STATE OF MINNESOTA

IN SUPREME COURT

OFFICE OF APPELLATE COURTS

SEP 23 2010

FILED

ADM09-8006
(formerly C4-84-2133)
CX-84-2170

ORDER ESTABLISHING DEADLINE FOR SUBMITTING COMMENTS ON PROPOSED AMENDMENT TO THE MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE AND PROPOSED SPECIAL RULES OF PRACTICE FOR THE MINNESOTA COURT OF APPEALS GOVERNING FAMILY LAW MEDIATION

The Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure has proposed a change to Rule 133.01 of the Rules of Civil Appellate Procedure to authorize implementation on a permanent basis of the existing Court of Appeals Family Law Appellate Mediation Pilot Project. This Court will consider the proposed change without a hearing after soliciting and reviewing comments on the proposed amendment. A copy of the proposed amendment is annexed to this order.

The Court of Appeals has adopted Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Mediation that will be authorized by the amendment to Rule 133.01, if adopted. Public comments on the proposed special rules of practice are also solicited. A copy of the special rules of practice is annexed to this order.

IT IS HEREBY ORDERED that any individual wishing to provide comments in support of or opposition to the proposed amendment or the special rules of practice shall submit twelve copies in writing addressed to Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155, no later than November 5, 2010.

Dated: September 23, 2010

BY THE COURT:

Lorie S. Gildea
Chief Justice

PROPOSED AMENDMENT

RULE 133. PREHEARING CONFERENCE; CALENDAR: STATEMENT OF THE CASE

Rule 133.01. Prehearing Conference

The appellate courts may direct the parties, or their attorneys, to appear before a justice, judge, or person designated by the appellate courts, either in person or by telephone, for a prehearing conference to consider settlement, simplification of the issues, and other matters which may aid in the disposition of the proceedings by the court. The justice, judge, or person designated by the appellate courts shall make an order which recites the agreement made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admission or agreement of counsel.

Unless exempted by the court for good cause shown, appeals in family law cases are subject to mandatory mediation. The court of appeals is authorized to issue special rules of practice governing the family law appellate mediation process. These special rules apply to appeals arising from marital dissolution actions; parentage actions; post-decree modification and enforcement proceedings, including civil contempt actions; child-support actions, including IV-D cases; and third-party custody and visitation actions.

Advisory Committee Comment—2010 Amendment

This rule is amended to add a second paragraph to provide expressly for the family law mediation pilot program initiated by the court of appeals in September of 2008 and made permanent in 2010. The primary purpose of this rule is to provide notice to litigants that certain family law appeals are subject to mandatory mediation in the court of appeals.

Following a successful pilot project in which family law appeals were referred to mediation (over 50% of the appeals that were mediated in the pilot project were settled, resulting in substantial benefits to the litigants and the

court), the court of appeals has recommended that the mediation requirement be made permanent. As part of the implementation of mediation as a standing requirement, the Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Appellate Mediation will include detailed guidance on the procedures involved in the mediation program. The program will be operated in accordance with the special rules of practice, which should be consulted by parties to family law appeals. The rules will be published as an adjunct to the Minnesota Rules of Civil Appellate Procedure and are accessible on the Minnesota Judicial Branch web site: www.mncourts.gov.

When those rules are adopted, this amendment to Rule 133.01 is appropriate to provide guidance to litigants of the existence of this program and the fact that it is generally mandatory. The rule includes reference to the possibility that good cause may exist for exemption from the mediation requirement. Exemption from mandatory mediation is governed by the Special Rules, and the Minnesota Court of Appeals Family Law Appellate Mediation Policies and Procedures provide explicitly for exemption in cases involving allegations of domestic violence. O ther grounds for exemption from mandatory mediation may include making a convincing demonstration that post-trial ADR has been employed without success, geographical unavailability of a trained appellate mediator, persuasive arguments that appeal presents an unsettled legal issue upon which the court of appeals should rule, and other reasons.

SPECIAL RULES OF PRACTICE
FOR THE
MINNESOTA COURT OF APPEALS
GOVERNING FAMILY LAW APPELLATE MEDIATION

Rule 1. General

(a) Authority. These special rules of practice are made in accordance with the appellate court's authority under Minn. R. Civ. App. P. 133.01 to direct the parties, or their attorneys, to appear before a judge or person delegated by the appellate courts, for a prehearing conference to consider settlement.

(b) Scope. These special rules apply to appeals arising from marital dissolution actions, parentage actions, post decree modification and enforcement proceedings, including civil contempt actions, child support actions, including IV-D cases, and third-party custody and visitation actions.

(c) Suspension of Processing Deadlines. In the interests of judicial economy and to facilitate the mediation process, there is good cause under Minn. R. Civ. App. P. 102 to suspend the requirements of certain appellate processing rules, as specified in these special rules.

(d) Applicability of the Rules of Civil Appellate Procedure. The Minnesota Rules of Civil Appellate Procedure apply unless these special rules direct otherwise.

(e) Time Periods to File a Direct Appeal or Notice of Related Appeal. These special rules do not extend or otherwise affect the time periods to file a direct appeal or notice of related appeal under Minn. R. Civ. App. P. 104.01.

Rule 2. Transcripts

(a) The time periods to file a transcript certificate and for preparation of the transcript under Minn. R. Civ. App. P. 110.02 are stayed in appeals that are referred to appellate family law mediation.

(b) If a transcript has already been ordered before the appeal is referred to mediation, upon receipt of the order referring the case to mediation, the party, if unrepresented, or the attorney for the party ordering the transcript, shall

immediately notify the court reporter that transcript preparation is stayed pending mediation.

(c) If a party chooses to have transcript preparation continue during mediation, the party, if unrepresented, or the attorney for the party, shall file with the Clerk of Appellate Courts a written notification to that effect, with proof of service on the court reporter and the other parties. A party who chooses to have transcript preparation continue during mediation is responsible for payment of transcript expenses, even if the case fully settles.

Rule 3. Briefing

The time periods for filing briefs under Minn. R. Civ. App. P. 131.01 are stayed pending mediation.

Rule 4. Other Processing Deadlines

In addition to the time periods for filing a direct appeal or notice of related appeal, the following processing requirements are not stayed in appeals subject to mediation: the filing of a certified copy of the order and judgment appealed from and proof of service for the appeal papers under Minn. R. Civ. App. P. 103.01, subd. 1, and the filing of a statement of the case under Minn. R. Civ. App. P. 133.03.

Rule 5. Untimely Appeals

Untimely appeals are not subject to mediation. A party may file a motion to dismiss a direct appeal or notice of related appeal that is not filed and served within the time periods specified in Minn. R. Civ. App. P. 104.01.

Rule 6. Screening Process

(a) The Family Law Appellate Mediation Office screens new family law appeals to determine their suitability for mediation.

(b) If the initial screening shows mediation suitability, the Court of Appeals shall issue an order staying processing of the appeal and directing the parties to file a confidential mediator selection form and confidential information form.

(c) A party may request an exemption from mediation by including in the confidential information form, the request and the reason(s) for the request. This request may be granted at the discretion of the Family Law Appellate Mediation Office. If the request is granted, the parties shall be notified in writing no later than ten (10) days after the Family Law Appellate Mediation Office receives the confidential information form from all parties.

(d) When multiple appeals involving the same parties are filed, all pending issues on appeal shall be consolidated into a single mediation process.

Rule 7. Confidentiality

(a) All information obtained for and through the mediation process shall remain confidential and shall not become part of the appellate record.

(b) To the extent applicable, Minn. R. Gen. Pract. 114.08, 114.10(c), and 114.10(d), which govern confidentiality in civil cases subject to Alternative Dispute Resolution processes, are incorporated into these special rules by reference.

Rule 8. Appellate Mediator Roster

(a) Appointment to the Appellate Mediator Roster. The court shall maintain a roster of approved appellate mediators and shall recruit mediators as needed throughout the state.

(b) Removal from the Appellate Mediator Roster. An appellate mediator may be removed from the appellate mediator roster if the mediator violates the Rule 114 Code of Ethics, fails to maintain good standing with the licensing board for the profession in which the person practices, fails to comply with the rules and policies of this program, or for other good cause shown.

Rule 9. Mediation Process-Timelines

(a) Within ten (10) days of the Court of Appeals order staying the process of the appeal and referring the case for family law appellate mediation, the parties shall file with the Family Law Appellate Mediation Office a confidential mediator selection form and confidential information form.

(b) After receiving from both parties the confidential mediator selection form and confidential information form, the Family Law Appellate Mediation Office shall issue a letter appointing the mediator and the Family Law Appellate Mediation Office shall contact attorneys and pro se parties to schedule a premediation conference call.

(c) Parties shall begin mediation as soon as practicable after the premediation conference call and shall complete mediation no later than seventy (70) days after the premediation conference call, unless the Family Law Appellate Mediation Office receives a request for and grants an extension.

Rule 10. Assignment of Mediator

(a) The Family Law Appellate Mediation Office shall assign a mediator from the appellate mediator roster to each case to be mediated.

(b) Before the mediation process begins, the parties shall sign a written agreement to mediate.

Rule 11. Appellate Mediation Fees

The Family Law Appellate Mediation Office shall establish a schedule of fees to be paid by the parties to the appellate mediator.

Rule 12. Liability of Appellate Mediator

Mediators appointed by the court serve in a quasi-judicial role and in the absence of willful and wanton misconduct are immune to claims as provided by law.

Rule 13. Finalization of Mediation Process

(a) Mediation Settlement Agreement. In the event that the parties reach an agreement resolving all or any issues involved in the appeal, the parties, and counsel, if any, shall sign a Mediated Settlement Agreement setting out the essential terms of all agreements reached in mediation and, if applicable, designating the individual responsible for drafting and filing any additional documents needed to implement the agreement in the district court and the time for completion of that drafting and filing in the district court. The purpose of the Mediated Settlement Agreement is to memorialize the essence of the agreement

for the parties, counsel, and the mediator, each of whom shall be given a copy of the signed agreement. Because of the purpose of this agreement, it shall not be filed with the Court of Appeals or the Family Law Appellate Mediation Office.

(b) Mediator Case Closing Notice. When the parties reach agreement resolving all issues on appeal and have signed a Mediation Settlement Agreement, or when the mediator has declared mediation concluded without agreement resolving all issues, the mediator shall mail to the parties, or counsel if represented, and file with the Family Law Appellate Mediation Office a completed Mediator Case Closing Notice informing the parties that:

(1) In the event agreement is reached on all issues involved in the appeal, the appeal shall be dismissed when appellant (and respondent if a related appeal is involved) file a Voluntary Dismissal with the Court of Appeals. If appellant (and respondent if a related appeal is involved) fails to voluntarily dismiss the appeal (and any related appeal) within forty-five (45) days of the date of this notice, the Court of Appeals shall issue an order vacating the stay of the appeal, setting a deadline for a completed initial transcript certificate to be filed, and providing that briefing shall proceed under Rule 131.01.

(2) In the event mediation is concluded without a full resolution of all issues, the Court of Appeals shall immediately issue an order vacating the stay of the appeal, setting a deadline for a completed initial transcript certificate to be filed, and providing that briefing shall proceed under Rule 131.01.

Rule 14. Reinstatement of the Appeal

In the event that the district court does not approve a Mediated Settlement Agreement of all issues on which an appeal was taken, the mediation shall be treated as a failure to reach a settlement, and the appeal shall be reinstated following motion to the Court of Appeals by the appellant. A reinstatement motion shall contain a certified copy of the district court's order and shall be filed within ten days of that order with no new filing fee.

Rule 15. Sanctions

(a) The Court of Appeals may sanction a party for the failure to comply with the requirements of the appellate mediation program. Neither the Family Law Appellate Mediation Office nor the mediator is authorized to impose sanctions.

(b) The Family Law Appellate Mediation Office may file a deficiency notice with the Court of Appeals if a party fails to comply with the requirements of the program. The Court of Appeals may issue an order compelling the party to comply and may also impose sanctions.

(c) The Court of Appeals may impose sanctions against a party who refuses to attend a mediation session or sessions, unreasonably delays the scheduling of mediation, or otherwise unreasonably impedes the procedures required for the mediation program.

(d) The Court of Appeals may impose sanctions on its own motion or on the motion of a party made in compliance with Minn. R. Civ. App. P. 127. A party's motion for sanctions may not be filed until mediation has been closed. A motion for sanctions may be filed but no later than within the time for taxation of costs under Minn. R. Civ. App. P. 139.03.

(e) Sanctions may include, but are not limited to, assessment of reasonable expenses caused by the failure of mediation, including an amount equivalent to mediator and/or attorney fees, assessment of all or a portion of appellate costs, or dismissal of an appeal or a notice of related appeal.

November 4, 2010

ADM 09-8004
CX-842170

OFFICE OF APPELLATE COURTS

NOV 4 2010

FILED

Chief Justice Lorie S. Gildea
Minnesota Supreme Court
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St Paul, Minnesota 55155

Dear Chief Justice Gildea:

I write as a long time ADR advocate, program designer and researcher, *and* as the evaluator of the appellate family mediation pilot program in Minnesota to express my *opposition* to the proposed Amendment to the Minnesota Rules of Civil Appellate Procedure and Proposed Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Mediation. I oppose these as written even though I strongly support an appellate mediation program in Minnesota.

I am particularly concerned that the proposed *mandatory* nature of the program flies in the face of more progressive thinking about ADR program design in general as well as the specific results of the pilot project. Although the proposed rule provides for an exemption "for good cause shown," the "other grounds" included in the advisory comment reference "post-trial ADR," but not pre-trial ADR. Why this distinction? Moreover, no reference is given to pro se parties at all. This is especially troubling, given the data from the pilot program evaluation.

In the evaluation, there were only 21 mediated cases in which one or both parties were pro se, so the data is limited. The settlement rate for these cases, however, was only 14%, quite a contrast to the over all settlement rate for the pilot program. It is unclear that the program as envisioned now is set to provide any additional resources to these pro se parties that will positively affect the settlement rate. Certainly if the overall settlement rate had been only 14%, it is doubtful that anyone would be suggesting that the program be institutionalized.

One of the compelling reasons for courts to undertake mediation programs is the clear evidence that, in mediation, an "experience of justice" is more available to litigants, i.e., both substantive *and* procedural justice are more available in a well conducted mediation process. A *mandatory* program is not consistent with the procedural justice that citizens expect from the court system.

Without a more explicit and robust screening mechanism for the proposed cases, the program should have an explicit opt-out procedure for those litigants who do not wish to use mediation. It goes against the fundamentals of a process designed to ensure party self-determination to not allow those parties the ultimate very first decision: whether to use the mediation process at all. This is also not in accordance with the ABA/AAA/ACR Standards governing mediation (see Standard I next page). If the Minnesota rule does not provide for a specific opt-out procedure, then it would be better for the court to establish

a presumption that requests for exemption from mediation will be granted, and require the court to affirmatively decide otherwise (on some specific grounds) if parties are ordered to mediation.

Judges Kevin Burke and Steve Leben authored a thoughtful white paper for the American Judges Association in 2007 that speaks some to this issue. The paper, *Procedural Fairness: A Key Ingredient in Public Satisfaction* is available at: *http://aja.ncsc.dni.us/htdocs/AJAWhite*Paper9-26-07.pdf Importantly, the voluminous research about the arena of procedural justice is cited therein. (I would be happy to provide more of this research as well.) It may be helpful for the court to know that research also confirms that allowing an opt-out, while supporting the dictates of procedural justice, does not have to result in fewer people choosing to use the mediation process. It will, however, likely result in higher settlement rates, and this will definitely result in more satisfied customers for those who do choose mediation.

Thank you for your work on this important issue.

Sincerely,

Bobbi McAdoo

Bobbi McAdoo
Professor, Hamline University School of Law

Excerpt from the Joint American Bar Association Section of Dispute Resolution/American Arbitration Association/Association for Conflict Resolution Model Standards of Conduct for Mediation. Adopted 2005.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

OFFICE OF THE RAMSEY COUNTY ATTORNEY
Susan Gaertner, County Attorney

50 West Kellogg Boulevard, Suite 415 • St. Paul, Minnesota 55102-1483
Telephone (651) 266-3100 • Fax (651) 266-3365

Child Support Enforcement Division

November 4, 2010

Mr. Frederick Grittner,
Clerk of the Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, Minnesota, 55155

RE: Ramsey County Attorney's Office's Response to the Proposed Amendment to Rule 133

Dear Mr. Grittner:

Thank you for the opportunity to respond to the proposed amendment to Rule 133. It is my understanding that the proposed amendment incorporates the pilot appellate mediation project into the pre-hearing conference rule. It is also my understanding that the only change from the original pilot project was to specifically clarify that IV-D cases are included and to add the Advisory Committee Comment. While I agree that mediation is a useful tool in the court system, and that the results of the pilot project show that mediation is helpful at the appellate level too, my comment relates to mandatory participation by the Counties in IV-D cases. I suggest that the Counties' involvement be optional as set forth below.

According to the 2010 Department of Human Services Minnesota Child Support Performance Report, there are approximately 243,000 open IV-D cases. This number fluctuates and has been as high as 251,000 open IV-D cases in 2006. While the Counties establish paternity and support for the cases without orders and enforce cases with orders, the Counties have found that when an appeal resulting from one of these cases does not involve an issue for which the County has an interest, it is the best use of limited resources to let the Court of Appeals and the parties know that the County is not participating in the appeal. With limited resources and probable cuts to the IV-D program in the future, it is more important than ever for Counties to make a determination whether participation in an appeal meets the Federal and State mandates of the IV-D program.

It is seems like an easy fix to provide that if there is an open IV-D case, the Counties have an interest in an appeal. However, counties are limited to working on issues that only relate to the administration of the IV-D program, and therefore, such an apparent easy amended rule creates unintended consequences. For example, in an appeal relating to spousal maintenance or property division in a dissolution, while the county may have an open IV-D case it is enforcing, spousal maintenance and property division

are not issues in which the county has or can have a position[1]. The County's involvement in mediation at the appellate level would be to attend the mediation session and let the mediator and parties know that they have no interest and cannot have an interest due to Federal Law.

The issues for which counties can and cannot have positions are delineated by the Federal Government which oversees the IV-D Program and are as follows:

- Services Counties are mandated to provide in IV-D cases:
  - Establishing paternity for children for whom paternity has not already been established
  - Establishing basic support, child care support, and medical support orders
  - Enforcing basic support, medical support, and spousal maintenance orders (when maintenance is tied to a child support obligation)
  - Reviewing and modifying basic support, child care support, and medical support
  - Working with other states, tribes, and foreign countries
  - Collecting and disbursing current and/or past child support payments

- Services Counties are prohibited from providing in IV-D cases are:
  - Assistance with divorce
    - other than establishing child support
  - Assistance with the establishment, modification, and enforcement of custody and parenting time
    - except in paternity cases when there is an agreement as to these issues by both parties which is accepted by the court
  - Establishment or modification of spousal maintenance
    - unless the maintenance obligation is tied to a child support obligation; or
    - the Counties can collect and disburse maintenance obligations when not tied to a child support obligation if one of the parties applies for non-IV-D services and a $15 per month fee is paid
  - Collection of attorneys fees or property settlements
  - Legal advice

[1] For more information about the requirements and prohibitions involved in the IV-D Program, please see:
- Minnesota Statutes, section 518A.26, subdivision 10 – Definition of a IV-D Case
- Minnesota Rules of General Practice (Ex Pro Rules) 352.01(f) – Definition of a IV-D Case
- Minnesota Rules of General Pracitce (Ex Pro Rules) Rule 353 – Mandated and Prohibited Issues in the Expedited Process
- 42 U.S.C. section 602(a)(2) – Federal Mandate for States to have a IV-D Program
- 42 U.S.C. section 601(a) – Purpose of the IV-D Program
- 42 U.S.C. section 651 – Purpose of the IV-D Program
- *Understanding Child Support: A Handbook for Parents published* , published by the Minnesota Department of Human Services
- *Essentials for Attorneys in Child Support Enforcement Handbook,* Third Ed., DHHS, OCSE, Published by the American Bar Association and Tier Technologies

Because of the complex nature of whether the county has or can even have a position in family law cases when there is an open IV-D case, I propose the following change to the proposed amendment – new language is submitted in ***bold and italics***:

...These special rules apply to appeals arising from marital dissolution actions; parentage actions; post-decree modification and enforcement proceedings, including civil contempt actions; child-support actions, including IV-D cases, and third-party custody and visitation cases. ***When the public authority responsible for the enforcement of child support is a party or is providing services to a party with respect to the action, the public authority may opt out of the mediation by notifying the Court that the public authority does not have an interest in the appeal.***

The County not having an interest in an appeal involving an open IV-D case could fall under the "other reasons" exemption delineated in the Advisory Committee Comments following the rules. In fact, several counties received exemptions under the pilot by simply returning the form explaining that there is not a IV-D issue in the case. However, my concern stems from the insertion of the words "including IV-D cases" in the proposed permanent rule that were not part of the original pilot language. The insertion of these words together with the Advisory Committee Comments list relating to what constitutes allowable exemptions, I am concerned that attorneys, parties, and the courts will now expect the Counties to appear in mediation on cases for which they have no interest in the issues being appealed.

Regardless of whether the Advisory Committee adopts the above proposed amendment above, I propose that the list of allowable exemptions in the 2010 Amendment Advisory Committee Comment be expanded to state the same – new language is submitted in ***bold and italics***:

...Other grounds for exemption from mandatory medication may include making a convincing demonstration that post-trial ADR has been employed without success, geographical unavailability of a trained appellate mediator, persuasive arguments that appeal presents an unsettled legal issue upon which the court of appeals should rule, ***if the County has made a determination in an open IV-D case that it does not have an interest in the appeal,*** and other reasons.

It is not clear why "including IV-D cases" was added to the proposed amendment to Rule 133. Again, it appears that the insertion of the words was for a specific reason and concern. Because Counties are involved in the cases listed in both the pilot project language and the proposed amendment if there is an open IV-D case and the county has an interest, my assumption is that the Counties will participate in the appeal or mediation. Thus, the insertion of these words is not necessary. If the concern that if the Counties do not participate in the mediation, the Counties may appear at the District Court hearing to put the mediated settlement agreement on the record, and state that they do not agree with the settlement, defeating the purpose of the mediation, then the

amended rule should say just that. Counties should not expect to be able to come to the settlement agreement hearing and state their objection if they were properly notified of the mediation opportunity and waived their right to appear at the mediation. If this is the concern, then I propose that language be added to affirmatively state that if the County opts out of the mediation, they should be bound to any order resulting from the mediated settlement agreement. For example:

...***and thus be bound by any order resulting from a mediated settlement agreement***, and other reasons.

In addition to the Counties not having an interest, it is important to note the opportunities litigants using the Expedited Process system for child support have before a case reaches the level of an appeal, that are not available to litigants in Family Law Cases in District Court.

In Expedited Process cases in which Counties are involved, Counties make every effort possible to settle cases before bringing the case into the courtroom for a decision by a Child Support Magistrate. I can only speak for Ramsey County, but we are quite successful at settlement through pre-hearing conferences and stipulations through our "Best Order" philosophy, which is to propose the best order for the family as a whole. If we cannot get an agreement before the hearing, we present any agreements that were met, and then argue our case to the court. We are confident that most pro se parties who are willing to listen to us, whether or not they agree with the end result, they understand the process and what is being required of them.

Additionally, an element that is different in IV-D cases than other Family Law Cases is that Counties do not represent the obligor, obligee or even the child. Counties represent the interests of the public. As a result, sometimes the County's position aligns with the custodial parent (parent with whom the child resides), sometimes with the non-custodial parent (parent with whom the child does not reside), or sometimes with the relative caretaker; but sometimes the County's position is the third or fourth different position in the case. This is different than other areas of family law, where each side is represented (pro se or with a private attorney), and this third or fourth point of view does not exist on the case.

Something else unique to cases involving the IV-D Program is that if any party does not agree with the decision and order of the Child Support Magistrate, that party has the right to file a motion for review back to the Child Support Magistrate who issued the order or to a District Court Judge, and may also request to present additional evidence in that review. While parties may appeal the decision directly to the Court of Appeals, I would venture to guess that most parties opt to request a review prior to going through the expensive and time consuming process of appealing a case. There are pro se forms for motions for review that are easy to use and accessible to the public. In District Court, there are no pro se forms to request a reconsideration, and a request for reconsideration, or amended findings or a new trial must be brought before the judicial officer who issued the order. As a result, requesting a review prior to an appeal is

easier in the Expedited Process system than in District Court cases, and may reduce the number of appeals on purely IV-D child support issues. Cases that end up in the appellate system that involve open IV-D cases are more likely to be appealed for issues beyond County interests or are purely issues of law.

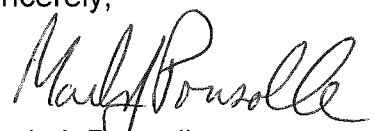
Most IV-D cases involve pro se litigants, as the Expedited Process was designed for parties to proceed efficiently and cost-effectively without the need to hire an attorney to navigate the court process. Our experience in Ramsey County shows that there is a lack of understanding of the limitations set forth by the law as a reason for dissatisfaction with the outcome of the hearings a lot of the time. There is often a power imbalance coupled with a knowledge imbalance that would make mediation problematic and less effective. To many pro se litigants, child support and all of family law should be intuitive, not legislated or governed by court rules. We often find ourselves arguing with people who really don't care if their position is contrary to "law" if it meets with their own sense of "what's fair". By the time an appeal has been filed, the County has made every effort possible to settle the case and to educate the parties as to the limitations of the law. Unless the issue is purely legal, I am not sure the County's involvement in mediation will help settle the case. But, that said, I agree that having the parties required to participate in mediation prior to an appeal, unless they meet an exemption, may help encourage settlement; mediation may provide another chance at educating the parties of the limitations set forth by the law.

Generally, if Counties appeal a case to the Court of Appeals, they are doing so to establish new law or clarify law that is unclear. County child support appeals are unlike the emotional and factual disputes that obligors and obligees weave into their appeals. The county does not come to the negotiating table with the baggage that parties have (i.e. failed relationship, disagreements on child rearing, who is getting the house, how can we afford two separate household etc.). The only issue for Counties on appeal is whether the court abused its discretion on a matter of law, and a mediator won't be able to help us with that, except maybe helping with educating the pro se parties on what we are trying to do.

Finally, the cost of mandatory mediation is a concern. Counties are exempt from paying filing fees, but it does not appear that there is a similar exemption from the costs of mediation. Thus, if the Counties are expected to pay for its share of the costs of mediation, the cost alone would limit the counties' decision to take part in mediation, considering all of the efforts made to settle the case prior to the appeal. I also have a concern about the costs of mediation on pro se and even represented parties. Approximately 73% of Ramsey County's IV-D caseload is made up of cases involving current or former public assistance recipients hovering over the poverty guidelines (the statewide average is approximately 63%). Some of these cases would qualify for an IFP order, but some are barely beyond that limit. So, I ask whether there information from the pilot project as to the costs of mediation, and is there any thought that the county would be exempt from any costs?

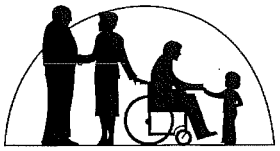
Please let me know if you have any questions or would like more information as to my comments. Again, thank you for the opportunity to comment. Mediation is an effective and useful tool, but clarification of the Counties' participation in appeals involving open IV-D cases would be appreciated.

Sincerely,



Mark J. Ponsolle
Ramsey County Attorney's Office

Director of Human Services Division
and Ramsey County IV-D Director



Minnesota Department of **Human Services**

November 5, 2010

Mr. Frederick Grittner,
Clerk of the Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, Minnesota, 55155

RE: Proposed Amendment to Rule 133 of the Civil Rules of Appellate Procedure

Dear Mr. Grittner:

Attached is the Minnesota Department of Human Services' (DHS) response to the proposed amendment to Rule 133 of the Civil Rules of Appellate Procedure. In summary, DHS supports the use of mediation in family law appeals, but is very concerned about the mandatory involvement of the public authority responsible for child support enforcement (public authority) in the mediation.

The proposed amendment makes mediation mandatory for all child support actions, including IV-D cases. The proposed amendment would require the public authority to participate in mediations when there is an open IV-D case, even if the issue being mediated is not one in which the public authority has a vested IV-D public interest. In fact, it would not be allowable under federal law that regulates the IV-D program for the public authority to participate in the resolution of issues subject to mediation if there is no IV-D public interest.

The IV-D services provided by the public authority are heavily federally funded and allowable expenses are regulated. The IV-D attorney mediation expense in family law cases if the issues being mediated are outside of the scope of the public authority's federally required services will be ineligible for federal funding. In addition, any contribution by the public authority toward appellate mediation fees regardless of the scope of the issues is ineligible for federal funding. To address these concerns, DHS proposes the following additional amendments:

Rule 133.01. Prehearing Conference

The appellate court may direct the parties, or their attorneys, to appear before a justice, judge, or person designated by the appellate courts, either in person or by telephone, for a prehearing conference to consider settlement, simplification of the issues, and other natters which may aid in the disposition of the proceedings by the court. The justice, judge, or person designated by the appellate courts shall make an order which recites the agreement made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admission or agreement of counsel.

Unless exempted by the court for good cause shown, appeals in family law cases are subject to mandatory mediation. The court of appeals is authorized to issue special rules of practice governing the

family law appellate mediation process. These special rules apply to appeals arising from marital dissolution actions; parentage actions; post-decree modification and enforcement proceedings, including civil contempt actions; child-support actions~~, including IV-D cases~~; and third-party custody and visitation actions. When the public agency responsible for child support enforcement is a party or is providing services to a party with respect to the action, the public agency may opt out of the mediation and will thereafter be bound by any mediated decision and order.

In addition, DHS recommends that Rule 11 of the Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Appellate Mediation be amended as follows:

Rule 11. Appellate Mediation Fees
The Family Law Appellate Mediation Office shall establish a schedule of fees to be paid by the parties to the appellate mediator. The public agency responsible for child support is exempt from the payment of any of these fees.

Please review the attached memorandum and let me know if you have any questions or would like more information as to the comments. The state child support program strongly believes these additional amendments are needed and thanks you for the opportunity to comment.

Sincerely,

Erin Sullivan Sutton
Assistant Commissioner, Children and Family Services
Minnesota Department of Human Services

Enclosure

MEMORANDUM

Comments by the Minnesota Department of Human Services Regarding The Proposed Amendment to the Rule 133.01 of the Rules of Civil Appellate Procedure

November 5, 2010

Executive Summary

The Department of Human Services Child Support Enforcement Division (DHS) submits this memorandum to provide additional information for the Supreme Court's consideration in deciding whether to amend Rule 133.01 as proposed by the Advisory Committee. DHS recognizes the success of the existing Court of Appeals Family Law Appellate Mediation Pilot Project and supports the use of mediation to provide parties to family law appeals alternative means to resolve their disputes.

However, DHS is very concerned about the mandatory nature of the mediation in the proposed amendment in relation to the involvement of the public authority responsible for child support enforcement (public authority). The proposed amendment appears to expand the scope of the pilot project and would require the presence and participation of the public authority at mediations where the public authority has no vested public interest in the issues being mediated.

The IV-D services provided by the public authority are heavily federally funded and regulated. These services are reimbursed by the federal government at the rate of 66% for allowable services. The IV-D attorney time for mediation would only be reimbursable if there is a IV-D public interest vested in the issue being mediated. Any contribution by the public authority toward appellate mediation fees is ineligible for federal funding. As a result, DHS is concerned with the mandatory involvement of the public authority in every family law case being mediated for which there is an open IV-D case, and the financial burden the proposed amendment places on the program's limited resources. As such, DHS recommends that proposed amendment to Rule 133.01 be further amended to comply with the federal directives and make the involvement of the IV-D program optional.

Recommended Language

Rule 133.01. Prehearing Conference

The appellate court may direct the parties, or their attorneys, to appear before a justice, judge, or person designated by the appellate courts, either in person or by telephone, for a prehearing conference to consider settlement, simplification of the issues, and other natters which may aid in the disposition of the proceedings by the court. The justice, judge, or person designated by the appellate courts shall make an order which recites the agreement made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admission or agreement of counsel.

Unless exempted by the court for good cause shown, appeals in family law cases are subject to mandatory mediation. The court of appeals is authorized to issue special rules of practice governing the family law appellate mediation process. These special rules apply to appeals arising from marital dissolution actions; parentage actions; post-decree modification and enforcement proceedings, including civil contempt actions; child-support actions~~, including IV-D cases~~; and third-party custody and visitation actions. When the public agency responsible for child support enforcement is a party or is providing services to a party with respect to the action, the public agency may opt out of the mediation and will thereafter be bound by any mediated decision and order.

In addition, DHS recommends that Rule 11 of the Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Appellate Mediation be amended as follows:

Rule 11. Appellate Mediation Fees
The Family Law Appellate Mediation Office shall establish a schedule of fees to be paid by the parties to the appellate mediator. The public agency responsible for child support is exempt from the payment of any of these fees.

Proposed Alternative Language
In the alternative, the public authority recommends at minimum the exemption language in the Advisory Committee Comment-2010 Amendment be amended as follows:

Other grounds for exemption from mandatory mediation may include making a convincing demonstration that post-trial ADR has been employed without success, geographical unavailability of a trained appellate mediator, persuasive arguments that the appeal presents an unsettled legal issue upon which the court of appeals should rule, that the public authority responsible for child support enforcement has made a determination in an open IV-D case that it does not have an interest in the appeal, and other reasons.

Rationale
Issue 1: The public authority's role in family law cases receiving IV-D services is limited by federal law. This limited role makes the public authority's participation in mediation not allowable when there is no IV-D public interest served by the public authority's involvement. The public authority must be permitted the discretion to opt out of the mandatory mediation requirement when its involvement is not allowable.

Unlike other types of family law cases, cases receiving IV-D services comprise a unique mixture of parental and governmental involvement and actions. Minnesota Statutes, section 518A.26, subdivision 10, defines "IV-D case" in pertinent part as follows:

> "IV-D case" means a case where a party has assigned to the state rights to child support because of the receipt of public assistance as defined in section 256.741

> or has applied for child support services under title IV-D of the Social Security Act, United States Code, title 42, section 654(4).

Therefore, the public authority is a real party in interest in any IV-D case where there has been an assignment of support due to the receipt of government services. Minn. Stat. § 518A.49 In all other IV-D cases, the public authority may have a pecuniary interest and/or an interest in the welfare of the children involved in those cases. *Id.* The public authority may intervene as a matter of right in those cases to ensure that child support orders are obtained and enforced, and provide for an appropriate and accurate level of child, medical, and child care support. *Id.* If the public authority participates in an IV-D case and action taken by the public authority requires the use of an attorney's services, the public authority must be represented by a public attorney consistent with the provisions in Minnesota Statutes Section 518A.47.

The county attorney represents the public authority in a Minnesota IV-D case. The county attorney does not represent either of the other parties involved in the case, and the public authority's interests may or may not be aligned with either of the other parties. *See* Minn. Stat. § 518A.47

In IV-D cases, the public authority's decisions concerning the merits of intervening or otherwise participating are based on the nature and extent to which a particular case involves the public authority's interest as defined by Minnesota Statutes and federal law. Generally, the public authority has an interest in actions to establish paternity, actions brought for reimbursement of public assistance, and actions brought to establish, modify or enforce a child support order (where a party has assigned its right to child support to the state or has applied for child support services). 42 USCA § 654 The public authority is prohibited from providing certain services under the federally required IV-D State Plan, including assistance with divorce, establishment or enforcement of spousal maintenance, establishment or enforcement of parenting time, etc. *Id.* Compliance with the IV-D State Plan is necessary to receive federal funding for provision of IV-D services in the state.

The scope of the services and activities provided by the public authority is detailed in the IV-D State Plan. The State Plan must be submitted to and approved by the United States Department of Health and Human Services, Office of Child Support Enforcement, as a condition of the State's receiving federal funding for its child support program. 42 USCA § 602. Therefore, although it may be allowable for the public authority to participate in the action at the trial level, and address the issues in which it has a vested public interest, it may not be allowable for the public authority to participate on appeal if the appeal concerns only issues outside the scope of the public authority's interest as set forth in the approved State Plan.

In addition, there may be certain factual issues involving actions in IV-D cases to establish paternity, actions brought for reimbursement of public assistance, and actions brought to establish, modify or enforce a child support order which limit

the public authority's interest. Although the public authority is interested in ensuring appropriate and accurate levels of child, medical, and child care support are awarded in IV-D cases, the underlying factual dispute in a IV-D case which results in an appeal may not rise to the level of a vested public interest for the IV-D program.

For example, the public authority may bring an action to establish child support. Within that action the court may order an upward deviation from the child support guidelines based on a factual finding that the obligee has extraordinary educational expenses for the child. The obligor might limit the appeal to that factual finding. The public authority would not have a vested public policy interest in that particular factual dispute and should have discretion to opt out of mediation.

As a public agency, the public authority has a responsibility to advocate for enforcement of existing laws and policy that serve a relevant public interest policy, however, the public authority must be permitted the discretion to determine if its participation in mediation is allowable to most effectively use valuable program resources.

Issue 2: The IV-D attorney time for mediation would be ineligible for federal funding unless there is a IV-D public interest vested in the issue being mediated. Any contribution by the public authority toward the appellate mediation fees is ineligible for federal funding. Thus mandating participation by the public authority in mediation when the issues are outside the scope of the IV-D mandated services would significantly and negatively impact IV-D child support enforcement program resources.

The IV-D child support enforcement activities conducted by the state child support program are funded by Federal Financial Participation (FFP), whereby the federal government reimburses the state for 66% of allowable child support outlays. 42 USCA § 655. Only federally approved state child support agency expenditures for Title IV-D activities are eligible for reimbursement. In general, expenditures that are necessary for undertaking the mandatory operations of the IV-D program are reimbursable, and the cost of activities that are not required under the child support State Plan cannot be submitted for reimbursement and paid out of IV-D funds.

State IV-D child support enforcement agencies also receive federal incentive money based on their performance on five measures, in competition with other States. 42 USCA § 658a. Incentive money also cannot be used for any items that are not reimbursable expenses without special approval from the federal government.

Requiring a IV-D attorney to participate in mediation when the issue being mediated is not relevant to an activity or service the state program is required to provide under the State Plan would result in the attorney time being ineligible for federal funding. Because the federal government contributes about 75% of the state's total child support

enforcement funding, any expense that is not federally reimbursed significantly and negatively impacts state child support program resources.

A significant number of appeals have the public authority as a named party but do not concern a IV-D issue. For example, an appeal relating to custody or the amount of parenting time ordered may arise out of a marital dissolution where the public authority was involved because one of the parties applied for child support services. Establishment and enforcement of custody and/or parenting time are not IV-D services and any IV-D attorney time spent mediating these issues on appeal would not an allowable use of IV-D resources and would be ineligible for federal funding.

In addition, any contribution required by the public authority toward the appellate mediation fees would be ineligible for federal funding. Because the state is required under 42 USCA § 666(a)(2) and 45 CFR § 303.101 to have in effect and to use an expedited administrative procedures for establishing paternity and for establishing, modifying, and enforcing support obligations, the cost to compensate presiding officers in the expedited process, including child support magistrates is eligible for FFP. However, 45 CFR § 304.21 specifically limits FFP for court services outside of the child support expedited process, specifically making FFP unavailable for the cost of compensation of district court judges and district court filing fees.[1]

Therefore, if the appellate mediation fees were attributable to the public authority, that cost would not be eligible for FFP. As stated above, expenses of the public authority not eligible for FFP have a significant negative impact on the state and county child support program's limited resources.

Even if the public authority does not opt out of the mediation, DHS requests that Rule 11 of the Proposed Special Rules of Practice for the Minnesota Court of Appeals Governing Family Appellate Mediation be amended to exempt the public authority from the appellate mediation fees, similar to the exemption provided to the public authority in regards to fees in district court. *See* Minn. Stat. § 357.021, subd. 1a(c) (2010).

---

[1] 45 CFR § 304.21(b) Limitations. Federal Financial Participation is not available in:
(1) Service of process and court filing fees unless the court or law enforcement agency would normally be required to pay the cost of such fee;
(2) Costs of compensation (salary and fringe benefits) of judges;
(3) Costs of travel and training related to the judicial determination process incurred by judges;
(4) Office-related costs, such as space, equipment, furnishing and supplies, incurred by judges;
(5) Compensation (salary and fringe benefits), travel and training, and office-related costs incurred by administrative and support staff of judges; and
(6) Costs of cooperative arrangements that do not meet the requirements of § 303.107 of this chapter.

Proposed Alternative Language: As an alternative the proposed amendment should be further amended to allow the public authority to obtain an exemption when it has no vested public interest in the case or issue(s) being mediated.

The proposed amendment as currently written only allows the public authority to opt out of the mediation if it is able to obtain an exemption for good cause from the court. An exemption for good cause as defined in the proposed Advisory Comment to the 2010 Amendment states that mediation is "generally mandatory" and narrowly defines good cause to "cases involving allegations of domestic violence" cases, cases where ADR has been employed without success in the past, "geographical unavailability of a trained appellate mediator", and cases expected to set precedent for an issue. See Advisory Committee Comment to the 2010 Proposed Amendment.

Although the comment states there may be "other reasons" at the end of the definition, the definition is fairly narrow and the "A Mediation Tune Up For the State Court Appellate Machine" states that few exemptions were granted in the pilot project as the mediation was designed to be mandatory for selected case types. McAdoo, page 12. If the Supreme Court does not wish to give the public authority the discretion to opt out of mediation based on whether a IV-D public interest is served by its participation on the mediation, DHS suggests that, at a minimum, the exemption language be modified as specified above to allow the public authority to obtain an exemption when it has no vested public interest in the case or issue(s) being mediated.

Conclusion

While DHS supports the use of mediation in family law appeals, it must respectfully request that the proposed amendment to Rule 133.01 be further amended to provide the public authority the ability to opt out of mediation when participation is not appropriate. Mandatory participation in meditation by the public authority in all child support actions when IV-D services are being provided would be an unnecessary and inappropriate use of the state child support program's already limited resources. In addition DHS recommends that the public authority be exempt from contributing towards the cost of mediation as the cost of mediation would be ineligible for FFP, the state child support program's primary source of funding.

LEGAL SERVICES ADVOCACY PROJECT

November 4, 2010

ADM09-8006

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, MN 55155

RE: Proposed Rules regarding Family Appellate Mediation

Dear Mr. Grittner:

The following are comments submitted on behalf of statewide Minnesota regional legal services programs (Legal Services) in response to the Request for Comments for Proposed Amendment to the Rules of Civil Appellate Procedure and Proposed Special Rules of Practice issued on September 23, 2010. Legal Services programs represent or advise thousands of low-income clients across Minnesota each year in a variety of matters, including family law. Thus, our comments focus on the impact of mandatory family court appellate mediation on low-income Minnesotans.

Family Law Appellate Mediation Office - Review

The rules as a whole contemplate a Family Law Appellate Mediation Office with authority to determine cases appropriate for mediation, determine eligibility for exemptions from mediation, maintain a roster of mediators and set a fee schedule. However, it does not appear that there is any opportunity for parties to request review or reconsideration of a determination of the Family Law Appellate Mediation Office. Given the impact of this process on parties seeking appellate review, there should be some process for review or reconsideration of determinations made by the Family Law Appellate Mediation Office.

Exclusion from Appellate Mediation

As written, the comments to the proposed rules contemplate exemptions from appellate mediation in family law cases. However, the grounds for exemption are mentioned only within the advisory comments rather than included in the rules themselves. It is our position that these important issues, which include domestic violence, a "convincing" demonstration that post-trial ADR has already been attempted, geographic unavailability of a trained mediator, the presence of unsettled legal issues that require a court ruling and "other" grounds should be specifically included in the rules as grounds for exemptions. This is particularly important in cases of

2324 University Avenue West, Suite 101 Midtown Commons St. Paul, MN 55114
Telephone: 651.222.3749 Facsimile: 651.603.2750 www.lsapmn.org
A United Way Agency

domestic violence. Furthermore, it is our position that any unsuccessful attempt at post-trial ADR should be sufficient to warrant an exemption without requiring a "convincing" demonstration of failed ADR, which would be consistent with the exemption from ADR in Rule 310 the Family Court Rules of General Practice.

Fees and In Forma Pauperis Standing.

The proposed rules generally reference that the Family Law Appellate Mediation Office must set a fee schedule. However, the proposed rules are silent as to the applicability of an *in forma pauperis* determination in either the underlying district court action or pursuant to a motion filed as part of the appeal process. It is our position that the rules should state that an approved *in forma pauperis* determination should waive any fees in family appellate mediation.

Alternatively, if fees will not be waived, a party who has been granted *in forma pauperis* standing should be specifically exempted from appellate mediation. This amendment is consistent with the ADR provisions in Rule 114.11 of the General Rules of Practice for the District Courts.

Interpreters

The proposed rules do not contain any provision for the use or availability of interpreters for non-English speaking parties, and whether any fees would be associated with the use of interpreters in mediation. It is our position that interpreters should be made available to parties in a manner consistent with existing court rules and practices. If interpreters will not be available, or will only be available with a fee, then cases that need interpretation services should be either specifically exempted from appellate mediation or specifically permitted to opt out of mediation.

Qualification and Training Requirements for Mediators

The proposed rules are silent as to the qualification and training that mediators appointed to the Family Appellate Mediation program must have and maintain. Given the importance that this program will take in the appellate process, the rules should detail the qualification and training requirements to be appointed and remain a mediator.

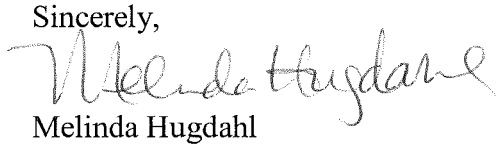
Scope of Mediation

Finally, we noted that the proposed rules are silent as to whether issues that are not on appeal can be brought into the appellate mediation process. While we recognize that bringing district court issues into the appellate mediation can and does help settle some cases, we have significant concerns that in other cases the ability to bring in issues not on appeal will increase the expense

of the mediation, delay the appellate process, and bring the finality of district court determinations into question.

Thank you for the opportunity to comment on these proposed rule changes to implement Family Appellate Mediation.

Sincerely,



Melinda Hugdahl
Staff Attorney
Legal Services Advocacy Project

THE MINNESOTA COURT OF APPEALS
MINNESOTA JUDICIAL CENTER
25 REV. DR. MARTIN LUTHER KING JR. BLVD.
ST. PAUL, MINNESOTA 55155

CHAMBERS OF
HONORABLE MATTHEW E. JOHNSON
CHIEF JUDGE

ADM09-8006

(651) 297-1616

December 7, 2010

Honorable Lorie S. Gildea
Chief Justice
Minnesota Supreme Court
424 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, Minnesota 55155

RE: Proposed Amendment to Rule 133 of Minnesota Rules of Civil Appellate Procedure and Proposed Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Appellate Mediation

Dear Chief Justice Gildea:

In November, the supreme court received four sets of comments on the above-captioned proposed amendment to the rules of civil appellate procedure and the proposed special rules. I write on behalf of the court of appeals to respond to those comments and to request that the supreme court promulgate the amendment to rule 133.01 as proposed, with one minor revision.

Background

The proposed amendment and the proposed special rules are intended to implement a pilot program that the court of appeals initiated in September 2008. The pilot program has exceeded expectations and has demonstrated that mediation of family law cases at the appellate stage is worthwhile for litigants and for the court system. To date, 98 of the 190 cases that have gone through the mediation process (*i.e.*, 52%) have been resolved by a voluntary settlement agreement of the parties.

The advantages of the family law mediation program are achieved at relatively low costs to the court. Since the beginning of the pilot program, we have incurred minimal out-of-pocket expenses. Through a State Justice Institute grant, we paid for a program evaluation and for a consultant to assist in setting up the mediation program and in training mediators. During the first year of the pilot program, when approximately 50 cases were settled, the court of appeals' average cost per settled case was approximately $600. That number is far less than the overall average cost per case for the court of appeals, which exceeds $4,000. After January 1, 2011, we expect that the costs of the mediation program will be little more than the personnel costs of a Family Law Mediation Program Coordinator, a half-time position. In short, the court of appeals' family law mediation program is a significant innovation that will allow the court to achieve its mission more efficiently.

Comments of Minnesota Department of Human Services and Ramsey County

The Minnesota Department of Human Services (DHS) and Ramsey County expressed concerns about being required to participate in mediation in child-support enforcement actions. The court of appeals does not wish to require public authorities prosecuting IV-D cases to participate in mediation to the extent that they seek to be exempted.

We believe that the concerns of DHS and Ramsey County can be accommodated with two changes. First, it appears that the concerns are resolved by adding the following sentence to rule 6(c) of the Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Appellate Mediation:

> When the public agency responsible for child support enforcement is a party or is providing services to a party with respect to the action, the public agency may opt out of the mediation and will thereafter be bound by any mediated decision and order.

DHS recommended that this language be added to rule 133.01. At its monthly bench meeting earlier this week, however, the court of appeals added this language to rule 6(c) of this court's special rules. A copy of the special rules, as amended, is enclosed. In light of that amendment to the court of appeals' special rules, we believe that it is unnecessary for the supreme court to make a similar change to rule 133.01 of the rules of civil appellate procedure, although we would have no objection to an amendment to rule 133.01 that corresponds to special rule 6(c).

Second, to avoid any confusion, the court of appeals respectfully recommends that the supreme court delete the phrase "including IV-D cases" from the last sentence of the proposed amendment to rule 133.01 (which appears on line 16 of the rules committee's recommendation). This is a revision specifically recommended by DHS.

Comments of Professor Bobbi McAdoo

Professor Bobbi McAdoo opposes the pending proposals on three grounds. For the reasons stated below, the court of appeals respectfully requests that the supreme court not make any revisions to the proposed rules based on Professor McAdoo's comments.

First, Professor McAdoo states that a party to a family law case should be permitted to opt out of the mediation program at will. The court of appeals continues to believe that participation in the mediation program should be mandatory, subject to the provisions for exemptions.

Second, Professor McAdoo questions whether prior settlement efforts in post-trial ADR should be more deserving of an exemption than prior settlement efforts in pre-trial ADR. We believe that a family law case is substantially different after a district court has issued a final judgment. The program's mediators seek to educate parties about, among other things, the standards of review that apply to a district court's discretionary determinations and findings of fact, as well as the foreseeable appellate remedies. Many appellants opt for settlement after obtaining additional information about the probability of reversal and the additional costs and time necessitated by a remand.

Third, Professor McAdoo states that the program should not apply to *pro se* litigants. She concedes that there is limited data concerning settlement rates in cases with unrepresented parties. We continue to believe that *pro se* parties should be required to mediate. *Pro se* parties are especially likely to benefit from the information provided by the court of appeals and by the mediator. Even if a *pro se* party does not enter into a voluntary settlement, he or she has had an opportunity to be heard orally. In addition, the costs for *pro se* parties generally are low. Most *pro se* parties pay a flat fee of $25.00 (if they have *in forma pauperis* status) or low hourly fees of $25.00 or $37.50.

Comments of Legal Services Advocacy Project

The Legal Services Advocacy Project (LSAP) submitted a letter containing six comments. For the reasons stated below, the court of appeals respectfully submits that it is either unnecessary or undesirable to make any revisions to the proposed rules to address the concerns stated by LSAP.

First, LSAP suggests that parties should have an opportunity to seek review by a judge or panel of judges whenever the family law appellate mediation office rules on a request for exemption from mediation. This issue has received considerable attention since the beginning of the pilot program. The proposed rules reflect the view that information received from attorneys and litigants in the mediation process should not be shared with judges or other court personnel who may be assigned to the case if it goes forward to oral argument, conference, and a written opinion. In addition, the opportunity for further review by judges would tend to increase the costs and fees incurred by litigants. Furthermore, mediators participating in the program retain the discretion to determine at an early stage that a case is not appropriate for mediation.

Second, LSAP suggests that potential grounds for exemption from mediation should be included in the rule rather than in the comments of the advisory committee. It is my understanding that the rules committee considered this issue and determined that the present proposal would best indicate that exemptions will be determined on a case-by-case basis.

Third, LSAP suggests that persons possessing *in forma pauperis* status should have mediation fees waived or should always be exempted from mediation. The court of appeals' internal policies and procedures (a copy of which is enclosed for your convenience) require *in forma pauperis* parties to pay a flat fee of $25.00. Studies indicate that settlement rates are higher when indigent litigants are required to pay a small amount of mediation fees.

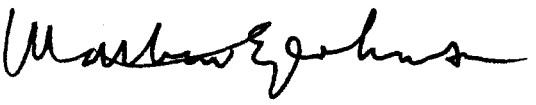
Fourth, LSAP suggests that the rules should provide for the availability of interpreters for non-English-speaking parties. At present, parties requiring or desiring interpreters are required to provide their own interpreters. This practice is consistent with established ADR practice in the district courts. In practice, an insurmountable language barrier likely will be sufficient grounds for an exemption from mediation.

Fifth, LSAP suggests that the rules expressly state the qualifications required for mediators in the program. The court of appeals' internal policies and procedures require that mediators be certified pursuant to rule 114.

Sixth, LSAP suggests that the rules expressly state that issues not raised on appeal may not be discussed in mediation. We believe that this is a matter best left to the discretion of the trained professional mediators participating in the program.

If the supreme court desires any additional information concerning the court of appeals' family law mediation program or the proposed amendment and the proposed special rules, please do not hesitate to contact me. Thank you.

Very truly yours,



Matthew E. Johnson

cc: Honorable G. Barry Anderson, Minnesota Supreme Court
Honorable Harriet Lansing, Minnesota Court of Appeals
Honorable Jill Flaskamp Halbrooks, Minnesota Court of Appeals
Commissioner Richard Slowes
Fredrick K. Grittner, Esq.
Cynthia L. Lehr, Esq.
David F. Herr, Esq.
Erin Sullivan Sutton, Minnesota Department of Human Services
Mark J. Ponsolle, Esq., Ramsey County Attorney's Office
Professor Bobbi McAdoo, Hamline University School of Law
Melinda Hugdahl, Esq., Legal Services Advocacy Project

Enclosures: Proposed Special Rules of Practice for the Minnesota Court of Appeals Governing Family Law Appellate Mediation, revised December 2010
Minnesota Court of Appeals Family Law Mediation (internal) Policies and Procedures

SPECIAL RULES OF PRACTICE
FOR THE
MINNESOTA COURT OF APPEALS
GOVERNING FAMILY LAW APPELLATE MEDIATION

Rule 1. General

(a) Authority. These special rules of practice are made in accordance with the appellate court's authority under Minn. R. Civ. App. P. 133.01 to direct the parties, or their attorneys, to appear before a judge or person delegated by the appellate courts, for a prehearing conference to consider settlement.

(b) Scope. These special rules apply to appeals arising from marital dissolution actions, parentage actions, post decree modification and enforcement proceedings, including civil contempt actions, child support actions, including IV-D cases, and third-party custody and visitation actions.

(c) Suspension of Processing Deadlines. In the interests of judicial economy and to facilitate the mediation process, there is good cause under Minn. R. Civ. App. P. 102 to suspend the requirements of certain appellate processing rules, as specified in these special rules.

(d) Applicability of the Rules of Civil Appellate Procedure. The Minnesota Rules of Civil Appellate Procedure apply unless these special rules direct otherwise.

(e) Time Periods to File a Direct Appeal or Notice of Related Appeal. These special rules do not extend or otherwise affect the time periods to file a direct appeal or notice of related appeal under Minn. R. Civ. App. P. 104.01.

Rule 2. Transcripts

(a) The time periods to file a transcript certificate and for preparation of the transcript under Minn. R. Civ. App. P. 110.02 are stayed in appeals that are referred to appellate family law mediation.

(b) If a transcript has already been ordered before the appeal is referred to mediation, upon receipt of the order referring the case to mediation, the party, if unrepresented, or the attorney for the party ordering the transcript, shall immediately notify the court reporter that transcript preparation is stayed pending mediation.

(c) If a party chooses to have transcript preparation continue during mediation, the party, if unrepresented, or the attorney for the party, shall file with the Clerk of Appellate Courts a written notification to that effect, with proof of service on the court reporter and the other parties. A party who chooses to have transcript preparation continue during mediation is responsible for payment of transcript expenses, even if the case fully settles.

Rule 3. Briefing

The time periods for filing briefs under Minn. R. Civ. App. P. 131.01 are stayed pending mediation.

Rule 4. Other Processing Deadlines

In addition to the time periods for filing a direct appeal or notice of related appeal, the following processing requirements are not stayed in appeals subject to mediation: the filing of a certified copy of the order and judgment appealed from and proof of service for the appeal papers under Minn. R. Civ. App. P. 103.01, subd. 1, and the filing of a statement of the case under Minn. R. Civ. App. P. 133.03.

Rule 5. Untimely Appeals

Untimely appeals are not subject to mediation. A party may file a motion to dismiss a direct appeal or notice of related appeal that is not filed and served within the time periods specified in Minn. R. Civ. App. P. 104.01.

Rule 6. Screening Process

(a) The Family Law Appellate Mediation Office screens new family law appeals to determine their suitability for mediation.

(b) If the initial screening shows mediation suitability, the Court of Appeals shall issue an order staying processing of the appeal and directing the parties to file a confidential mediator selection form and confidential information form.

(c) A party may request an exemption from mediation by including in the confidential information form, the request and the reason(s) for the request. This

request may be granted at the discretion of the Family Law Appellate Mediation Office. If the request is granted, the parties shall be notified in writing no later than ten (10) days after the Family Law Appellate Mediation Office receives the confidential information form from all parties. When the public agency responsible for child support enforcement is a party or is providing services to a party with respect to the action, the public agency may opt out of the mediation and will thereafter be bound by any mediated decision and order.

(d) When multiple appeals involving the same parties are filed, all pending issues on appeal shall be consolidated into a single mediation process.

Rule 7. Confidentiality

(a) All information obtained for and through the mediation process shall remain confidential and shall not become part of the appellate record.

(b) To the extent applicable, Minn. R. Gen. Pract. 114.08, 114.10(c), and 114.10(d), which govern confidentiality in civil cases subject to Alternative Dispute Resolution processes, are incorporated into these special rules by reference.

Rule 8. Appellate Mediator Roster

(a) Appointment to the Appellate Mediator Roster. The court shall maintain a roster of approved appellate mediators and shall recruit mediators as needed throughout the state.

(b) Removal from the Appellate Mediator Roster. An appellate mediator may be removed from the appellate mediator roster if the mediator violates the Rule 114 Code of Ethics, fails to maintain good standing with the licensing board for the profession in which the person practices, fails to comply with the rules and policies of this program, or for other good cause shown.

Rule 9. Mediation Process-Timelines

(a) Within ten (10) days of the Court of Appeals order staying the process of the appeal and referring the case for family law appellate mediation, the parties shall file with the Family Law Appellate Mediation Office a confidential mediator selection form and confidential information form.

(b) After receiving from both parties the confidential mediator selection form and confidential information form, the Family Law Appellate Mediation Office shall issue a letter appointing the mediator and the Family Law Appellate Mediation Office shall contact attorneys and pro se parties to schedule a premediation conference call.

(c) Parties shall begin mediation as soon as practicable after the premediation conference call and shall complete mediation no later than seventy (70) days after the premediation conference call, unless the Family Law Appellate Mediation Office receives a request for and grants an extension.

Rule 10. Assignment of Mediator

(a) The Family Law Appellate Mediation Office shall assign a mediator from the appellate mediator roster to each case to be mediated.

(b) Before the mediation process begins, the parties shall sign a written agreement to mediate.

Rule 11. Appellate Mediation Fees

The Family Law Appellate Mediation Office shall establish a schedule of fees to be paid by the parties to the appellate mediator.

Rule 12. Liability of Appellate Mediator

Mediators appointed by the court serve in a quasi-judicial role and in the absence of willful and wanton misconduct are immune to claims as provided by law.

Rule 13. Finalization of Mediation Process

(a) Mediation Settlement Agreement. In the event that the parties reach an agreement resolving all or any issues involved in the appeal, the parties, and counsel, if any, shall sign a Mediated Settlement Agreement setting out the essential terms of all agreements reached in mediation and, if applicable, designating the individual responsible for drafting and filing any additional documents needed to implement the agreement in the district court and the time for completion of that drafting and filing in the district court. The purpose of the Mediated Settlement Agreement is to memorialize the essence of the agreement

for the parties, counsel, and the mediator, each of whom shall be given a copy of the signed agreement. Because of the purpose of this agreement, it shall not be filed with the Court of Appeals or the Family Law Appellate Mediation Office.

(b) **Mediator Case Closing Notice.** When the parties reach agreement resolving all issues on appeal and have signed a Mediation Settlement Agreement, or when the mediator has declared mediation concluded without agreement resolving all issues, the mediator shall mail to the parties, or counsel if represented, and file with the Family Law Appellate Mediation Office a completed Mediator Case Closing Notice informing the parties that:

(1) In the event agreement is reached on all issues involved in the appeal, the appeal shall be dismissed when appellant (and respondent if a related appeal is involved) file a Voluntary Dismissal with the Court of Appeals. If appellant (and respondent if a related appeal is involved) fails to voluntarily dismiss the appeal (and any related appeal) within forty-five (45) days of the date of this notice, the Court of Appeals shall issue an order vacating the stay of the appeal, setting a deadline for a completed initial transcript certificate to be filed, and providing that briefing shall proceed under Rule 131.01.

(2) In the event mediation is concluded without a full resolution of all issues, the Court of Appeals shall immediately issue an order vacating the stay of the appeal, setting a deadline for a completed initial transcript certificate to be filed, and providing that briefing shall proceed under Rule 131.01.

Rule 14. Reinstatement of the Appeal

In the event that the district court does not approve a Mediated Settlement Agreement of all issues on which an appeal was taken, the mediation shall be treated as a failure to reach a settlement, and the appeal shall be reinstated following motion to the Court of Appeals by the appellant. A reinstatement motion shall contain a certified copy of the district court's order and shall be filed within ten days of that order with no new filing fee.

Rule 15. Sanctions

(a) The Court of Appeals may sanction a party for the failure to comply with the requirements of the appellate mediation program. Neither the Family Law Appellate Mediation Office nor the mediator is authorized to impose sanctions.

(b) The Family Law Appellate Mediation Office may file a deficiency notice with the Court of Appeals if a party fails to comply with the requirements of the program. The Court of Appeals may issue an order compelling the party to comply and may also impose sanctions.

(c) The Court of Appeals may impose sanctions against a party who refuses to attend a mediation session or sessions, unreasonably delays the scheduling of mediation, or otherwise unreasonably impedes the procedures required for the mediation program.

(d) The Court of Appeals may impose sanctions on its own motion or on the motion of a party made in compliance with Minn. R. Civ. App. P. 127. A party's motion for sanctions may not be filed until mediation has been closed. A motion for sanctions may be filed but no later than within the time for taxation of costs under Minn. R. Civ. App. P. 139.03.

(e) Sanctions may include, but are not limited to, assessment of reasonable expenses caused by the failure of mediation, including an amount equivalent to mediator and/or attorney fees, assessment of all or a portion of appellate costs, or dismissal of an appeal or a notice of related appeal.

MINNESOTA COURT OF APPEALS
FAMILY LAW APPELLATE MEDIATION
POLICIES AND PROCEDURES
INTERNAL DOCUMENT—NOT INTENDED FOR CIRCULATION

These policies and procedures provide guidelines for the court and direction for the Family Law Appellate Mediation Office. This internal, unpublished document is intended to be informational only and does not bind the court or preclude periodic changes to review and refine our policies and procedures.

Forms and Scheduling

Origination of Mediation Process by Transfer of Copy from Clerk's Office

As soon as practicable, and in ordinary circumstances within two (2) business days after a family law appeal eligible for mediation, as defined in Spec. R. Pract. Governing Family Law Appellate Mediation 1(b), is filed with the office of the Clerk of Appellate Courts, the clerk shall send a copy of the file to the Family Law Appellate Mediation Office.

Screening

Every family law case eligible for family law appellate mediation shall be screened as soon as practicable, and in ordinary circumstances within two (2) business days after it is filed with the Clerk of Appellate Courts, to determine whether it has been timely filed. This screening will take place before it is processed by the Family Law Appellate Mediation Office. Untimely appeals shall not be mediated.

The Family Law Appellate Mediation Office shall screen all family law case files sent to the Family Law Appellate Mediation Office to determine if it should be accepted into the Family Law Appellate Mediation Program. This initial determination shall be based on the issues and the location of the parties. If the case is not accepted into the Family Law Appellate Mediation Program, the Family Law Appellate Mediation Office shall alert the Clerk of Appellate Courts and central staff that the case shall not be mediated, and a central staff attorney shall draft an order with timelines for the appeal.

Domestic Violence Protocol

The Family Law Appellate Mediation Program monitors for domestic violence at the following four times in the mediation process: (1) initial screening by the Family Law Appellate Mediation Office, (2) review by the Family Law Appellate Mediation Office of the Confidential Information Form, which provides an opportunity to request an exemption, (3) review of the file by the assigned

mediator who is qualified under Rule 114.13(c) of the Minnesota General Rules of Practice for the District Courts, and (4) communication between the assigned mediator and the parties.

Exemptions

In an effort to allow every party to mediate, mediation shall be the presumptive course for all cases. When a party submits the confidential information form with a written request and reason for the case to be excluded from the Family Law Appellate Mediation Program, the Family Law Appellate Mediation Office, consistent with its established mediation policies, has the discretion to exempt the case from the mediation program.

Forwarding Confidential Information Form and Mediator Selection Form to the Family Law Appellate Mediation Office

When a confidential information form, mediator selection form, or any other document intended for the Family Law Appellate Mediation Program is inadvertently submitted to an office other than the Family Law Appellate Mediation Office, the documents should be forwarded through interoffice mail as soon as possible to the Family Law Appellate Mediation Office, MJC 335A.

Mediator Selection/Fees

Appellate Mediator Roster

(a) Appointment to the Appellate Mediator Roster. In accordance with Rule 9, the court shall maintain a roster of approved appellate mediators and shall recruit mediators as needed throughout the state. To be eligible for the roster, a mediator must be a qualified family law facilitative neutral under Minnesota General Rules of Practice for the District Courts Rule 114 and must complete an application as required by the court. Preference shall be given to applicants who have substantial work experience as family mediators and who have family law and appellate experience.

(b) Appellate Mediator Training. Mediators selected for the roster must complete a one-day interactive training sponsored by the court that provides the history, context, and process of appellate family mediation as well as the implications of domestic violence for the mediation process. To maintain roster eligibility, appellate mediators must, as feasible, attend periodic court-sponsored meetings and training events.

Assignment of Mediator

(a) For each case to be mediated, the Family Law Appellate Mediation Office shall provide to the parties a list of potential appellate mediators

and a description of each appellate mediator's qualifications and background.

(b) The parties shall rank their preferences for the appellate mediator to be selected and provide their preferences to the Family Law Appellate Mediation Office.

(c) The Family Law Appellate Mediation Office shall assign an appellate mediator to the case based on all relevant factors including but not limited to, the parties' preferences, the appellate mediator's availability, the appellate mediator's geographical location, and the appellate mediator's expertise.

Agreement to Mediate

Prior to the commencement of mediation, the parties, their counsel and the mediator shall sign a written agreement to mediate, which shall address the following terms:

(a) The process to be followed in mediation;

(b) The fees to be charged by the mediator (including appropriate terms to assure prompt payment);

(c) Confidentiality of the process;

(d) The method of documenting and implementing agreements reached by the parties; and

(e) Compliance with Rule 114 of the Minnesota General Rules of Practice for the District Courts.

Appellate Mediation Fees

(a) The Family Law Appellate Mediation Office shall set the fee which each party shall pay to the appellate mediator. The Family Law Appellate Mediation Office shall inform the appellate mediator and each party of the fee to be charged to each party in the mediation process. The appellate mediator shall be paid for time expended in preparation and mediation at the hourly rate set for each party by the Family Law Appellate Mediation Office. The hourly mediation fee for each party shall be determined after taking into consideration the party's gross annual income as illustrated in the chart below, the hourly rate charged by the party's attorney, and any extenuating circumstances.

(b)

Party's Gross Annual Income	**Hourly Mediation Fee for Party**
Party with IFP Status	$25.00 Flat Fee
$0 - $49,999	$25.00 per hour
$50,000 - $74,999	$37.50 per hour
$75,000 - $99,999	$50.00 per hour
$100,000 - $124,999	$75.00 per hour

$125,000 - $250,000	$125.00 per hour
Over $250,000	$150.00 per hour

(c) If the appellate mediator learns of additional information not available to the Family Law Appellate Mediation Office that would change the applicable rate, the appellate mediator shall promptly inform the Family Law Appellate Mediation Office of the additional facts. The Family Law Appellate Mediation Office shall make adjustments to the hourly rate as warranted.

(d) The appellate mediator shall determine when payment to the appellate mediator is due and provide this notice in the agreement to mediate.