Phone Number 701-328-4216*) with written credentials indicating the neutral meets the following requirements:

(1) Civil Arbitrator Roster. An arbitrator shall complete 30 hours minimum of arbitration training. The training must include the following topics:

(A) Pre-hearing communications between parties and between parties and the neutral;

(B) Components of the hearing process including evidence, presentation of the case, witnesses, exhibits, objectives, awards, and dismissals;

(C) Settlement techniques;

(D) Rules, statutes, and practices covering arbitration, including these rules.

(E) An arbitrator must also complete nine hours of continued arbitration training during each three-year period.

(2) Civil Mediator Roster. A mediator shall complete 30 hours minimum of mediation training, including a minimum of 15 hours of role-playing. The training must include the following topics:

- (A) Conflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution;**

- (B) Mediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues, and power balancing;**

- (C) Components in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process;**

- (D) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, standards of practice, and mediator introduction;**

- (E) Rules, statutes, and practices governing mediation in the trial court system, including these rules.**

(F) A mediator must also complete nine hours of continued mediation training during each three-year period.

(3) *Domestic Relations Mediator/Contested Child Proceedings Mediator Roster.* A domestic relations mediator or a contested child proceedings mediator under N.D.C.C. ch. 14-09.1 shall complete 40 hours minimum of domestic relations mediation training, including two hours minimum of domestic abuse training, and nine hours of continued domestic relations mediation training during each three-year period; and

(A) have a Bachelor's Degree in Behavioral Science with two years of experience in family/child intervention service; or

(B) have a Master's Degree in Behavioral Science with one year of experience in family/child intervention service; or

(C) have a license to practice law supplemented with two years of experience in domestic relations cases.

(4) *Appellate Domestic Relations/Estate Mediator Roster.* A domestic relations/estate proceedings mediator shall complete 40 hours minimum of domestic relations mediation training, including two hours minimum of domestic abuse training, and nine hours of continued

domestic relations mediation training during each three-year period; and

(A) have a license to practice law supplemented with two years of experience in domestic relations or probate cases; and

(B) have two years minimum experience in domestic relations or estate appellate practice.

(5) A qualified neutral may not provide services during a period of suspension of a professional license.

(6) If a neutral is rostered in Minnesota within 60 days of the effective date of this rule, the neutral may be placed on the appropriate North Dakota roster within one year of the effective date of this rule as long as the neutral is still in good standing with the Minnesota rostering system.

(c) Selection of Neutral. The parties may select a neutral who is not listed on the State Court Administrator's roster. A court-appointed contested child proceedings mediator under N.D.C.C. § 14-09.1-03 must have the qualifications specified in subdivision (b)(3) of this rule.

(d) Continuing Training. Training requirements may be attained through course work and attendance at state and

national ADR conferences. The neutral is responsible for maintaining attendance records and shall disclose the information to program administrators and the parties to any dispute. The neutral shall submit continuing education credit information to the State Court Administrator's office every three years.

(e) Certification of Training Programs. Neutrals shall attend initial and continuing training programs that are approved by the Joint Committee on Alternative Dispute Resolution.

(f) Disclaimer. Each roster must include the following disclaimer:

The qualifications for listing a neutral on a roster are minimum standards, and the State Court Administrator's listing of a neutral does not imply the neutral has the requisite degree of skill or competency for a particular case. When choosing a neutral, the parties must make further inquiry about the qualifications and experience of the neutral. The rosters are intended to assist people in locating an appropriate neutral by serving as a starting point.