

MEDIATION FROM THE
FARMER'S PERSPECTIVE

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**HIGHLIGHTS OF 1987 LEGISLATIVE
CHANGES TO THE FARMER-LENDER MEDIATION LAW**

The 1987 Minnesota Legislature made important changes in the Farmer-Lender Mediation Act. Those changes went into effect on July 1, 1987, and apply to all mediations in which the creditor's mediation notice is filed with the Minnesota Extension Service on or after that date. Mediation From the Farmer's Perspective, Second Edition, incorporates the changes made in the law by the 1987 legislative session. Those changes include:

1. A limit on the number of times a farmer can mediate;
2. A limit on the kinds of debts that are subject to mediations;
3. A requirement that farmers attend an orientation session before the first mediation meeting;
4. A requirement that creditors provide the farmer with copies of important documents describing the debts that are being mediated;
5. The opportunity for implement dealers to obtain a crop lien if seasonal use machinery is used during mediation;
6. An opportunity for contract for deed sellers to obtain a crop lien if the seller is required to participate in mediation;
7. An increase in the amount that creditors must release for family living expenses;
8. A requirement that farmers allow creditors to inspect collateral during mediation;
9. A procedure for farmers or creditors to obtain the assistance of a court if there is a disagreement about the amount of farm proceeds to be released for family living or farm operating expenses;
10. A procedure for farmers or creditors to obtain the assistance of a court if a mediator makes a disputed decision regarding the good faith of a participant in mediation; and
11. A procedure whereby a farmer and creditors can agree to use a professional mediator.

Because of these changes in the law, it is very important that farmers understand the requirements of the Farmer-Lender Mediation Act. This updated and expanded second edition is intended to help farmers do that.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u>	1
II. <u>FARMER-LENDER MEDIATION LAW</u>	1
A. Which Debts Must Be Mediated?	2
B. Who Is Required to Mediate?	2
1. The Farmer	2
2. The Creditor	2
C. What Is The Timetable For Mediation?	4
1. Mediation Notice	4
2. Mediation Request Form	5
3. Financial Analyst and Farm Advocate	6
4. Mediation Proceeding Notice	6
5. Orientation Session	7
6. Creditor Claim Forms	7
7. The First Mediation Meeting	8
8. The Second and Subsequent Meetings	8
9. The Mediation Agreement	9
10. The End of Mediation	9
III. <u>DECISIONS, RIGHTS, AND OBLIGATIONS</u> <u>UNDER MEDIATION</u>	10
A. The Farmer	10
1. Decisions	10
2. Your Rights	11
a. No Collection Action is Allowed During Mediation	11
b. Release of Living and Operating Expenses	11
3. Your Obligations	13
B. The Creditor	13
1. The Creditor's Rights	13
a. Inspection	13
b. Contract for Deed Seller's Lien	13
c. Seasonal Use Machinery Lien	14
2. The Creditor's Obligations	15
C. The Mediator	15
IV. <u>PLANNING FOR MEDIATION</u>	15
A. Preparing for the Orientation Meeting	15
B. Planning Your Debt Restructuring Proposal	16
1. What Do You and Your Family Want To Do?	16
2. How Much of Your Property is Safe From Creditors?	17

3.	Which Items of Property are You Willing to Give Up?	17
4.	How Do Your Creditors View Your Circumstances?	17
a.	The Bottom Line	18
b.	the Creditor's Security	18
c.	The Creditor's Financial Situation	19
5.	How Can You Change Your Farm Operation to Cut Costs?	20
6.	Does Your Proposal Contain a Solution for Future Problems?	20
C.	Debt Restructuring Alternatives	21
1.	State and FmHA Programs to Restructure Debt	21
a.	State Interest Buydown	21
b.	State Farm Loan Restructuring	22
c.	FmHA Interest Rate Buydown Program	22
d.	FmHA Loan Servicing and Debt Restructuring	22
e.	Farm Credit System Debt Restructuring	22
2.	Examples of Restructured Long-Term Debt	23
3.	Examples of Restructured Intermediate-Term Debt	24
4.	Examples of Restructured Short-Term Debt	25
V.	<u>PARTICIPATING IN MEDIATION</u>	26
A.	Obligation of Good Faith	26
B.	How to Succeed in Mediation	28
VI.	<u>CONCLUSION</u>	29
Appendix A	30
Appendix B	31
Appendix C	32
Appendix D	34

I. INTRODUCTION

In 1986 the Minnesota legislature found that the financial stress caused by low farm commodity prices, high interest rates, and reduced farm income required an orderly process by which the farmer and the creditor could sit down at the same table and attempt to work out an agreement so that the farmer could pay back his debt. The Farmer-Lender Mediation Law was enacted to provide the orderly process that the legislature felt was needed.

In 1987 the legislature enacted changes to the law to clarify issues which were raised during the first year of mediation meetings. These changes included additional protections for both the farmer and the creditor.

This book was written for you, the Minnesota farmer who may have just received a mediation notice or who knows that a mediation notice will be served shortly. In this book, the Farmer-Lender Mediation Law is explained in terms of the mediation process itself, the rights and obligations of the farmer and the creditor, and general advice for planning and participating in the mediation process. We suggest that you use this book as a starting place for learning about mediation. The Minnesota Extension Service, financial analysts, farm advocates, the Minnesota Family Farm Law Project (MFFLP), or your own attorney should next be contacted about how to deal with mediation. In addition to this book, a videotape has been produced dealing with mediation. It is entitled Preparing for Mediation: The Farmer's Perspective. It is 30 minutes long and shows what the attitude of the farmer should be upon entering mediation. The tape was produced by the Minnesota Department of Agriculture and the Farm Advocate Program. Copies of the tape are available for use, free of charge, from any of the farm advocates, legal services offices, or the extension service offices.

(See Appendix A for advice on where to find an advocate or attorney).

II. FARMER-LENDER MEDIATION LAW

In 1986 the Minnesota legislature passed a bill which brought farmers and their creditors together to attempt to restructure debts and to reach agreements regarding the future farm operation. The 1987 legislative session made changes to the law, which gives additional protections to both farmers and creditors. The following is an explanation of the mediation process: which debts must be mediated, who is required to mediate, and what the timetable is for mediation.

A. WHICH DEBTS MUST BE MEDIATED?

All debts that are secured by agricultural property are subject to mediation. Agricultural property is defined as:

1. Land used in the farm operation;
2. Personal property such as equipment, crops and livestock; and
3. The new law includes "removable agricultural structures under lease with option to purchase" in the definition of agricultural property. This means that if you are in default on a lease to purchase silos, grain bins, or some type of removable farm building, you will be able to use mediation if your lease agreement contains an option to buy.

Agricultural property does not include other kinds of personal property under lease, or farm machinery that is used primarily for custom field work.

B. WHO IS REQUIRED TO MEDIATE?

1. The Farmer.

The farmer is not required to mediate; you are given the opportunity to mediate if you so choose. (See Section III, "Decisions, Rights, and Obligations under Mediation", for advice on whether you should mediate or not). The law defines a farmer as someone who operates a family farm, a family farm corporation, or an authorized farm corporation. The law does not apply to a farmer who owns or leases less than 60 acres and had less than \$20,000 in sales of agricultural products.

2. The Creditor.

A creditor cannot begin to take certain actions to collect a debt you owe on agricultural property unless a mediation notice is served upon you. The collection actions that must be preceded by notice include the cancellation of a contract for deed, foreclosure of a mortgage, enforcement of a security interest through a replevin action, or the process of levying and executing a judgment against your agricultural property.

There are several exceptions to the above general rule.

- a. The creditor is not required to serve a mediation notice upon you if the amount of the debt is under \$5,000. This does not mean that debts under \$5,000 cannot be mediated; the creditor simply does not have to give you notice of the mediation process. (See Section II. C. 2.)
- b. The creditor is not required to mediate debts that were listed in a Chapter 7, 11, 12, or 13 bankruptcy petition.
- c. The creditor is not required to mediate the same debt more than once, even if the creditor did not serve a mediation notice when the debt was first mediated. This exception may not apply to debts that were mediated before July 1, 1987, and may not apply in situations where the creditor failed to file a claim form during the previous mediation.
- d. If the creditor served a mediation notice on you, and you did not request mediation in a timely way, the creditor is not required to mediate the debt described in the mediation notice. However, the creditor must start action to enforce the debt within 30 days of the last day that you could have requested mediation. If the creditor does not take action during this time period, this exception is lost and the debt can be mediated, if you request mediation.
- e. If you enter into a mediation agreement with a creditor and are unable to carry through with the terms of the mediation agreement, the creditor does not have to mediate the debt again. Instead, the creditor may proceed to collect on the debt without mediation. The law is not clear if this exception applies to mediation agreements reached before the change in the law became effective on July 1, 1987.
- f. If you enter into mediation with the holder of your contract for deed, the contract for deed holder is entitled to a lien for the rental value of the land during the mediation process. (See Section III.B.2 for details on this lien.) The contract for deed holder's lien that is placed on your crops is not subject to mediation.
- g. If you fraudulently conceal, remove, or transfer agricultural property that is covered by a security agreement and do not remit proceeds from the sale of

the property to the secured creditor, you may not be entitled to mediation. The creditor can petition the district court for an order permitting it to proceed with collection of the debt. The district court must issue a summons to you within seven days of receiving the creditor's petition for an order. A hearing must be scheduled within seven to 14 days after the summons is issued. At the hearing the court will hear both your side of the matter and the creditor's side. The judge must decide, within ten days of the hearing, whether or not mediation will be required. This exception applies if the creditor files its petition within one year of the date that the fraudulent transfer allegedly occurred.

C. WHAT IS THE TIMETABLE FOR MEDIATION?

Mediation is an organized process which, if understood and used properly, can result in an agreement that both you and your creditor can live with. Appendix B is a flow chart that sets out the steps and timetable in the mediation process. The following is a description of the steps outlined in Appendix B.

1. Mediation Notice

Before a creditor can start any action against a farmer's property which is secured by a debt of over \$5,000, it must first personally serve, or serve by certified mail, a mediation notice on the farmer. The notice must describe the action that the creditor intends to take and the property that is to be taken.

The notice that is served by the creditor after July 1, 1987 (the effective date of the new law) must include the following language:

YOU HAVE THE RIGHT TO HAVE THE DEBT REVIEWED FOR MEDIATION. IF YOU REQUEST MEDIATION, A DEBT THAT IS IN DEFAULT WILL BE MEDIATED ONLY ONCE. IF YOU DO NOT REQUEST MEDIATION, THIS DEBT WILL NOT BE SUBJECT TO FUTURE MEDIATION IF THE SECURED PARTY ENFORCES THE DEBT.

IF YOU PARTICIPATE IN MEDIATION, THE DIRECTOR OF THE MINNESOTA EXTENSION SERVICE WILL PROVIDE AN ORIENTATION MEETING AND A FINANCIAL ANALYST TO HELP YOU PREPARE FINANCIAL INFORMATION. IF YOU DECIDE TO PARTICIPATE IN MEDIATION, IT WILL BE TO YOUR ADVANTAGE TO ASSEMBLE YOUR FARM FINANCE AND OPERATION RECORDS AND TO CONTACT A COUNTY EXTENSION OFFICE AS SOON AS POSSIBLE. MEDIATION

**WILL ATTEMPT TO ARRIVE AT AN AGREEMENT FOR HANDLING
FUTURE FINANCIAL RELATIONS.**

Farmers Home Administration is currently refusing to participate in mediation, so if you are an FmHA borrower, you will not receive the above notice from FmHA. A lawsuit has been filed asking the court to order FmHA to participate in mediation. The MFFLP Information and Referral Line can provide you with information about the status of this lawsuit and FmHA's participation in mediation.

2. Mediation Request Form

You must file a mediation request form with the County Extension agent within 14 days of receipt of the mediation notice from the creditor. The mediation request forms are available at your County Extension office. You should send the form to the County Extension office by certified mail using return receipt. If you are not certain that certified mail service will get the mediation request form back to the County Extension office within the 14-day period, you should hand deliver the mediation request form to the County Extension office and request that a signed receipt be given you. If you do not return the completed mediation request form within the 14-day period, the creditor who served the mediation notice is free to proceed with the action that was described in the mediation notice. If you attempt to file the mediation request form after the 14-day deadline, the Extension Service is authorized to deny you the right to mediate.

In the mediation request form, you must list all creditors who have a security interest in your agricultural property. You have the option of listing your unsecured creditors on the mediation request form.

If you do not receive a mediation notice and your creditor begins to collect a debt, you have the right to request mediation. The law does not specify a time limit during which you must request mediation when the creditor fails to give you a mediation notice. It is probably in your best interest to contact the County Extension agent immediately after the creditor begins the collection action in order to begin the protection afforded you under mediation. If you are unsure if you or your debt qualifies for mediation, call your attorney or the Minnesota Family Farm Law Project Information and Referral Line.

3. Financial Analyst and Farm Advocate

Within three days after you file your mediation request form, the County Extension agent must give you the name of a financial analyst who will review and prepare your financial records for mediation. The County Extension agent must also provide you with a list of farm advocates employed by the Minnesota Department of Agriculture who will work with you and the financial analyst in preparing for mediation. There is no charge for the services of an advocate or financial analyst.

4. Mediation Proceeding Notice

If you properly file your mediation request form, the County Extension agent performs the next steps in the mediation process. First, the agent must send a **mediation proceeding notice** to you and to all the secured and unsecured creditors you listed in the mediation request form.

The mediation proceeding notice must be sent out within ten days after you file your mediation request and gives you the following information:

- a. That you have the choice of using one of the three mediators listed on the mediation proceeding notice or of selecting and paying for the services of a professional mediator. If you decide to use the mediators appointed by the agent, you can request the agent to exclude one of the names from the list. This must be done within **three days** of receipt of the mediation proceeding notice. The creditor who sent you the mediation notice also has the right to exclude one of the names from the list.
- b. The time and date of the orientation session.
- c. The time and date of the first mediation meeting.
- d. That the time period during which the creditor cannot proceed against your property went into effect the day you filed the mediation request form. If the creditor is a federal agency, the creditor cannot begin the collection action until 180 days from the time the mediation request form is filed. For all other creditors, the collection action can commence 90 days after you filed the mediation request form.

e. That the creditor must provide you with:

- (1) Copies of the note, contract, or other agreements that will be discussed in mediation; and
- (2) A statement of interest rates, delinquent payments, balance of unpaid principal and interest, the creditor's appraised value of the collateral, and any debt restructuring programs offered by the creditor.

5. Orientation Session

The first mediation meeting must be scheduled within 20 days of the date of the mediation proceeding notice. At least five days before the first mediation meeting, the County Extension agent must schedule an **orientation session**. You, the financial analyst, and a mediator must meet to determine if your financial and inventory records are in order for the upcoming first mediation meeting. Appendix C is a list of records that should be gathered together and brought to the orientation session. The mediator (who may not be the one eventually assigned to your case) will explain what is required of you and your creditor during the upcoming meetings.

6. Creditor Claim Forms

All of the creditors you list on the mediation request form do not have to participate in the mediation meetings. However, they are bound by the mediation agreement reached. There are two ways the creditors can protect their rights as to what is in the mediation agreement. The first is to attend mediation meetings and participate in mediation. The second is to file a claim form with the County Extension agent. By filing a claim form, the creditor reserves the right to review and object to the mediation agreement. If the creditor files a claim form, the mediator must notify the creditor of the terms of any agreement reached by you and the other creditors who actively participated in mediation. The creditor has ten days to review the agreement and to file written objections to the agreement with the mediator. If the mediator receives written objections, the mediator must schedule another mediation meeting during the ten days after the mediator receives the written objections. At this meeting you and the creditors must attempt to mediate a new agreement that is acceptable to the creditor who filed the claim form. If the creditor who filed the claim form does not file objections to the

mediation agreement, the creditor will be bound by that agreement.

7. The First Mediation Meeting

The mediator will be in charge of the mediation meeting. He or she will usually begin the meeting by introducing the persons who have come to the meeting. All of the creditors may not attend the mediation meetings, but may have filed a claim form (see above), which gives them the opportunity to review any agreement reached.

After introductions the mediator will briefly review the mediation process that was explained to you at the orientation meeting. The mediator will ask each participant to make a brief statement describing their understanding of the farm financial problems. After each participant has had an opportunity to speak, the mediator will try to identify the key issues of the financial problem.

After the issues have been defined, the mediator will ask you, the creditor, and other participating creditors to describe his or her written plan to restructure the debt. This is your chance to present the plan you have developed with the advice of your financial analyst, farm advocate, or attorney. If you have developed several different plans, you will want to begin by presenting the plan that is most advantageous to you. (See the section entitled **Planning for Mediation** for advice on how to develop a plan.)

The mediator will listen carefully as each plan is presented. After listening to all participants, the mediator will begin searching for those parts of each proposal which all parties agree upon. An entire agreement may not be reached at the first meeting, but the key areas of agreement and disagreement should be identified. This will give you a starting point to do more thinking and planning outside of the first meeting in order to prepare for the second and subsequent meetings.

The mediator will also address the issue of release of family living and farm operating expenses. Section III gives a detailed explanation of what amounts can be released.

8. The Second and Subsequent Meetings

At the second meeting, or other meetings scheduled after the second meeting, you can concentrate on the unsettled

issues identified at the first mediation meeting. It is important to know that the representative of the creditor may or may not have the power to approve an agreement. If the representative does not have the power to approve a plan at the mediation meeting, the representative must notify you within one business day of the mediation meeting of the creditor's acceptance or rejection of your plan. A failure to make a binding commitment within one business day is a lack of good faith on the part of the creditor. (See Section V.A on Obligation of Good Faith).

9. The Mediation Agreement

Once an agreement is reached, the mediator will prepare the agreement for signature by you and the creditor. The document prepared by the mediator will contain only the basic elements of your agreement. More detailed documents will need to be prepared by an attorney to implement the mediation agreement. Before you sign a mediation agreement, you will need to know whether it adequately protects your legal rights and whether it creates unexpected tax liability for you. Before you sign a mediation agreement, you will need to go over its terms with a lawyer and a person who is knowledgeable and experienced in income taxation. Even though many farmers are losing money every year, restructuring debt can create income tax liability. For example, if you deed land back to your creditor in exchange for buying the land back on contract for deed, you may realize capital gains and incur a tax liability.

Also remember that the agreement is subject to review by any creditor who filed a claim form with the County Extension agent before the first mediation meeting. (See Section II.C.6 above).

The mediation agreement, once it is signed, is binding on both you and the creditors who sign the agreement. You will be bound by the terms of the agreement in the years to come.

10. The End of Mediation

The mediator must prepare and serve you and the other creditors who participated in mediation with a termination statement at the end of the mediation period. The statement must state that the mediation period has ended and must list any agreements reached between you and the other parties. The termination statement lets the creditor know that it can proceed with a collection action.

The new law allows you to enter into an agreement during mediation with any of your creditors allowing the collection action to proceed without waiting the 90 or 180 days. If you enter into such an agreement, you can cancel the agreement within five business days after it has been signed. If you cancel the agreement during the mediation period, the creditor is required to continue with mediation.

III. DECISIONS, RIGHTS, AND OBLIGATIONS UNDER MEDIATION

Under mediation, you have decisions to make, rights to protect, and obligations to keep. The creditors are also afforded protections under mediation and are required to perform certain actions. In addition, the mediator has obligations under mediation. The following is an explanation of these decisions, rights, and obligations.

A. THE FARMER

1. Decisions

Under the changes made to the law in 1987, you will usually have only one opportunity to mediate all of the debts that are in default. When you receive a mediation notice, you should carefully consider whether to use mediation at that point, or to save it for some later point when another creditor serves a mediation notice. Examples:

- a. You are in default on payments to an implement company, on your operating loan to the Production Credit Association and on your mortgage payments to the local bank. You are negotiating with the PCA and the bank. Some progress has been made, and the PCA and bank are not putting pressure on you at this time. The implement company serves you with a mediation notice in order to repossess the tractor you have failed to make payments on. If you choose to request mediation, the PCA and the bank must be listed on the mediation request form as secured creditors, and they will be sent a mediation proceeding notice and be included in the mediation. By requesting mediation with the implement company, you have, in effect, released the PCA and the local bank from future mediations on those debts as well. You may want to consider releasing the implement company

from mediation by not filing the mediation request form.

- b. You are purchasing land on contract for deed. The land is not your homestead. You are delinquent in payments to the contract for deed holder, and a mediation notice is served upon you. If you decide to file for mediation, you give the contract for deed holder an opportunity to obtain a priority lien on the crops growing on the land which the contract for deed holder does not otherwise have. (See Section III.B.) If you feel that mediation would not result in restructuring the contract for deed, you may decide to allow the contract for deed holder to proceed with cancellation of the contract. If the contract for deed holder is in mediation because of collection activity against you by another creditor, you can avoid the crop lien by separately releasing the contract for deed holder from mediation. (See Section II. C. 10.)

2. Your Rights

If you decide to request mediation by filing a mediation request form, you are entitled to certain rights.

a. No Collection Action is Allowed During Mediation.

The most important right given you during mediation is the stopping of any collection action by the creditor during mediation. The mediation process, from the date you request mediation until the date mediation is complete, takes about 90 days.

b. Release of Living and Operating Expenses

A second right given you during mediation is that the creditor must release money from the sale of farm products for family living and farm operating expenses. Creditors, other than FmHA, do not have this obligation except during mediation.

This does not mean that a creditor must lend you more money or that a creditor must give you new credit. It means that if you sell farm products such as feeder pigs, eggs, milk, or grain, the creditor must agree to allow you to use the proceeds of that sale to pay family living expenses and farm operating costs.

(1) Family Living Expenses

Creditors must release family living expenses during mediation in an amount equal to one and one-half times the amount the family would be entitled to receive under the Aid to Families with Dependant Children program. A creditor cannot be required to release more than \$1,600 per month for family living which can be reduced by the amount of any off-farm income.

(2) Farm Operating Costs

The amount of money from the sale of farm products that can be used to meet farm operating costs is not limited in dollar amount. The law only states that creditors are not required to allow you to begin new farm operations. You can use the money from selling farm products only to pay for the expenses of your existing farm operation. For example, your creditor may be required to release money from a milk assignment to pay for dairy supplements, farm-related utility costs, post-emergent herbicides, the repair of a tractor, or a fuel delivery.

Family living expenses and farm operating costs should be one of the items that you discuss at the first mediation meeting. Let the mediator know the size of your family, and ask the mediator to tell you the amount of money that is allowed on a monthly basis for a family of your size. Give the mediator a list of the operating expenses that you have had since receiving your mediation notice and that you anticipate during the coming three months, and ask the creditors to indicate their agreement to pay those expenses. Also, distribute a plan describing which farm products you will be selling and the expected income that you will receive from those sales. Ask the creditors who have security interests in those farm products to agree that the money from the sale of those products can be used to pay expenses. The mediator is required to prepare an agreement that establishes your right to sell farm products and use the money for your family's needs and your farm's operating costs.

If you cannot reach an agreement at the first mediation meeting with regard to release of family living or farm operating expenses, you can petition either the conciliation court (if the amount in

dispute is \$2,000 or less) or the district court and request the court to decide what amount should be released during mediation. The court must schedule a hearing and make a decision within ten days after either you or the creditor files a petition. You can contact your own attorney or the legal services offices for assistance in getting the court to order release of family living or farm operating expenses.

3. Your Obligations

- a. Your first obligation is to attend the orientation meeting described in Section II.C.5.
- b. You are obligated to mediate in good faith. A further discussion of the good faith obligation follows in Section V.A.
- c. You are obligated to allow the creditor to inspect the collateral that is the subject of mediation during normal business hours on 24 hours' notice to you. Normal business hours are 8:00 a.m. to 6:00 p.m., Monday through Saturday. If you refuse to allow the creditor to inspect the collateral, you may be found to lack good faith. (See Section V.A.)

B. THE CREDITOR

1. The Creditor's Rights

Creditors are also afforded protections under mediation. These rights include the right of inspection of the collateral, and special liens for two types of creditors.

a. Inspection

The right to inspect the collateral during mediation is outlined in Section III.A 3. above. The law does not limit the inspection to only one inspection.

b. Contract for Deed Seller's Lien

Persons who are selling land by contract for deed and who participate in mediation because the contract is in default are given a crop lien equal to the reasonable rental value of the land during the 90-day mediation period. The rental value of the land can be negotiated during mediation, but it may not exceed the rental value established by the Minnesota Extension Service. The lien attaches to crops

growing or to be grown on the land, even if you do not own the crop. If a lien statement is filed with the county recorder during mediation or within 30 days after mediation concludes, the contract for deed seller's crop lien has priority over all other liens. Amounts paid to a contract for deed seller from the crop proceeds must be applied to reduce the balance owed on the contract for deed.

This provision only applies to natural persons who are contract for deed sellers. It does not apply to corporations. The contract for deed seller's lien applies whenever the contract for deed seller participates in mediations, even if the contract for deed seller is not the creditor who served you with the mediation notice.

c. Seasonal Use Machinery Lien

Implement dealers and other creditors who have purchase money security interests in seasonal use machinery can also obtain a crop lien under the new law if the seasonal use machinery is used for field work during mediation. This is true whether or not the secured creditor was the initiating creditor. This lien is only available to creditors that sold machinery to a farmer on an installment contract, or that loaned a farmer the money to buy the machinery in question (a purchase money security interest).

"Seasonal use machinery" includes machinery, equipment, and implements that are used exclusively for planting, row crop cultivating, or harvesting. Tractors and other machinery that are used for general farm purposes are excluded from this definition.

The amount of the creditor's lien is the amount of the default, or the rental value of the seasonal use equipment during the 90-day mediation period, whichever is less. The rental amount can be negotiated during mediation, but cannot be greater than the rental value established by the Minnesota Extension Service. The lien attaches to crops that are produced by the farmer in the calendar year during which mediation occurs. If the creditor files a financing statement with the county recorder during mediation, or within 30 days after mediation concludes, the creditor's crop lien has priority over all other liens except a landlord's lien and contract for deed seller's lien. Amounts paid to a creditor

from the crop proceeds must be applied to reduce the balance owed on the loan from the farmer to the creditor.

2. The Creditor's Obligations

As noted above, the creditor is obligated to release family living and farm operating expenses. The creditor is also obligated to mediate in good faith. (See Section V.A.)

The creditor is also obligated to provide you with copies of notes, a statement of interest rates of all debts, a listing of delinquent payments, a statement of the current unpaid principal and interest balance, a list of all collateral securing the debts and the creditor's estimate of the value of the collateral, and the debt restructuring programs in place or used by the creditor. The creditor must provide this information at the first mediation meeting.

C. THE MEDIATOR

Under a new provision in the law, the mediator has a responsibility to not participate in a mediation if the mediator has a conflict of interest that would affect his or her ability to be impartial. A conflict of interest includes being a current officer or member of the board of directors of the creditor who initiated mediation.

IV. PLANNING FOR MEDIATION

A. PREPARING FOR THE ORIENTATION MEETING

After you have submitted your mediation request form to the extension service office, the County Extension agent must appoint a financial analyst to help you and must schedule an orientation meeting within five days of the first mediation meeting. The first mediation meeting must be scheduled by the County Extension agent within 20 days of sending the mediation proceeding notice. Use this time to prepare a plan concerning the future of your farm operation. Farmers who prepare for mediation have a much better chance of success.

The mediator and the financial analyst will want to become familiar with the documents that describe your farm operation. The documents listed on Appendix C should be gathered

prior to the orientation meeting, and brought to the orientation meeting.

Finally, if you have completed a computer cash flow projection with your financial analyst, bring a copy of that financial plan to the orientation meeting.

B. PLANNING YOUR DEBT RESTRUCTURING PROPOSAL

Each farm operation is unique. The debt and asset structure of each farm is different. Other circumstances, such as the availability of off-farm income, the availability of alternative financing, and the desire of the entire family to continue farming, will be different in each situation. For these reasons, it is very difficult to give specific information about the way to plan your mediation proposal. At best, this book can give you general guidance that will get you started.

Prior to mediation, you should review each of the following questions.

1. What Do You and Your Family Want To Do?

This is the first important question. It is well worth the time for you and your spouse, your partner, or other involved persons to honestly talk this through. You should discuss all options, including bankruptcy and partial liquidation, so that you can realistically plan for mediation. If a consensus can be reached, you will be better able to make the other difficult decisions that follow.

For example, a farmer's goals in mediation could include several or all of the following:

- a. Continue farming existing land;
- b. Reduce debt;
- c. Retain a dairy herd;
- d. Retain title to the family home and surrounding building site; and/or
- e. Help a child continue farming.

It may not be possible, given the debt load, to achieve all of these goals. You will need to decide which goals are most important to achieve in mediation.

2. How Much of Your Property is Safe From Creditors?

Before you begin to plan, you also need to understand which items of your property are exempt, that is, they cannot be touched by your creditors, even if mediation fails. As you answer this question, remember that a 160-acre homestead is beyond the reach of all creditors **except** those to whom you have voluntarily given a mortgage. Household belongings up to \$4,000 are protected by Minnesota law from creditors. One vehicle, with an equity value of less than \$2,000, is protected. A limited amount of machinery and tools (between 5,000 and \$10,000 per individual, depending on your circumstances) may be protected by going through bankruptcy.

By knowing which property is safe from creditors, you will be better prepared to negotiate. You will know what property will be left, even if mediation and all other negotiations fail. You will also know what property you have to offer creditors as additional security to bring about an agreement.

3. Which Items of Property are You Willing to Give Up?

Mediation involves give and take. It is very important that you decide **before** mediation starts what you are willing to give up in order to accomplish your goals and objectives.

For example, you may be able to continue farming if you partially liquidate certain farm assets. Sometimes a partial liquidation involves the loss of personal property; for example, when certain items of equipment are sold. In other cases, a partial liquidation may mean the loss of legal title to a parcel of land but not the loss of the opportunity to continue farming the land on a contract for deed or lease. If you are insolvent, it is unlikely that you can continue farming without making some changes in your operation. It is important to think about what changes you are willing to make before you begin the mediation process.

4. How Do Your Creditors View Your Circumstances?

One helpful way of planning for mediation is to try to look at the situation from the perspective of your creditors. What financial pressure are they under? What security do they have? What is their "bottom line"?

a. The Bottom Line

The "bottom line" for many creditors is what they will get if the mediation fails, the creditor is forced to use legal remedies to obtain possession of your property, and you eventually liquidate either with or without a Chapter 7 bankruptcy.

- (1) A farmer who resists liquidation may be able to delay repossession of some personal property for six to ten months. Similarly, a farmer may be able to make a creditor wait 12 to 18 months before obtaining possession of the land. During that time (which may cover part or all of two growing seasons), the creditor will not have any income from the property.
- (2) If a farmer files for Chapter 7 bankruptcy, the farmer's debts will be discharged and become uncollectable. In some cases, the bankruptcy court will also wipe out the creditor's security interest in between \$5,000 and \$10,000 worth of machinery and tools for each individual who files for Chapter 7.
- (3) After bankruptcy or other liquidation, the creditor will probably be able to obtain possession of mortgaged land and secured chattel and put those items of property up for sale. The creditor will get whatever value the property has at that time.
- (4) The creditor will have to pay its lawyer for the work he/she has done and other costs of collection.

This represents the worst result for the creditor if the mediation fails. If your offer gives your creditor more than this, the creditor should be interested in your proposal.

b. The Creditor's Security

Always begin by analyzing how well secured your creditors are. A creditor that is well secured is not likely to give much up during mediation. The creditor that is undersecured will be more willing to negotiate.

From the information the creditor is required to provide you with by the first mediation meeting, you should be able to determine the following:

- (1) The amounts of principal and interest that are presently owed;
- (2) The current market value (based on a 60-day sale) of the assets that secure the debt;
- (3) Whether the creditor is undersecured (that is, does the amount of the debt exceed the value of the security?); and
- (4) Whether you have nonexempt assets which have values that exceed the amounts owed against them.

If you determine that the answer to question (3) is "yes", and the answer to question (4) is "no", your creditor is facing a potential loss and may be willing to negotiate a debt restructuring plan if you can show debt repayment ability.

Keep in mind that some equipment that you gave as security may be claimed as exempt in bankruptcy. Using "lien avoidance", you may be able to eliminate your creditors' security interests in that property. Such additional property may be enough to allow you to continue farming, and should be considered when preparing mediation strategy.

To evaluate a creditor's secured status, you should review the documents listed in Appendix C. Security agreements and mortgages are very technical documents. If you have any questions regarding these documents, you should contact an attorney. For more general information about security interests, see Protecting the Farm: A Farmers's Guide to Lending Law. (See Appendix D for information on this book.)

c. The Creditor's Financial Situation

Remember that creditors are regularly audited by examiners, and that loans which are in default or which are undersecured may be classified by examiners in such a way that the loan is not considered an asset of the bank. If you can restructure your debt so that part of it is no longer in default, the creditor may be able to adjust its balance sheet in a way that is more favorable to its financial position.

Any offer of cash will be very attractive to your creditors. For example, although you may owe your banker \$75,000, the banker may be willing to accept \$50,000 (and forgive the rest) if the \$50,000 is cash obtained by refinancing through another creditor.

5. How Can You Change Your Farm Operation to Cut Costs?

If your creditor is facing a loss, you will be in a strong negotiating position if you can show that you have the ability to repay a debt that is larger than the amount the creditor would get by a liquidation. To show debt repayment ability, you may need to restructure your farm operation and debts so that your operating costs take a smaller part of your annual gross farm income. You will need to show the creditor that your farm operation can generate sufficient cash flow to service the restructured debt. Your financial analyst can help you with this important part of your planning.

Compare your annual cost of owning real estate (including interest, taxes and assessments) with current cash rents. If your cost of ownership is out of line, you may want to propose an arrangement whereby you give up legal title but continue to farm the land under a land contract or lease. Similarly, you can compare your cost of owning equipment (annual interest and maintenance costs) with the cost of renting necessary equipment. You can also compare your cost of producing necessary feed with the cost of purchasing the feed at market prices.

If your debt-to-asset ratio is 70 percent or more, your farm operation will have difficulty generating sufficient income to service the debt. In such cases, your plan will need to propose debt restructuring through rescheduling, interest rate adjustments, refinancing, debt set-asides, or write-offs.

6. Does Your Proposal Contain a Solution for Future Problems?

You may be in mediation because you are in default on your operating loan, even though you have stayed current on your land payments. The solution to your problems with your short-term creditor must include a plan to stay current on future land payments as well. Perhaps you are in mediation because of a default on your mortgage. A solution to that problem must also involve a plan with your short-term creditor for operating credit for the coming year. Look ahead and plan solutions to future problems as well.

C. DEBT RESTRUCTURING ALTERNATIVES

There are literally dozens of different ways to restructure debt. There is no one right way to do it. The following examples are only intended to get you started in your own thinking and planning so that you go to the first mediation session with a concrete proposal to present to your creditors. The first group of examples outline some of the state, FmHA and Farm Credit programs that are available to restructure debt. The second group of examples are arranged into groupings based on the nature of the debt. Long-term debt is usually secured by a mortgage on the land, and is paid over a term for 20 to 40 years. Intermediate-term debt is usually secured by machinery, equipment, livestock, and fixtures, and may be payable on demand or over a term of up to six or seven years. Short-term debt is usually secured by crops and feeder animals, and is payable in a few months or one year.

1. State and FmHA Programs to Restructure Debt

The State of Minnesota, FmHA and the Farm Credit System have provided programs to help you restructure your debt. An explanation of these programs follows.

a. State Interest Buydown

On April 7, 1987 the Minnesota Legislature passed the Family Farm Loan Interest Buydown Act. Interest on farm operating loans can be reduced under this Act. There are two programs, both of which can make a big difference in your cash flow.

The first program is a subsidy for 1987 operating loans. If you qualify, the state will pay the first 2.8 percent of the interest on up to \$60,000 of an operating loan. The creditor must also contribute a 1.7 percent subsidy.

The second program provides a subsidy for FmHA guaranteed short-term operating loans. As with the first program, the state subsidy will be 2.8 percent; the creditor's and FmHA's contributions shall be equal to at least 1.7 percent.

If you believe that either of these programs may help you, contact the Minnesota Commerce Department at (612) 296-4521.

b. State Farm Loan Restructuring

In 1986 the Minnesota Legislature created the Minnesota Rural Finance Administration (RFA) and authorized it to participate in the restructuring of farm real estate loans. The program defers payments on the mortgage principal and part of the interest, charges interest at less than market rates, and potentially cancels a portion of the mortgage balance, including deferred interest. If you believe that this program may help you, contact the RFA at (612) 296-5943.

c. FmHA Interest Rate Buydown Program

FmHA has a program to reduce the interest rate on guaranteed operating loans, guaranteed farm ownership loans, and guaranteed soil and water loans. The interest rate can be reduced up to 4 percent under this program. While FmHA is currently not participating in mediation, this program may be important in achieving a positive cash flow. You should contact either your creditor or FmHA for a detailed explanation of this program.

d. FmHA Loan Servicing and Debt Restructuring

FmHA has various loan servicing programs available for its borrowers. These programs include release of security, rescheduling, reamortization, consolidation, subordination, and limited resource loans, deferral, and debt set aside. In addition, FmHA has debt restructuring options which include debt settlement, homestead protection, and farm property leaseback/buyback. The MFFLP Information and Referral Line can provide you with additional information on these programs.

e. Farm Credit System Debt Restructuring

Section 307 of the Farm Credit Amendments Act of 1985 requires the Federal Land Bank and Production Credit Associations to review for restructuring any loans which have been classified as non-accrual. If one of your creditors is a member of the Farm Credit system, you should ask about any debt restructuring programs being offered.

2. Examples of Restructured Long-Term Debt

The restructuring options that are suggested below for long-term debt may also work for intermediate-term debt. You should use your own creativity to develop a plan that fits your situation.

- a. You enter into a loan modification agreement with your creditor, whereby you are required to make payments based on a principal amount equal to the present value of your land. The amount of your payments is calculated using the current market interest rate and a 20-year amortization schedule. The amount of your debt that exceeds the present value of your land is set aside and accrues no interest. Your modified loan agreement provides that after the first seven years the land will be reappraised and a balloon payment will be due. The amount of the balloon payment will be one-half of the increase in the land's value (if any) plus the remaining balance on the land value agreed upon when the modified loan agreement was signed.
- b. You execute a deed transferring the ownership of the land to your creditor. Your creditor accepts the deed in full satisfaction of your entire debt. The creditor also agrees to sell the land back to you on a contract for deed at a price equal to the current market value of the land. The interest rate depends upon the amount you can make as a down payment. (The higher your down payment, the lower the interest rate.) A 20-year amortization schedule is used to establish the annual payments. At the end of five years, the entire amount of the remaining principal and interest is due in a balloon payment.
- c. You execute a deed conveying the property to your creditor in full satisfaction of your debt. However, the deed is **not** recorded but is instead placed in escrow with a third party to be released only upon a default in the terms of your modified, restructured loan agreement. Under the modified agreement, you are required to make annual payments only on that part of the principal that equals the current value of your land. The payment amount is based upon a 20-year amortization schedule and the current market interest rate. At the end of the ten years, a balloon payment equal to the unpaid reamortized principal is due. If there is a default at any time during the ten years, or if you cannot make the balloon payment at the end of the ten years, the deed

is released from escrow and can be recorded, thus transferring ownership of the land to your creditor. However, if you make all payments (including the balloon payment), the remaining unpaid principal will be forgiven and the unrecorded deed will be returned to you.

This alternative is very similar to the previous alternative involving a deed in lieu of foreclosure and a repurchase by contract for deed. However, because a transfer of title does not occur unless the farmer defaults on the restructured agreement, negative tax consequences are avoided. This alternative can be particularly important if the farmer has a low tax basis in his land.

- d. You agreed to deed your land to your creditor, thereby giving up ownership to the property. Your creditor agrees to accept your deed as full satisfaction of your debt. Your creditor also agrees to sell back to you the building site and a portion of the land at the current market value. This amount will be reduced by the income the creditor will receive from renting the remaining land. The rental period will be what would have been the redemption period had you forced the creditor to go through foreclosure. In addition, the creditor agrees to lease the remaining land to you at an agreed rental per acre. (Note: You are guaranteed the right of first refusal under Minnesota law. However, you may want to negotiate special repurchase or lease options that fit your individual circumstances.)

3. Examples of Restructured Intermediate-Term Debt

- a. You agree to liquidate those items of equipment and machinery that you can get along without and to refinance the remaining equipment. Your creditor agrees to accept, in full satisfaction of the remainder of your debt, the amount of any take-out loan that you can obtain from another creditor, such as FmHA;
- b. Based on your computer cash flow, you determine the annual payment that you can afford to make on your intermediate-term debt. You agree to pay that amount in principal and interest annually to your creditor. Your creditor agrees to reschedule your intermediate-term debt over a period of time long enough to retire the debt based on payments equal to the amount

you can afford to pay. Any amount not paid at the end of five years is forgiven.

- c. Together with your private creditor, request that FmHA guarantee your machinery and equipment loans. With an 80 or 90 percent FmHA guarantee, your creditor will have the additional security it needs so that it will be willing to amortize your machinery and equipment loans over seven years at a reasonable interest rate.
- d. Agree to liquidate some of your unsecured property and apply the proceeds to the intermediate-term debt. Of the remaining balance, agree to repay one-half at a negotiated interest rate over the next five years. Ask the creditor to agree to carry the remainder of the unpaid debt as a nonrecourse loan at below market interest for 10 years, and to negotiate a schedule for payment for the unpaid balance at that time.

4. Examples of Restructured Short-Term Debt

Any mediated settlement should contain a provision that establishes how you will obtain operating credit for at least the next year or two.

- a. Offer to sell some collateral or provide additional security to the creditor in exchange for its written promise to lend you necessary funds for another year's operation.
- b. Obtain your creditor's agreement to subordinate its security interest in future crops and livestock to input suppliers or to another creditor up to a specified amount.
- c. Negotiate the release of a portion of your current year's crop and the permission of your creditor to use the proceeds to finance the next year's operation. If necessary, execute a new note with your creditor with a multi-year payback in an amount equal to a part of the value of the collateral that is released.

Keep in mind that your different creditors can cooperate to ensure that you will have enough operating credit. For example, a short-term creditor may be willing to extend operating credit if the long-term creditor is willing to write down the interest rate.

These suggestions are only intended to get you started in preparing your own plan. What is most important is that you go to your mediation session with a restructuring plan and a cash flow projection that shows that you can make the plan work. Interest rates, debt set-aside, debt forgiveness, refinancing, different ownership arrangements, additional collateral, and rescheduling of loan agreements are all devices that can be used in different combinations to fit your needs. Use your ingenuity and creativity to develop a plan that is best for you.

V. PARTICIPATING IN MEDIATION

A. OBLIGATION OF GOOD FAITH

Both you and your creditors are required to mediate in good faith. The failure to mediate in good faith can result in penalties against you or your creditors, depending on who did not perform in good faith.

The law defines a lack of good faith as:

1. Your failure or the failure of your creditor to attend or participate in mediation meetings.
2. Your failure to provide full information regarding your financial status to your creditor.
3. Failure of your creditor to provide you with all of the information it is required to give you by the first mediation meeting. (See Section I.C.4.)
4. Failure of your creditor to send a representative to mediation who does not have the authority to enter into a mediation agreement within one business day of the mediation meeting at which an agreement is reached.
5. Failure of either you or your creditor to provide a written statement of a proposed plan of restructuring.
6. Failure of either you or your creditor to give a written statement of reasons why a plan is not acceptable.
7. Failure of your creditor to release family living and farm operating expenses after an agreement on releases has been reached, either in the first mediation meeting or by a court action.

8. Your fraudulent sale, removal, concealment or transfer of secured property during the mediation period.
9. Your failure to allow your creditor to inspect the collateral during the mediation period.

Your creditor's refusal to restructure your debts, refinance them or forgive part of your debts is not a lack of good faith. This is merely a failure to reach a mediation agreement.

If you are found by the mediator to have lacked good faith, the mediator will file an affidavit with the County Extension agent stating the reasons why you lack good faith. Your creditor is then released from mediation and can continue the collection action which was started by service of the mediation notice upon you.

If your creditor is found to lack good faith, you can request that mediation continue under the supervision of the district court in your county. To begin the process of court-supervised mediation, you must file a copy of the mediator's affidavit with the district court in the county where you live and a request for court supervision of the mediation. A copy of your request must also be served on your creditor. The court can then order an additional mediation period of 60 days. All protections given you under the mediation process are extended to this additional time period. If, by the end of this additional mediation period the court finds that the creditor still lacks good faith, the court can stop the creditor from proceeding with the collection action against you for 180 additional days. Your creditor is responsible for paying your attorney's fees.

The mediator is the only person who can make a determination that either you or your creditor have not been participating in good faith. While the mediator is the only person who can declare either you or your creditor to lack good faith, you can request the court to review a mediator's decision to not issue an affidavit of lack of good faith against your creditor or if you believe an affidavit has been unjustly filed against you. The creditor can also request the court to review the mediator's action if an affidavit of lack of good faith is filed against the creditor or if the creditor feels an affidavit should have been issued against you. Review by the court is limited. The court will decide only if the mediator abused his or her discretion when the affidavit of lack of good faith was issued.

The court must review the affidavit within ten days after either you or the creditor files a petition for review. The court can order the following:

1. If the court finds that the lack of good faith affidavit issued against the creditor is proper or that an affidavit should have been issued against the creditor, the court will order court supervised mediation.
2. If the court finds that the lack of good faith affidavit issued against you is proper or that an affidavit should have been issued against you, the court can allow your creditor to proceed immediately against you with the collection action initiated by service of the mediation notice upon you.
3. If the court finds that the lack of good faith affidavit issued against you was not proper, the court will reinstate mediation.

B. HOW TO SUCCEED IN MEDIATION

Many creditors have prepared for farm mediation by attending seminars that provide training on the dynamics of the mediation process. Farmers will probably not have the benefit of such training sessions. Yet you can perform very successfully in mediation if you remember a few basic rules.

1. Be prepared with a plan. You know your business better than anyone else. Be prepared to use your knowledge to good advantage.
2. Know your rights. You need to let your creditors know that you are prepared to use the debtor protections that the law gives you. If you have specific questions about your rights, you should contact an attorney. The Minnesota Family Farm Law Project has a toll-free information and referral line if you need legal advice. The number is 1-800-233-4534. You also can read Protecting the Farm: A Farmer's Guide to Lending Law for general information about your rights. See Appendix D for information about ordering the book.
3. The mediator can be of help to you. If past experiences have caused you to have difficulty talking with a particular creditor, let your mediator know that. Although the mediator will not let you use the mediation session to criticize your creditors, he or she will help you if you are having difficulty communicating with a particular creditor.

4. Ask for time out for a break if you are tired or if you and your spouse want some time to talk privately. Mediation sessions will last for two or three hours. You may become very tired at some point in the mediation meeting. You may feel that your spouse is making statements or is prepared to make agreements with which you disagree. At any time in the mediation meeting, you can simply ask for a fifteen minute break to meet privately with your spouse and advocate. Do not hesitate to ask for a break if you need it.
5. Present only reasonable plans. A creditor is not likely to forgive large portions of your debt and continue to allow you to hold title to your land. On the other hand, you should not give up your exemption rights, discussed earlier in Section IV.B.2 (which may in some cases give you the free use of the land for two growing seasons), without getting something in exchange.

VI. CONCLUSION

Mediation is an opportunity for you, the farmer. You should be aggressive in suggesting ways to restructure your debt, and be prepared to back up your suggestions with appraisals and cash flow projections. Mediation gives you a chance. Use it well and you can reap the benefits for years to come.

APPENDIX A

FINDING AN ATTORNEY OR FARM ADVOCATE

If you can afford a private attorney but do not know one, you can ask a friend who is satisfied with his or her attorney, or you can contact the **Minnesota State Bar Association Lawyer Referral Services**. The Lawyer Referral Services can provide the telephone number of a private attorney in your area who may be able to help you.

The **Minnesota Family Farm Law Project Information and Referral Line** can provide general information concerning farm legal issues, refer you to the legal services office in your part of the state, and make other referrals that are appropriate to your needs.

The **Legal Services Office** may be able to help if you are unable to afford legal assistance, your debt-to-asset ratio exceeds 50%, and your last year's federal adjusted gross income was less than \$15,000. Legal services offices give priority to debt restructuring cases. If the legal services office cannot represent you, they will usually try to refer you to someone else who may be able to help.

The **Minnesota Farm and Home Preservation Hotline** can refer you to a Farm Advocate in your area.

Telephone Numbers

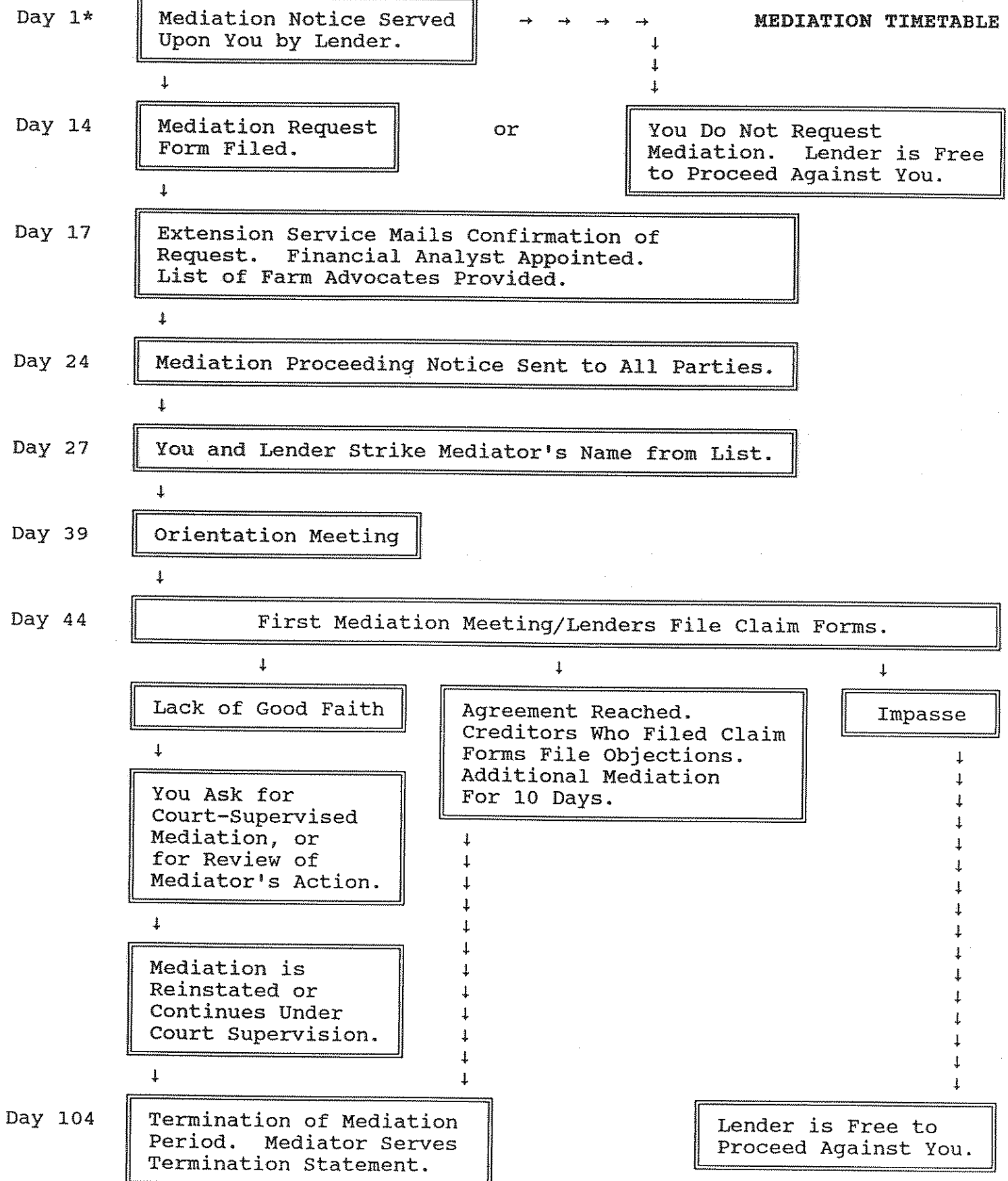
Minnesota State Bar Association Lawyer Referral Service	1-800-292-4152
Minnesota Family Farm Law Project Information and Referral Line	1-800-233-4534
Minnesota Farm and Home Preservation Hotline	1-800-652-9747

Legal Services Offices

Mankato	507/387-1211
Marshall	507/537-1588
Moorhead	218/233-8585
Toll Free:	1-800-452-3625
St. Cloud	612/253-0121
Toll Free:	1-800-622-7773
Winona	507/454-6660
Worthington	507/372-7368

APPENDIX B

MEDIATION TIMETABLE



* This reflects the maximum amount of days allowed for each step in the process.

APPENDIX C

WHAT SHOULD A FARMER BRING TO THE ORIENTATION SESSION?

1. Copies of real estate mortgages;
2. Copies of any land contracts;
3. Copies of any land leases;
4. Copies of promissory notes and security agreements that you have signed;
5. Copies of financing statements filed under your name in the County Recorder's Office at the county courthouse;
6. Copies of recent financial statements prepared for creditors;
7. Copies of any legal papers that have been served on you, such as summons and complaints, notices of mortgage foreclosure, or notices of garnishment; and
8. If you operate as a partnership or a corporation, copies of your corporation or partnership agreements.

In addition to this list of documents, you should prepare the following items for the mediator or financial analyst to see:

1. A list of all your farm assets, including vehicles, machinery, equipment, tools, livestock, grain, and land, whether or not they are mortgaged or used as collateral on a loan. If your property has not been recently appraised, get an estimate of current market values from a certified appraiser, an auctioneer, real estate agent or the county tax assessor;
2. The amounts you paid for your capital assets (such as land), improvements made to the land, and your current tax basis in major items of personal property (such as livestock, special use buildings or machinery). A depreciation schedule is a useful way to summarize this information;
3. A list of all secured debts, including the date incurred, the amount, and the purpose of the debt. The creditor will identify the delinquent amount of principal, the delinquent amount of interest, and the collateral that is claimed as security for the debt;

4. A summary of your income for the past three years. Include any income you might have had other than from farming. Your tax forms are good places to find this information.
5. A summary of crop yields and livestock production for the past three years.
6. If you have been a part of any corporation or partnership within the last six years, the name of the business corporation or partnership, when you started doing business, and the names and addresses of all corporate officers and stockholders or partners. Bring along your corporate book or partnership agreement if you have one.
7. If you have been divorced, a copy of the Judgment and Decree of Dissolution.
8. Finally, list on paper everyone (that includes relatives, friends, etc.) you owe money to or who may owe money to you, along with the amounts of principal and interest due.

APPENDIX D

Farmers who understand their legal rights will be better prepared to use mediation. The Minnesota Family Farm Law Project has written a book that describes the legal rights of farmers. It is entitled Protecting the Farm: A Farmer's Guide to Lending Law. If you want one or more copies of this book, send your name and address to:

Minnesota Family Farm Law Project
1301 Minnesota Building
46 East Fourth Street
St. Paul, Minnesota 55101