

**Providing Access to Mediation for Rural Participants  
Nebraska's Story  
By Kristen M. Blankley & Kelly Riley**

Tammy Bell is a nurse in Cozad, Nebraska, a town of roughly 4,000 people. She shares custody of her two children with John Singleton, who lives about two hours away in the smaller town of Blue Hill. John works on the family farm. John and Tammy met in Kearney, Nebraska, when they were both in college.

As the kids became teenagers, they preferred to stay in Cozad to compete in their sports activities and spend time with their friends. Going to John's house on the farm did not hold the allure that it did when they were younger. Although they still have cousins in Blue Hill, they have grown apart from their childhood friends. John has become upset that Tammy "refuses" to allow him to have his court-ordered parenting time.

John hires a lawyer, who is located in Hastings, another small city, and he files a contempt action against Tammy. Tammy has a lawyer in Kearney who moves to modify the parenting plan to give Tammy more time, given the kids' preferences. Under Nebraska law, the parties must mediate this case before a trial on the merits can occur. The parties decide to use the mediation center in Kearney. The mediation center sets up a Zoom mediation with a mediator in a different part of the state. A video mediation accommodates all participants, who all live within a two- or more-hour radius, and saves everyone significant time and expense related to travel.

Although this particular case is fictionalized, it is representative of many family law cases in the state. In addition, the phenomenon of distance between parties is not limited to family law cases, but could apply in any dispute.

The State of Nebraska recognizes that distance is among the rural community's biggest impediments to access to justice. It is also committed to mediation across the state. The pandemic expanded opportunities for remote participation in mediation and has suggested lessons for other court-access issues moving forward.

*Nebraska's Commitment to Mediation Across the State*

With the passage of the Dispute Resolution Act in 1991,<sup>1</sup> the State of Nebraska created a system in which mediation is available to citizens in all 93 counties and four Tribal Nations, regardless of the parties' ability to pay for services. The Act created a Supreme Court Dispute Resolution Advisory Council, created the Office of Dispute Resolution within the Administrative Office of the Courts and Probation (AOCB), and funded mediation service providers. The service providers are six independent nonprofit community mediation centers that undergo an annual review to maintain their approval status through the Office of Dispute Resolution. The centers operate in defined service areas without geographic overlap, though there are times when a center will provide services in another center's area. When this situation arises, the centers communicate and come to an agreement about which center will provide the service.

Most of Nebraska is rural, with two urban centers, Omaha and Lincoln, sitting in the eastern part of the state. Nebraska's population density is between 25.22<sup>2</sup> and 26.06<sup>3</sup> people per square mile, which ranks eighth in the United States for states with the lowest population density. In the early days of the Dispute Resolution Act, the four most rural mediation centers struggled, partly due to the size of their service area and the difficulties of providing in-person mediation. The centers have largely decided that they will do what they can to bring mediation to a location convenient to the parties when providing in-person services, rather than making parties travel to a mediation center's office.

When the legislature passed the Dispute Resolution Act in 1991, the six community mediation centers received grant funding of roughly \$30,000 per year from the Office of Dispute Resolution in the form of infrastructure grants. The centers could use that money on expenditures such as staffing, rent, insurance, mediator pay, or mileage, among other things. Today, the centers receive infrastructure grants in the amount of \$60,000 per center per year, but this grant only begins to cover the routine costs of each center. For the mediation centers to stay in business, they also rely on mediator fees from private clients, as well as other grant funding.

Over the last thirty years, demand for mediation has grown, particularly in court-connected cases. Early on, the centers partnered with Nebraska's Department of Health and Human Services (and later the AOCP) to provide facilitated conferencing in child welfare cases, and those relationships have led to increased cases over time. In 2007, Nebraska amended its Parenting Act<sup>4</sup> to require mediation in all cases that are not settled prior to court. The 2007 legislation instituted a filing fee that is distributed to the mediation centers so they can work on parenting plan cases for those who could otherwise not afford mediation.

Nebraska law mandates access to mediation for everyone in the state, regardless of their ability to pay. The fees for most mediation clients are determined on a sliding fee scale for those willing to provide proof of income. An annual sliding fee scale is distributed by the Office of Dispute Resolution every year and is based on Federal Income Guidelines. Nearly all of the clients of Nebraska's community mediation centers are eligible for reduced fee services due to their income.

#### *Distance as an Impediment to Access to Justice*

In rural Nebraska, and likely most rural parts of the United States, distance is one of the largest barriers to access to justice. Distance affects nearly every aspect of a dispute—e.g., distance between parties, distance from lawyers, and distance to a courthouse.

While the great majority of Nebraskans live in Omaha and Lincoln, the remaining population lives in small towns and villages, often at significant distances from one another. Like many large midwestern and western states, Nebraska suffers from the phenomenon known as a "legal desert" with limited access to attorneys in rural areas.<sup>5</sup> Of Nebraska's 93 counties, twelve counties have no lawyers.<sup>6</sup> Many additional counties have fewer than five lawyers.

Although Nebraska has a system in place to provide mediation access to all counties, the rural mediation centers all have vast geographic coverage areas, some as large as 35 counties. Before

the pandemic, rural centers primarily sought to bridge the divide by recruiting mediators across their geographic areas and by relying on access to mediation through telephone services and videoconferencing, when available.

In most cases, providing mediation services aided by technology was better than not providing mediation services at all. Although telephone conferencing could bring parties together, the lack of visual cues makes the mediation more difficult. In a telephone mediation, parties do not necessarily know when to start talking without an oral cue, such as “*Tammy*, please tell us more about your kids’ activities in Cozad.” Similarly, a party may not be able to gauge whether the mediator and other parties understand the story or the point being made, thus they may repeat a point multiple times. Telephone mediation requires the mediator to be more conscious of providing oral cues to keep the process moving.

A decade ago, videoconferencing for mediations involved software such as Skype and early versions of Zoom. These programs often ran slowly, and they only had computer interfaces. In rural areas, parties with unreliable internet or no internet at all would need to schedule use of a publicly available service at a local library, university, or community center. Questions also arose about whether using public computers met the requirements of confidentiality and security.<sup>7</sup>

The Nebraska mediation centers that have mediators available across their geographic areas can arrange space at local libraries, churches, and community centers to provide in-person mediation in a way that is convenient and cost-effective. Rural centers thus rely on creativity and connections with local resources throughout the service area to meet the needs of the community.

Two factors have greatly increased access to justice through technology in rural Nebraska. First, Nebraska committed to providing infrastructure for high-speed internet and phone services. And second, the pandemic forced people to use more remote services across many areas of life.

### *Nebraska Builds Technology Infrastructure*

Over the last decade, Nebraska has made great progress towards providing greater access to telecommunications across the state. The availability of broadband, in particular, has been a priority for the state, leading to the creation of the Nebraska Broadband Office in 2023.<sup>8</sup> Nebraska’s broadband initiatives have focused on rural access.

Additionally, telephone companies have been working to increase their coverage. Nearly all of Nebraska now has 4G and 4G LTE coverage through at least one cellular provider. In addition, 5G coverage is beginning to expand to cities outside of Omaha and Lincoln. These innovations helped set the stage for access to mediation services in rural Nebraska.

### *The Pandemic Creates Opportunities for Increasing Access to Mediation*

When the pandemic caused facilities to close, nearly every public-facing industry looked for ways to continue serving its customers, clients, and constituents. Schools, stores, doctors’ offices and courthouses, to name a few, all needed to embrace technology to continue providing access

to goods and services. At the individual level, those who had rarely relied on technology were forced to learn new skills to stay in touch and to conduct daily tasks.

Within the legal and ADR communities, Zoom became the platform of choice for meeting with clients. Mediators gravitated to Zoom because of its ease of use and helpful features. The breakout room feature, suggested by mediator Colin Rule,<sup>9</sup> provided mediators with the ability to caucus and create flexible spaces for different configurations of people and stakeholders.

Mediation centers across the country, and in Nebraska, all began to train mediators and staff on how to best use online platforms. When necessary, center staff walked parties through the technology so they knew what to expect at the mediation.

Advances in technology have made videoconferencing particularly attractive. Phone-based applications, as opposed to web-based software, allow parties to connect via either a data plan or a Wi-Fi connection. Accessing Wi-Fi on a phone in a café parking lot, library, or workplace is significantly easier than finding a place for a party to use a laptop or desktop computer. And people of all ages were already learning how to use Zoom to connect with friends and family during lockdowns.

Although online mediation may have started as a necessity, many of the rural mediation centers in Nebraska continue to use online tools to help parties who live at a distance and to bring more cases to the table. Online mediation brings flexibility and cost-efficiency. Nebraska mediation centers have seen an increase in the number of attorneys who can participate in mediation online, since the attorneys would no longer need to travel long distances.

Further, mediation centers can recruit mediators from across the state to act as online facilitators. The physical presence of the mediator is not required, which allows the centers to recruit across the state or even, in narrow circumstances, outside of the state. Additionally, the six community mediation centers can share mediators to ensure that statewide caseloads are managed. In particular, the rural centers can leverage excess capacity of mediators in Omaha and Lincoln if those mediators are willing to provide some services online.

Thus, the pandemic opened additional opportunities for rural mediation centers through advances in technology. While the rural centers have always needed to be creative to manage distance and other barriers, online mediation opens new opportunities that will long outlast the lockdowns of 2020 and 2021.

### *Barriers for Online Mediation*

While virtual mediation has been a blessing for the Nebraska mediation centers, there are barriers to remote participation. First, the parties may prefer in-person meetings. With self-determination a fundamental aspect of mediation, the preferences of the parties should drive how the mediation occurs.

Second, cases involving a large number of participants, such as child welfare conferencing, may benefit from in-person sessions. Specifically, while most professionals have access to a computer

for virtual meetings, many other participants may join via phone; but phone interface cannot accommodate as many participants on one screen and can impact engagement. According to the Pew Research Center, 27 percent of Americans earning less than \$30,000 per year use only a smartphone and do not have broadband access at home.<sup>10</sup> The number of people relying on smartphones has increased from 12 percent in 2013 to 27 percent in 2021. This segment of the population accounts for a large portion of mediation center clients, and their needs and resources should be taken into consideration when determining the meeting format.

Third, Stanford University researchers have identified causes of “Zoom fatigue”<sup>11</sup> that mediators should understand. For instance, virtual sessions, which involve close-up, highly intense eye contact and a constant view of yourself, impose a higher cognitive load. Mediation has always been recognized as draining for participants under the best of circumstances, so limiting online session time may be particularly valuable. Thus, access issues must be balanced against the challenges associated with virtual technology. While professionals who use virtual technology regularly have learned how to overcome “Zoom fatigue,” the challenges identified can be a factor for participants who are not regular virtual users.

### *New Frontiers*

The AOCPC continues its commitment to financially assist the Nebraska mediation centers in serving state residents. The Office of Dispute Resolution also has regular discussions with the centers to determine how to increase the number of mediators and facilitators and how to increase diversity. At the outset of the pandemic, when mediations switched to mostly virtual sessions, some mediators decided it was time to retire, thereby reducing the number of mediators available to the centers. Because the centers are struggling to find new mediators, many existing mediators are expanding the number of centers they work with and may be limited to virtual availability only.

Within the next few years, the Nebraska judicial branch plans to implement online dispute resolution (ODR), starting with small claims cases. The goal is to increase access to justice, especially in the rural areas where court may only be in session on certain days and during daytime hours, making it difficult for litigants to attend. Additionally, depending on the courthouse’s location within the county, parties may have to drive an hour just to get to the court.

The vision for ODR in Nebraska includes a level of seamless integration among the litigants, the courts, and the mediation centers. Similar to ODR offered through other states, the ODR process would allow litigants across the state to first try negotiating a settlement themselves asynchronously. If they are unable to reach an agreement, the mediation center serving the county where the case is filed would be notified, and a mediator would be assigned to assist. This step would also happen asynchronously to allow the litigants flexibility to access the process at a time that best works with their schedules. If an agreement is reached, either with or without the assistance of a mediator, the signed agreement would be uploaded to the court for review by the assigned judge, and the litigants would not need to physically attend court. Depending on the success of ODR in the realm of small claims court, ODR may expand and be offered in simple divorce cases that do not involve children.

## Conclusion

Nebraska's statewide system envisions and works towards providing access to mediation services to everyone within the state. This ideal, however, still poses significant challenges to the state's rural populations. Technology has been one way to help bridge the gap. With recent advances in technological infrastructure and increased attention to online mediation, Nebraska's rural communities have experienced increased access to justice.

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<sup>1</sup> Neb. Rev. Stat. 25-2901.

<sup>2</sup> <https://worldpopulationreview.com/state-rankings/state-densities>.

<sup>3</sup> <https://wisevoter.com/state-rankings/population-density-by-state/#nebraska>.

<sup>4</sup> Neb. Rev. Stat. 43-2929.

<sup>5</sup> American Bar Association, *Legal Deserts Threaten Justice for All in Rural America* (Aug. 3, 2020), at <https://www.americanbar.org/news/abanews/aba-news-archives/2020/08/legal-deserts-threaten-justice/?login>.

<sup>6</sup> Nebraska Bar Association, *Rural Practice Initiative*, at <https://www.nebar.com/general/custom.asp?page=RPI>.

<sup>7</sup> Model Standards of Conduct for Mediators, Standards V & VI (confidentiality and quality of the process).

<sup>8</sup> Don Walton, *Pillen Creates New Nebraska Broadband Office*, Lincoln Journal Star, Jan. 6, 2023.

<sup>9</sup> *Zooming Around: Privacy Issues and Alternatives* (Apr. 8, 2020), at <https://simonboehme.medium.com/zooming-around-privacy-issues-and-alternatives-997aa4fd308>.

<sup>10</sup> <http://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

<sup>11</sup> <https://news.stanford.edu/2021/02/23/four-causes-zoom-fatigue-solutions/>.

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