GENERAL ORDER 07-2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

GENERAL ORDER AMENDING LOCAL RULES

It is hereby ORDERED that the following amendments to the local rules, having been approved by the judges of this court, are adopted for immediate implementation:[1]

1. LOCAL RULE CV-5 Service and Filing of Pleadings and Other Papers

(a) **Electronic Filing Required**. Except as expressly provided or in exceptional circumstances preventing a Filing User from filing electronically, all documents filed with the court shall be electronically filed in compliance with the following procedures.

(1) **Exemptions from Electronic Filing Requirement**. The following are exempted from the requirement of electronic filing:

(A) In a civil case, the initial documents, including the complaint, the civil cover sheet, the service of the summons and the notice of removal (Note: although not yet required, counsel are strongly encouraged to file case opening documents electronically and pay initial filing fees online using the court's CM/ECF system);

(B) In a criminal case, the charging documents, including the complaint, information, indictment, and any superseding indictment; petitions for revocation of probation or supervised release; affidavits in support of search and arrest warrants, pen registers, trap and trace requests, wiretaps and other documentation related to these types of applications; and other matters filed ex parte in connection with ongoing criminal investigations;

(C) filing from pro se litigants (prisoner and non-prisoner);

(D) consents to proceed before a magistrate judge;

[1]New language appears in underlined text; deleted language appears in ~~strikeout~~ text.

(E) proof of service of the initial papers in a civil case;

(F) papers received from another court under Fed.R.Crim.P. 5(c), Fed.R.Crim.P. 20 and Fed.R.Crim.P. 40 ;

(G) official administrative records or transcripts of prior court or administrative proceedings from other courts or agencies that are required to be filed by law, rule or local rule (*but see* Local Rule CV-80(a));

(H) notice of appeal (Note: although not yet required, counsel are strongly encouraged to file notices of appeal electronically and pay appellate filing fees online using the court's CM/ECF system);

(I) application to appear pro hac vice; and

(J) any document pertaining to presentence investigation reports in criminal cases.

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Comment: The change to section (a)(1)(G) continues allows official administrative records or transcripts from agencies or courts other than this court to be filed in paper format. However, transcripts of Texas Eastern court proceedings filed after March 1, 2007 must be submitted electronically by the court reporter per new Local Rule CV-80(a).

2. LOCAL RULE CV-7 Motions Practice

(a) **Generally**. All motions, unless made during a hearing or trial, shall be in writing, conform to the requirements of Local Rules CV-5 and CV-10, and shall be accompanied by a separate proposed order for the judge's signature. The proposed order shall be endorsed with the style and number of the cause and shall not include a date or signature block. Motions, responses, replies and proposed orders, if filed electronically, shall be submitted in "searchable PDF" format. All other documents, including attachments and exhibits should be in "searchable PDF" form wherever possible.

(1) **Dispositive Motions.** Dispositive motions shall not exceed thirty pages, excluding attachments, unless leave of court is first obtained. Likewise, a party opposing a dispositive motion shall limit the response to the motion to thirty pages, excluding attachments, unless

leave of court is first obtained. See Rule CV-56 regarding attachments to motions for summary judgment and responses thereto. Any reply brief to an opposed dispositive motion filed pursuant to section (f) of this rule shall not exceed ten pages, excluding attachments. In addition to the above limitations, unless leave of court is first obtained, the following limitations shall apply: (1) a party's summary judgment motions shall not exceed sixty pages collectively, excluding attachments; (2) a party's responses to summary judgment motions shall not exceed sixty pages collectively, excluding attachments; (3) a party's reply briefing to summary judgment motions shall not exceed twenty pages collectively excluding attachments; and (4) a party's surreply briefing to summary judgment motions shall likewise not exceed twenty pages collectively, excluding attachments.

Dispositive motions shall contain a statement of the issues to be decided by the Court. Responses to dispositive motions must include a response to the movant's statement of issues.

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Comment: The court believe it will aid the decisional process if attorneys routinely identify and discuss the issues to be decided in their dispositive motions and responses thereto. The purpose of this new requirement is to encourage attorneys to focus their arguments on identifying and delineating the specific matters at issue before the court.

2. LOCAL RULE CV-56 Summary Judgment Procedure

(a) **Motion.** Any motion ~~party moving~~ for summary judgment must include: (1) a statement of the issues to be decided by the Court; and (2) ~~should identify both the legal and factual basis for its motion. The text of the motion or an appendix thereto must include~~ a "Statement of Undisputed Material Facts:" If the movant relies upon evidence to support its motion, the motion should include appropriate citations to proper summary judgment evidence as set forth below~~, as to which the moving party contends there is no genuine issue of material fact for trial.~~ Proper summary judgment evidence should be attached to the motion in accordance with section (d) of this rule.

(b) **Response.** Any response to a motion for summary judgment must include: ~~party opposing~~

~~the motion should serve and file a response that includes in the text of the response or as an appendix thereto,~~ (1) any response to the statement of issues; and (2) any response to the "Statement of Undisputed Material Facts ~~Genuine Issues~~." The response should be supported by appropriate citations to proper summary judgment evidence as set forth below. ~~as to which it is contended that a genuine issue of material fact exists.~~ Proper summary judgment evidence should be attached to the response in accordance with ~~the procedure contained in~~ section (d) of this rule.

(c) **Ruling.** In resolving the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion, as supported by proper summary judgment evidence. The court will not scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment.

(d) **Proper summary judgment evidence.** As used within this rule, "proper summary judgment evidence" means excerpted copies of pleadings, depositions, answers to interrogatories, admissions, affidavits, and other admissible evidence cited in the motion for summary judgment or the response thereto. The phrase "appropriate citations" means that any excerpted evidentiary materials that are attached to the motion or the response should be referred to by page and, if possible, by line. Counsel are strongly encouraged to highlight or underline the cited portion of any attached evidentiary materials, unless the citation encompasses the entire page. The page preceding and following a highlighted page may be submitted if necessary to place the highlighted material in its proper context. Only relevant, cited-to excerpts of evidentiary materials should be attached to the motion or the response.

Comment: The court's comment here is the same as the comment to item 2 above.

3. Local Rule CV-80 Stenographer; Stenographic Report or Transcript as Evidence

(a) **Electronic Filing of Transcripts by Court Reporters.** Any transcript of proceedings in this court filed by a court reporter after March 1, 2007 shall be filed electronically as a "private entry" document. Under this procedure, unsealed electronic transcripts filed after March 1, 2007 are available in electronic format to judges and court staff in the CM/ECF database, but are not available in the public PACER database. Upon request, the clerk shall make a paper or electronic version of any unsealed transcript available for public inspection without charge at the clerk's office. *See* 28 U.S.C. Section 753(b).

Comment: The purpose of this new rule is to (1) allow electronic access to unredacted transcripts to judges and court personnel; (2) continue to allow public access to unsealed court transcripts at the office of the clerk; and (3) continue to require non-indigent litigants, attorneys and members of the public to compensate court reporters for copies of the transcript.

4. Appendix H Court-Annexed Mediation Plan

(a) GENERAL PROVISIONS

(1) DEFINITIONS.

(A) Mediation is a supervised settlement conference presided over by a qualified and neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action.

(B) The mediator ~~is an attorney or judge who~~ possesses the unique skills required to facilitate the mediation process including the ability to suggest alternatives, analyze issues, question perceptions, use logic, conduct private caucuses, stimulate negotiations between opposing sides and keep order.

(C) The mediation process does not allow for testimony from witnesses. The mediator does not review or rule upon questions of fact or law, or render any final decision in the case. Absent a settlement, the mediator will report only to the presiding judge as to whether the case settled, was adjourned for further mediation (by agreement of the parties), or that the mediator declared an impasse.

(2) PURPOSE. It is the purpose of the court, through adoption and implementation of this Plan, to provide an alternative mechanism for the resolution of civil disputes (a court annexed mediation procedure) leading the disposition before trial of many civil cases with resultant savings in time and costs to the litigants and to the court, but without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial in the event of an impasse following mediation.

(b) QUALIFICATION AND COMPENSATION OF MEDIATORS; ETHICAL PRINCIPLES

(1) QUALIFICATIONS. An individual may serve as a mediator in this court if:

(A) He or she is a former state court judge who presided in a court of general jurisdiction and was also a member of the bar in the state in which he or she presided; or

(B) He or she is a retired judicial officer of the United States; ~~or~~

(C) He or she is a licensed attorney, has been a member of a state bar for at least seven (7) years and is currently admitted to the bar of this court, or

(D) He or she is a mediator who has been authorized to serve as such by the presiding judge.

In addition, attorneys who serve as mediators in this court must have completed a forty-hour mediation training course certified by the State Bar of Texas or be otherwise qualified in the opinion of the Court.

(2) DISQUALIFICATION. Any person selected as a mediator may be disqualified for bias or prejudice pursuant to 28 U.S.C. § 144 by the presiding judge, and shall be disqualified in any case in which such action would be required by a justice, judge or magistrate judge governed by 28 U.S.C. § 455.

(3) COMPENSATION. Mediators shall be compensated at a rate provided by the parties. Absent agreement of the parties to the contrary, the cost of the mediator's services shall be borne equally by the parties to the mediation conference. The Court reserves the right to review the reasonableness and apportionment of the fee. The Court also may at any time request a mediator to conduct a mediation *pro bono,* or

for a reduced rate.

(A) LIMITATIONS ON COMPENSATION. Except as provided by this Plan, no mediator shall charge or accept in connection with the mediation of any particular case any fee or thing of value from any other source whatever, absent written approval of the court given in advance of the receipt of any such payment or thing of value.

(4) MEDIATORS AS COUNSEL. Any member of the bar who is designated as a mediator pursuant to this Plan shall not for that reason be disqualified from appearing and acting as counsel in any other case pending before the court.

(5) ETHICAL PRINCIPLES FOR ~~ATTORNEY-~~MEDIATORS. Any ~~attorney~~ person acting as a mediator pursuant to section (d)(1) of this Plan is subject to the ethical principles specified in Attachment 1 to this Plan. The clerk of court shall provide each ~~attorney-~~mediator with a copy of these principles upon ~~the attorney's~~ his or her designation as a mediator.

(c) CASES SUBJECT TO MEDIATION; WITHDRAWAL.

(1) COURT REFERRAL. Except as specified below, litigants in all civil cases shall consider the use of court-annexed mediation pursuant to this Plan at an appropriate stage in the litigation. Upon order by the presiding judge, any civil action or claim may be referred to a mediation conference except:

(A) Appeals from rulings of administrative law agencies;

(B) Habeas corpus and/or extraordinary writs;

(C) Bankruptcy appeals.

(2) APPLICATION OF COUNSEL. Any action or claim may also be referred to a mediation conference through the stipulation of the counsel of record and approval of the Court.

(3) WITHDRAWAL. Any civil action or claim referred to mediation pursuant to this Plan may be withdrawn from mediation by the presiding judge at any time, before or after reference, upon a determination, for any reason, that this case is not suitable for mediation.

(d) PROCEDURES FOR REFERRAL. In every case in which the Court determines that referral to mediation is appropriate pursuant to this Plan, the Court shall enter an order of referral which shall:

(1) Designate the mediator;

(2) Define the window of time in which the mediation conference may be conducted;

(3) Designate lead counsel, who shall be responsible for coordinating mediation conference dates agreeable to the mediator and all counsel of record.

(e) SCHEDULING OF CONFERENCE.

(1) PARTY ATTENDANCE REQUIRED. Unless otherwise excused by the presiding judge in writing, all parties, corporate representatives, and any other required claims professionals (e. g. insurance adjusters, etc.) shall be present at the mediation conference with full authority to negotiate a settlement. Subject to the approval of the mediator, the mediation conference may proceed in the absence of a party who, after due notice, fails to be present. Failure to comply with the attendance or settlement authority requirements may subject a party to sanctions by the Court. And upon motion of an attending party, sanctions may be imposed by the Court on any party who, absent good cause shown, failed to attend the conference.

(2) CONTINUANCE. The mediator may, with the consent of all parties and counsel, reschedule the mediation conference to a date certain not later than ten (10) days prior to the scheduled trial date. Any continuance beyond that time must be approved by the presiding judge.

(f) MEDIATION REPORT. Within five (5) days following the conclusion of the mediation conference, the mediator shall electronically file the mediation report with the court using the CM/ECF filing system. The report shall indicate whether all required parties were present, whether the case settled, was continued with the consent of the parties, or whether the mediator declared an impasse.

(g) TRIAL UPON IMPASSE. If the mediation conference ends in an impasse, the case will be tried as originally scheduled. All proceedings of the mediation conference, including statements made by

any party, attorney, or other participant. are privileged in all respects.

(h) CONFIDENTIALITY. The mediation process is to remain confidential. Mediation proceedings may not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at a mediation conference unless a settlement is reached.

As specified in section 6 of Attachment 1 to this Plan, ~~an~~ a ~~attorney-~~mediator should protect confidential information obtained by virtue of the mediation process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, ~~an~~ a ~~attorney-~~mediator may disclose information (1) that is required to be disclosed by operation of law; (2) that he or she is permitted by the parties to disclose; (3) that is related to an ongoing or intended crime or fraud; or (4) that would prove an abuse of the process by a participant or ~~an~~ a ~~attorney-~~mediator.

(i) ADMINISTRATION AND EVALUATION OF THIS PLAN. And Absent entry of a general order to the contrary, the clerk of court is hereby designated to implement, administer, oversee and evaluate this Plan. The clerk shall make an annual report to the Court that evaluates the Plan's effectiveness and recommends improvements to the Plan.

Attachment 1 to Appendix H, Court-Annexed Mediation Plan

ETHICAL PRINCIPLES FOR ~~ATTORNEY-~~MEDIATORS
COURT-ANNEXED MEDIATION PLAN
U.S. DISTRICT COURT, EASTERN DISTRICT OF TEXAS

1. ~~An~~ A ~~attorney-~~mediator appointed or selected by the court should act fairly, honestly, competently, and impartially.

Comment: This is an objective, not subjective, standard. Should the integrity or competency of ~~an~~ a ~~attorney-~~mediator be questioned, the inquiry should be whether ~~an~~ a ~~attorney-~~mediator has acted fairly, honestly, competently, and impartially. Whether this standard has been met should be measured from the point of view of a disinterested, objective observer (such as the judge who oversees the mediation process), rather than from the point of view of any particular party.

The imposition of a subjective appearance standard would unfairly require the neutral to withstand the subjective scrutiny of the interested parties, who, for example, might seek to attack the neutral's impartiality if disappointed by the settlement. As this would undermine the important public interest in achieving binding settlements, there is no intention to impose such a subjective standard under this principle.

2. ~~An~~ A ~~attorney-~~**mediator should disqualify himself or herself if there is a conflict of interest arising from a past or current relationship with a party to the mediation process.**

Comment: Ordinarily, ~~an~~ a ~~attorney-~~mediator cannot perform effectively if there is a past or present representational or other business relationship with one of the parties to the dispute, even if that relationship existed only in connection with entirely unrelated matters. However, such conflicts of interest may be waived by the parties, so long as the particulars of the representational or other business relationship are first fully disclosed on a timely basis. Family relationships, and relationships that give rise to ~~an~~ a ~~attorney-~~mediator's having a financial interest in one of the parties or in the outcome of the dispute, or prior representation with regard to the particular dispute to be addressed in the mediation process, cannot be waived.

3. **An ~~attorney-~~mediator should avoid future conflicts that may arise after the mediation proceeding is complete. Thus, an attorney-mediator should be barred from representing a party to the mediation proceeding with regard to the same or substantially related matters, as should his or her law firm, except that no future conflict with regard to substantially related matters will be imputed to his or her law firm after the expiration of one year from completion of the mediation process, provided that the law firm shields the mediator from participating in the substantially related matter in any way.**

Comment: Parties to a mediation proceeding have a reasonable expectation that they will not be harmed in the future from ~~an attorney-~~mediator's knowledge about them, especially confidential information gained during the mediation process. Thus, this principle would preclude ~~the~~ a ~~attorney-~~mediator from representing any other mediation party in the same or substantially related matters, recognizing the sensitive nature of information, opinions, and strategies learned by the mediator. The same impairment would be imputed to ~~the~~ an attorney-mediator's law firm in the same case, but it would dissipate with the passage of time, our recommendation being one year, in any substantially related matter. This safe harbor recognizes that it would be far too draconian to automatically preclude the law firm's representation of a prospective client for all time merely because an attorney-mediator in that firm conducted mediation proceedings involving that party in the past, even in a substantially related matter. This provision assumes that the attorney-mediator has observed the duty of confidentiality and that he or she can be screened from any future related matter undertaken by the firm. Finally, because an attorney who serves as a court-appointed mediator does not thereby undertake the representation of the participants as clients in the practice of law, ethical rules governing future conflicts of interest arising from past representation, such as the ABA Model Rules of Professional Conduct 1.9 and 1.10, do not appear to apply.

4. **Before accepting a mediation assignment, ~~an~~ a ~~attorney-~~mediator should disclose any facts or circumstances that may give rise to an appearance of bias.**

Comment: Once such disclosure is made, the ~~attorney-~~mediator may proceed with the mediation process if the party or parties against whom the apparent bias would operate waive the potential conflict. The best practice is for the ~~attorney-~~mediator to disclose the potential conflict in writing and to obtain written waivers from each party before proceeding.

5. **While presiding over the mediation process, an attorney-mediator should refrain from soliciting legal business from, or developing an attorney-client relationship with, a participant in that ongoing mediation process.**

Comment: This provision prohibits the development of a representational attorney-client relationship, or the solicitation of one, during the course of the mediation process. It is not intended to preclude

consideration of enlarging the mediation process to include related matters, nor is it intended to prevent the attorney-mediator from accepting other mediation assignments involving a participant in an ongoing mediation matter, provided the attorney-mediator discloses such arrangements to all the other participants in the ongoing mediation matter.

6. **An ~~attorney-~~mediator should protect confidential information obtained by virtue of the mediation process and should not disclose such information to other attorneys within his or her law firm or use such information to the advantage of the law firm's clients or to the disadvantage of those providing such information. However, notwithstanding the foregoing, an ~~attorney-~~mediator may disclose information (a) that is required to be disclosed by operation of law, including this court's Mediation Plan; (b) that he or she is permitted by the parties to disclose; (c) that is related to an ongoing or intended crime or fraud; or (d) that would prove an abuse of the process by a participant or an attorney-mediator.**

Comment: This provision requires protection of confidential information learned during the mediation processes. For this purpose, information is confidential if it was imparted to the ~~attorney-~~mediator with the expectation that it would not be used outside the mediation process. Information otherwise discoverable in the litigation does not become confidential merely because it has been exchanged in the mediation process. This principle also permits disclosure of information that is required to be disclosed by operation of law. This provision accommodates laws such as those requiring the reporting of domestic violence and child abuse.

7. **~~An~~ A ~~attorney-~~mediator should protect the integrity of both the trial and mediation processes by refraining from communicating with the assigned trial judge concerning the substance of negotiations or any other confidential information learned or obtained by virtue of the mediation process, unless all of the participants agree and jointly ask the ~~attorney-~~mediator to communicate in a specified way with the assigned trial judge.**

Comment: This policy forbids ~~attorney-~~mediators from speaking with the assigned trial judge about the substance of confidential negotiations and also prohibits the assigned trial judge from seeking such information from an ~~attorney-~~mediator. Docket control should be facilitated by means of the ~~attorney-~~

mediator's report (see section (f) of the Plan) of whether the case settled or not or through other periodic reporting that does not discuss parties' positions or the merits of the case.

Public confidence in both the trial and settlement processes can be undermined if direct communication is permitted between the ~~attorney-~~mediator and the assigned trial judge regarding the merits of the case or the parties' confidential settlement positions. However, it does no harm to communicate with the trial judge at the joint request of the parties, such as requests for continuances, discovery accommodations, more time to pursue the effort, or administrative closure of the case pending implementation of a settlement agreement.

8. **~~An~~ A ~~attorney-~~mediator should fully and timely disclose all fee and expense requirements to the prospective participants in the settlement process in accordance with section (c) of this Plan. A participant who is unable to afford the cost of mediation may be excused from paying by the trial judge.**

Comment: If the trial judge intends to require a certain level of *pro bono* service from ~~the~~ a ~~attorney-~~mediator in a particular case, the level of the *pro bono* commitment should be explicitly defined by the trial judge at the outset of the mediation process, then explained by the mediator to the parties. When, as in most cases, ~~the~~ a ~~attorney-~~mediator is permitted to charge a fee to mediation participants, disputes about mediation fees, though rare, can be prevented through disclosure at the outset of the fee arrangements.

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Comment: The amendments to section (b)(1)(D) of the Plan now allow the presiding judge the option of appointing (1) a non-attorney mediator; (2) a mediator who has not completed a 40-hour mediation course as required by the State Bar of Texasp and (3) an attorney-mediator who is not a member of our bar. The language of the rest of the Plan has been amended to conform to the (b)(1)(D) changes.

Signed this 12 day of February, 2007.

FOR THE COURT:

THAD HEARTFIELD
Chief Judge