



# 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.