

# Mediation & Conference Programs in the Federal Courts of Appeals

*a sourcebook for judges and lawyers*

SECOND EDITION

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MEDIATION & CONFERENCE PROGRAMS IN THE COURTS OF APPEALS

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## 1. Introduction

This sourcebook is a reference guide on mediation and settlement conference programs in the thirteen federal courts of appeals. The Federal Judicial Center published the first edition of this sourcebook in 1997.<sup>1</sup> The changing structure of these programs and expressed interest from the courts of appeals made this update necessary.

### Terminology

This section describes terminology used throughout the sourcebook. The courts of appeals refer to mediation and settlement conference programs and their component parts in various ways. Courts use a variety of terms to describe essentially similar processes. *Mediation* is also called *conference*, *settlement conference*, and *Rule 33 conference*, and in this sourcebook, the term *mediation* includes all these terms. The *mediator*, that is, the person who facilitates party negotiations in mediation sessions, is also called *settlement counsel*, *conference attorney*, and *circuit mediator*. In this sourcebook, the term *mediator* includes all these terms. In the circuit-by-circuit descriptions of the courts' programs, the terms that a court uses are used in its program description; *mediation* and *conference* are often used interchangeably.

For simplicity and ease of presentation, in this sourcebook, certain words are used in their vernacular, rather than technical, sense. For example, unless the text indicates that the word *appeal* refers only to appeals of district court orders, the word as used in the sourcebook refers to any proceeding before the court of appeals, including petitions for review of agency or administrative actions, applications for enforcement of agency or administrative orders, and appeals of district court orders. Likewise, *filing of a notice of appeal* also includes filing of a petition for review of an agency or administrative order and filing of an application for enforcement of an agency or administrative order. Similarly, *appellant* means both appellant and petitioner.

A term that became part of the parlance of the circuit mediation programs for many years is the verb *conferenced*. Circuit mediators and other participants in these programs refer to an appellate case as *confer-*

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1. Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges & Lawyers* (Federal Judicial Center 1997).

*enced* if a court's mediation office determines that the case is eligible for the mediation program, refers the case for a mediation conference, and holds at least one mediation conference or session for the case. Circuit mediators have begun to use the term *mediated* instead of *conferenced*; *mediated* appears to be the favored term. This sourcebook generally uses the term *mediated*.

### **Sources for the Information**

This sourcebook reflects appellate court information gathered through the end of 2005. In each of the federal courts of appeals, the chief circuit mediator or mediation program manager worked with the author to revise the court's program description, using the 1997 sourcebook as a base. (In some courts, the position equivalent to chief circuit mediator is called senior conference attorney or some similar title.) These revisions typically included replacing program statistics with more recent data, updating descriptions to reflect changes in program procedures and structures, and ensuring that the sourcebook's descriptions were consistent with current court operating procedures and practices. The author also gathered information by reviewing court local rules, orders, and related program documents.

The sourcebook notes common elements of each program—eligibility for mediation, conference processes, and program staff, for example. It also describes aspects of each program that the program director believes merit emphasis.

The sourcebook represents a primer on the programs. Local appellate rules, court internal operating procedures, and other court documents provide more comprehensive information about the programs and, in particular, any changes that have occurred since the end of 2005.



## 2. Overview of Federal Appellate ADR

All thirteen federal courts of appeals have implemented appellate mediation or settlement programs, under Federal Rule of Appellate Procedure 33.<sup>2</sup> Each of the programs encourages or requires counsel for the parties to discuss settlement, including settlement discussions in the form of mediation.<sup>3</sup> In most cases referred to mediation, the mediator is a nonjudicial court employee or other third-party neutral. The courts' mediation program offices usually schedule mediations before the filing of appellate briefs and, in nearly all cases, before oral argument. Most local appellate court rules or procedures on mediation identify the criteria each court's mediation program office uses to determine whether a case is eligible for the program and whether to schedule mediation.

The circuit-by-circuit program descriptions presented in chapter 3 *infra* indicate the types of cases eligible for the program in each of the thirteen courts of appeals. The programs described in this sourcebook do not cover criminal cases.

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2. Rule 33 provides the following:

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

3. The basic concepts of mediation used in the federal courts of appeals are fundamentally the same as those used in the federal district courts. The Center is revising a similar sourcebook about alternative dispute resolution programs in the district courts. See Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (Federal Judicial Center 1996) (also published by CPR Institute for Dispute Resolution 1996). Upon completion, the revised district court ADR sourcebook can be accessed on the Center's website at [www.fjc.gov](http://www.fjc.gov). See also Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* (Federal Judicial Center 2001) (describing principles of mediation and offering guidance to federal district and bankruptcy courts on when to refer appropriate cases to ADR and how to manage cases referred).

### History of Programs

As the chronology in Table 1 shows, one federal court of appeals implemented a conference program in 1974.<sup>4</sup> By the end of the 1980s, five of the thirteen courts had conference or settlement programs; during the 1990s, seven more added programs; and the Federal Circuit added one in 2005. Some early programs lapsed and, in each court in which that happened, the court later started a new or replacement program—often through evolution of the new program over a number of years. The year listed in Table 1 marks, for each court, the start of the program that evolved into the program that the court had in place as of the end of 2005.

**Table 1. Year of Implementation of Mediation and Conference Programs in the Federal Courts of Appeals**

Second Circuit	1974	Eleventh Circuit	1992
Sixth Circuit	1981	Fourth Circuit	1994
Eighth Circuit	1981	Seventh Circuit	1994
Ninth Circuit	1984	Third Circuit	1995
D.C. Circuit	1987	Fifth Circuit	1996
Tenth Circuit	1991	Federal Circuit	2005 <sup>a</sup>
First Circuit	1992		

a. From 1989 to October 3, 2005, the Federal Circuit had a settlement program. The court replaced this with a mediation program in 2005. Under the settlement program, the court’s local rule required that attorneys for the parties hold settlement discussions in all civil cases that met eligibility requirements. Generally, the court did not keep track of attorneys’ compliance with this rule or learn with certainty whether the settlement discussions that attorneys did hold were substantive or merely pro forma.

4. Some state courts have established appellate mediation programs as well. As of April 2002, appellate-level courts in thirty-one states had active appellate mediation programs at various levels of the appeal process. For example, one state might have mediation programs at the intermediate court of appeals level and at the state supreme court level. *See generally* Nancy Neal Yeend, *State Appellate ADR: National Survey and Use Analysis with Implementation Guidelines* (2d ed. 2002); *see also* Roger A. Hanson, Carol R. Flango & Randall M. Hansen, *The Work of Appellate Court Legal Staff* (2000); Robert J. Niemic, *On Appeal: Mediation Becoming More Appealing in Federal and State Courts*, *Disp. Resol. Mag.*, Summer 1999, at 13.

In 1994, the Judicial Conference of the United States put into effect an amended Rule 33. The amended rule

- permits courts to require clients to attend mediation sessions with their attorneys;
- requires attorneys to consult with clients to obtain as much settlement authority as feasible;
- authorizes settlement as a topic during Rule 33 conferences;
- recognizes the possibility of telephone conferences; and
- authorizes non-judges to preside over conferences (which many programs already allowed).<sup>5</sup>

### **Program Objectives**

As described below, several objectives are common to the majority of the programs.

#### ***Settling cases through facilitated negotiations***

The primary focus of the programs is settlement of cases. As structured by the program managers, mediation sessions exist to help parties communicate with one another, clarify their understanding of underlying interests and concerns, identify the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. An underlying assumption is that lawyers are frequently reticent about initiating settlement negotiations. Unlike many trial proceedings, the typical federal appellate case presents few venues or opportunities for the parties to meet and to discuss settlement, other than the Rule 33 mediation conferences.

#### ***Helping litigants obtain outcomes not otherwise available***

The mediations can be a forum for stimulating creative solutions that often would not happen if the case followed the traditional path or if the parties acted on their own. The mediations might even help parties expand settlement discussions by going beyond the legal issues in the case before the court of appeals. Mediation sometimes results in resolution of other litigation involving the same parties.

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5. Fed. R. App. P. 33, Advisory Committee Notes.

### ***Conserving judicial resources***

Judges are only minimally involved in these programs. Settling a case early without judicial action helps reduce appellate docket pressures and can save the time that judges would have devoted to briefs, oral argument, and opinion writing. The Center has analyzed the benefits derived from some of the federal appellate conference programs. For example, the Center's evaluation of the Sixth Circuit program in the mid-1980s concluded that the program saved court and litigant resources by doing the work of 1.06 appellate judges and related staff.<sup>6</sup>

### ***Improving case management***

Most programs focus on settlement but also address procedural issues and case management. They often help parties simplify or clarify issues and resolve procedural matters, eliminating the need for motions. These steps have the potential to streamline the appellate process and complement other case-management techniques.<sup>7</sup> This streamlining can occur even when cases do not fully settle. For example, steps toward case management taken at the conclusion of mediation can improve the quality of any briefs or oral arguments that might be necessary, which, in turn, can expedite court decisions.

## **Comparing Program Features**

In the 1980s, there was more variation in the structure and operation of appellate mediation programs than there is today, but some differences remain. When designing and operating the programs, courts consider many factors, including regional practices and the size of the circuit. This section describes some similarities and differences between the programs' features, but does not assess the merits of any approach.

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6. See James B. Eaglin, *The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals* 30–31; 41–42 (Federal Judicial Center 1990). See also Anthony Partridge & Allan Lind, *A Reevaluation of the Civil Appeals Management Plan* (Federal Judicial Center 1983); Jerry Goldman, *An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration* (Federal Judicial Center 1977).

7. See Judith A. McKenna, Loral L. Hooper & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* (Federal Judicial Center 2000). See also Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913 (1995); *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Arthur D. Hellman ed., 1990).

### ***Program names***

The widely recognized precursor to the Rule 33 program is the Second Circuit's Civil Appeals Management Plan (CAMP), which was adopted in 1974.<sup>8</sup> Initially, most federal appellate courts used the title *pre-argument conference program*, but, more recently, have used names such as *mediation program*, *office of the circuit mediator*, and some variation of *settlement program* and *conference program*. The 1994 revision of Rule 33 changed the caption of the rule from *Prehearing Conference* to *Appeal Conferences* to "reflect the fact that occasionally a conference is held after oral argument."<sup>9</sup>

### ***Case types in the programs***

The programs range from those that include virtually all of a court's civil appeals (using that term broadly to include review of administrative orders)<sup>10</sup> to those that consider only specified categories of cases as generally eligible for the program. None of the programs cover criminal cases. Few cover prisoner petitions or original proceedings, such as petitions for writs of mandamus. Some programs will schedule mediation in certain otherwise ineligible civil appeals if one or more parties request mediation.

The types of cases that constitute a court's civil appellate caseload and their frequency of occurrence differ from one court to the next. In the Second Circuit, for example, habeas corpus petitions and petitions for review of immigration cases substantially increased during 2002 and 2003. During 2003, about three-fourths of the cases mediated were immigration appeals, and 60% of those cases were disposed of through CAMP.

Some programs generally do not include cases in which a public agency is a party, although most of these courts make exceptions if either party requests mediation or when other circumstances warrant referral to mediation. Changes in federal and state government policies concerning alternative dispute resolution (ADR) led some appellate mediation programs to refer more types of specific agency cases to mediation. For example, as issued in 1996, Executive Order No.

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8. The Seventh Circuit Court of Appeals adopted a different type of pre-argument program in 1972, which continued into the 1980s.

9. Fed. R. App. P. 33 Advisory Committee Notes.

10. Definitions for terms used in this sourcebook appear on page 1 *supra*.

12988 provides that federal agencies are to “make reasonable attempts to resolve [disputes] expeditiously and properly before trial.”<sup>11</sup> The Executive Order also states that ADR is “appropriate” if it will “materially contribute to the prompt, fair, and efficient resolution of the claims.”<sup>12</sup>

In the District of Columbia Circuit, where government entities are frequent litigants, the appellate mediation program has been regularly settling such cases. Because the court found that government attorneys often could not secure sufficient authority to negotiate and settle certain types of agency cases, its program requires that someone with settlement authority be reachable by telephone during the mediation sessions.

Appellate mediation offices generally do not schedule pro se cases for mediation because the circuit mediators have concerns that a pro se party might view the mediator as an advisor or representative or as imposing a settlement. In some appellate mediation programs, the program does not categorically exclude uncounseled cases from the mediation program; however, programs rarely refer cases to mediation if one of the parties is not represented by counsel. The program in the District of Columbia Circuit will refer to mediation a case with a pro se party in particular circumstances, as determined by the program director. In such cases, the program director reports that the court of appeals would have to appoint counsel to represent the pro se party for mediation purposes only. At the time this sourcebook was written, the D.C. Circuit did not place its pro se representation policy in a local rule. A local rule in the Third Circuit, however, provides that, in some cases, the program director may request pro bono counsel to represent pro se litigants for purposes of mediation only.

### *Case-selection processes*

Because some program managers believe it is difficult to predict from case documents alone which cases are likely to settle, some programs schedule nearly all eligible civil appellate cases for mediation while others select cases by random draw. Other program managers have developed criteria designed to select cases in which the prospects for mediation appear to be brightest.

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11. Exec. Order No. 12988, 61 Fed. Reg. 4729 (1996).

12. *Id.*

In the U.S. Courts of Appeals for the First and Second Circuits, nearly all civil cases (including administrative agency cases) are scheduled for a civil appeals management conference, which generally includes mediation. In the Eleventh Circuit, all fully counseled civil appeals except prisoner, habeas corpus, and immigration appeals are eligible for mediation, but the program might exclude from assignment some eligible appellate cases that do not appear conducive to settlement by mediation. The appellate mediation programs in the other circuits schedule mediation only in cases that appear likely to achieve settlement on some or all of the issues on appeal.

In these latter courts, circuit mediators or conference attorneys might consider appellate settlement unlikely if the case involves an agency with a cumbersome procedure for obtaining settlement authority or if one or more of the parties want to establish precedent through judicial resolution of the issues on appeal. Other factors might be whether the parties expressed interest in mediation, the complexity of the case, and the amount of monetary relief requested.

Docketing statements filed by the parties generally provide information about the nature of the action, the result below, and the issues on appeal. (Some courts refer to docketing statements as “appeal information statements” or “civil appeal statements.”) To determine a case’s suitability for mediation, circuit mediators or conference attorneys might also review the judgment or order that is on appeal, any related opinion below, the notice of appeal, district court docket sheets, and relevant motions. In some courts, before assigning a case to mediation, circuit mediators or conference attorneys not only review case documents but also contact appellate counsel to evaluate the likelihood of settlement and the case’s suitability for the program.

### ***Timing of the mediation***

Most mediations occur at an early stage in the appeal, usually before parties file their briefs. Generally, the mediation/conference office schedules a conference shortly after the appellate case is docketed. In most courts, briefing schedule orders are usually issued before the conference. In nearly all courts, a briefing schedule may be adjusted if progress toward settlement warrants it.

An underlying assumption in most appellate mediation programs is that parties’ incentives for settlement often decrease as their briefing

and oral argument preparation progresses. Scheduling mediation early gives parties the opportunity to settle before they incur the major expense of filing briefs and appendices. Furthermore, even if mediation does not result in settlement, any narrowing or clarifying of issues achieved because of mediation could benefit counsel in the briefing process and might yield more effective oral arguments.

Courts that do not schedule or require mediation in all program-eligible cases generally allow parties to request mediation at any time during the case. Mediation offices routinely grant such requests in non-prisoner civil cases in which all parties are represented by counsel. Some programs, however, occasionally allow prisoner cases into the program if a party requests mediation and mediation appears to have potential for settlement. Occasionally, appellate panels refer cases to mediation just before or after oral argument.

#### ***Effect on appellate proceedings***

The scheduling of mediation generally does not toll the time for filing briefs or ordering transcripts or otherwise trigger an automatic stay of appellate proceedings. If necessary, the mediator or, by motion, the parties may arrange more time for filing briefs, transcripts, or other matters. Some programs authorize the mediation/conference office to dispose of a wide variety of procedural motions that arise in a case.

#### ***In-person and telephone sessions***

In many of the programs, circuit mediators and conference attorneys work with counsel to schedule a location and format convenient for the mediation/conference participants.

Most programs hold a large portion of the conferences by telephone. The chief circuit mediators and conference attorneys in the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits indicated that they conduct from 50% to 95% of their sessions by telephone. Factors that contribute to the frequency of telephone sessions include the distances between the mediator and mediation participants and the travel costs for in-person sessions.

Proponents of in-person mediation, on the other hand, maintain that face-to-face interactions between the parties might help to bring about settlement. In three relatively compact circuits (the First, Third, and District of Columbia Circuits), most mediation sessions are held in



person. However, even in those programs, distant locations of participants or other factors may require telephone conferences. The initial mediation sessions in the Federal Circuit are held in person.

### ***Mediation techniques***

Programs use facilitative mediation techniques to help parties find solutions to the underlying problems that give rise to the litigation. After any preliminary discussions with a party's attorney to set up the mediation, a mediator usually begins mediation with a *joint session*, by discussing settlement jointly with all parties in the case. The mediator then usually meets, one or more times, separately with each party to facilitate settlement. These meetings are called *caucuses*, or private sessions. The mediator usually shuttles back and forth between the parties if the mediator calls for more than one caucus with each party. Each party's attorney is always included in the joint sessions and in the caucuses for that party.<sup>13</sup>

As stated in the First and Second Circuits' program procedures, the mediator also may make predictions about the outcome of the case if the case were to go before an appellate panel. In those two circuits, and in some others, the mediator also may recommend or suggest a fairly specific negotiated settlement, possibly in the form of a scenario or a hypothetical. Any predictions or recommendations on the merits are simply nonbinding opinions of the mediator.

### ***Mandatory versus voluntary participation***

In nearly all programs, parties—or at least their attorneys—are required to participate in mediation if the conference office schedules mediation in that case. Not every circuit program requires client attendance at the mediation sessions. Most programs do not have formal provisions for removing a case from the program; however, a few courts provide for removal of a case from the program either at a party's request or at the discretion of the mediator. In addition, some

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13. For a discussion of appellate mediation techniques that attorneys can use to help facilitate their clients' goals and assist the mediator or conference attorney in conducting the settlement conference, see Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. App. Prac. & Process 341 (1999) (discussing ADR structure at the district and appellate court levels and proposing effective mediation strategies for participating attorneys).

offices consider the willingness of the parties to mediate as a factor in deciding which cases to refer to mediation.

In the Eighth and Federal Circuits, participation in mediation conferences is voluntary, meaning that all parties must consent to participate and that a party has the right to cancel a scheduled conference.

### ***Settlement authority***

Attorneys attending an appellate conference must obtain from their clients “as much authority as feasible to settle the case.” Many programs strongly encourage the clients—not just their attorneys—to attend the conference. When the party is a corporation or other entity, the party often sends a company representative in addition to the attorney. Some programs have guidelines governing settlement authority in these situations. For example, a company representative or government employee who attends the mediation should have authority to settle. If settlement authority is limited, the company representative or public employee should have readily available the means to obtain approval of a settlement from company or government officials. Mediators might request, or program rules may require, that the person with full settlement authority be reachable by telephone during the mediation sessions.

### ***Confidentiality***

All of the program offices operate with confidentiality; the administration and operation of each program is separate from the court’s decision-making process. Local rules usually prohibit mediators, the parties, and the parties’ attorneys from disclosing the substance of a conference to any judge or non-party. Generally not considered confidential, however, are the fact that the mediation took place and the bare results of the mediation (for example, settled, not settled, or continued).

### ***Use of third-party neutrals***

In nearly all of the programs, attorneys who are employees of the circuit court conduct the mediations. These attorneys have a variety of titles in the programs, including *circuit mediator*, *settlement counsel*, *conference attorney*, and *staff counsel*. Courts report that most had experience or training in mediation and negotiation techniques before coming to the program. The courts also provide additional training.

In some courts, senior federal judges or retired state judges mediate some of the cases. In the Third Circuit's program, for example, senior circuit and district judges conduct mediations in about 10% of cases, and the program director and the staff mediation attorney mediate the rest. The First and Fourth Circuits each hired a former state court justice to facilitate conferences and to serve as program manager, and the Fourth Circuit program has three circuit mediators. In the Ninth Circuit, the mediator may refer a case to a circuit, district, or magistrate judge for mediation in exceptional circumstances.

In the District of Columbia and Federal Circuits, the director of the mediation program is a full-time employee of the court. These directors routinely assign cases to volunteer attorney–mediators who are members of the local bar, are experienced in mediation skills, and have been approved by the court for participation in the program. Occasionally, in the D.C. Circuit, the program director mediates or co-mediates a case. These two programs are the only ones among the federal courts of appeals that use volunteer mediators.

The Eleventh Circuit amended its local rules effective October 2004 to provide that, upon agreement of all parties, a private mediator may be employed by the parties at their expense to mediate an appeal that has been selected for mediation by the circuit's Kinnard Mediation Center.

### ***Costs to parties***

For the most part, appellate mediation/conference programs are available to appellate litigants at no charge. Each court of appeals funds the administration of the program. In at least one court, the costs for telephone conferences are typically borne by the party initiating the call, usually the appellant. For in-person sessions, parties bear their own travel costs.

In the programs for the District of Columbia Circuit and the Federal Circuit, the mediators are not paid for their services. These courts do reimburse mediators for some out-of-pocket expenses, however.

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### **3. Description of Programs, Circuit by Circuit**

#### **First Circuit: Civil Appeals Management Program (CAMP)**

The U.S. Court of Appeals for the First Circuit identifies its mediation conference processes as the Civil Appeals Management Program, or CAMP. The court established CAMP in 1992.

Under CAMP, the court's Office of Settlement Counsel conducts a pre-argument mediation conference for most civil cases docketed in the court. The office is located in the Office of the Circuit Executive. An active circuit judge, with the assistance of the circuit executive, oversees the program. The Office of Settlement Counsel in Boston manages the program, with operational assistance from a program administrator. All CAMP-eligible cases are assigned to the settlement counsel, who conducts the mediation conferences. The settlement counsel also conducts conferences in the U.S. District Court for the District of Puerto Rico, by scheduling as many conferences as he can for each of his visits to Puerto Rico or by telephone.

CAMP's primary goal is to encourage resolving appellate cases without court action, allowing the court to make optimum use of its limited resources while curbing litigants' costs. The program is a means to resolve open procedural matters, facilitate settlement, and identify meritless appeals. In CAMP conferences, the settlement counsel sometimes makes outcome-based predictions on the merits or recommends a specific negotiated settlement, which the parties are not required to accept. If parties do not settle, CAMP potentially can simplify outstanding issues and accelerate disposition.

If the Clerk's Office schedules a conference in a given case, participation in the conference process is mandatory—unless the information supplied by the parties demonstrates, in the opinion of the settlement counsel, that there is no reasonable likelihood of settlement in the case. Such cases constitute a very small percentage of program-eligible cases. All attorneys attending a conference must have full settlement authority.

In calendar year 2003, the Office of Settlement Counsel held one or more mediation conferences in 281 new cases. Federal Rule of Appellate Procedure 33 and First Circuit Rule 33 govern the program.

### ***Selecting Cases for Conferences***

#### *Eligible case types*

A CAMP-eligible case is any civil case docketed in the court except original proceedings (such as petitions for writs of mandamus), prisoner cases (including habeas corpus petitions), immigration cases, cases in which a party appears pro se, National Labor Relations Board summary enforcement actions, and cases with unresolved jurisdictional problems. Among the many types of cases in the program are bankruptcy appeals, tax cases, most agency cases (including those involving denial of Social Security benefits), and other petitions for review of administrative orders.

Upon receipt of case documents, the Clerk's Office refers all CAMP-eligible cases to the Office of Settlement Counsel, where they are scheduled for mediation conference. Parties in non-eligible cases may not request mediation.

When the court of appeals receives the notice of appeal or otherwise docketed the case, the Clerk's Office notifies the appellant's attorney that the notice of appeal has been received and docketed. For each CAMP-eligible case, the Office of Settlement Counsel requires that the appellant, within fourteen days after receiving the clerk's notice, send the office an appearance form, a docketing statement, and a transcript order/report. The office also notifies all attorneys that they are required to file a preconference memorandum that explains the basis for jurisdiction; the nature of the action; the issues to be raised on appeal; and any case pending, or about to be brought, that arises from substantially the same case or involves an issue substantially similar to one on appeal. CAMP rules direct the appellant to include copies of all judgments and accompanying memoranda that are the subject of the appeal.

#### *Judicial selection*

At any time during a case, a circuit judge may refer any matter to the program upon motion or sua sponte. Occasionally, hearing panels refer cases just before or after oral argument.

### ***Scheduling the Conferences***

#### *Scheduling process*

The program administrator schedules a mediation conference and notifies attorneys in the case of the date and time. Consolidated and companion cases are scheduled for combined conferences. The program administrator normally schedules a conference so that it is held at least fourteen days before the appellant's brief is due. The objective is to hold the conference before the parties have made substantial investments of time and resources in the appeal.

#### *Conference sites*

The program holds about 80% of CAMP conferences in person, because program officials believe that in-person conferences are more effective than telephone conferences in producing settlements. For in-person conferences, attorneys for each side of the appeal and, usually, their clients travel to the site of the Office of Settlement Counsel. For New England-based appeals, in-person conferences are held at the John Joseph Moakley U.S. Courthouse, One Courthouse Way, Boston, MA; for Puerto Rico-based appeals, conferences are held either at the federal courthouse in Hato Rey or by telephone.

### ***Mediation Submissions***

CAMP does not require written mediation statements from the parties, as some other mediation programs do.

### ***Mediation Sessions***

#### *Nature of sessions*

During the conference, the settlement counsel attempts to mediate a resolution. At the beginning of the conference, the settlement counsel instructs participants on the confidentiality rules and discusses procedural concerns and any motions the parties may wish to file. Attorneys for both sides then present their respective positions on the issues raised on appeal, and the settlement counsel makes comments and poses questions. Attorneys must be fully prepared to discuss and evaluate the legal merits of each issue and to narrow, eliminate, or clarify issues when appropriate. The settlement counsel sometimes makes outcome-based predictions on the merits and, in appropriate situa-

tions, recommends a specific negotiated settlement, which the parties are not required to accept.

After the joint session, the settlement counsel usually meets separately with attorneys for each side. These meetings, called caucuses, include a candid appraisal of the likely outcome on appeal; exploration of each party's interests; and solicitation of settlement proposals, ideas, and offers. Mediation conferences conclude when the parties reach an agreement or impasse. Follow-up conferences are arranged to pursue negotiated settlements fully.

Any other matters, including pertinent matters raised by the parties, may be discussed if the settlement counsel determines that discussing them may have a positive effect on the mediation. Such matters might be procedural—such as staying execution on the district court judgment—or they might be substantive—for example, negotiating a global settlement of cases pending in other courts.

#### *Party participation*

Unless attendance by a party-client or party representative is excused with the express, prior approval of the settlement counsel, the program rules require that all persons necessary to make a decision to resolve the matter (including the party-client's attorney and the party-client or the party-client's representative with full settlement authority) attend the entirety of the initial mediation conference until a settlement is reached or the settlement counsel declares a recess or an impasse. Mediation conferences after the initial conference may be held with or without party-clients, as necessary to pursue negotiated settlements fully; all attorneys and party representatives attending these conferences are required to have full settlement authority.

The program rules direct all parties to participate in the settlement conference process in good faith, that is, with the intention to attempt to settle on a basis agreeable to all parties.

#### *Number and length of sessions*

The Office of Settlement Counsel schedules conferences to last for at least two hours unless there is a specific reason to plan a longer or shorter time period. The office reports that initial conferences run generally from one to three hours. The initial conference might last as long as three hours, or longer, if progress toward resolution continues to be



made. After the initial conference, the settlement counsel may schedule one or more follow-up telephone or in-person conferences, with or without party-clients. Follow-up discussions might continue for days or weeks. For most cases, one or two joint conferences per case are sufficient.

*Fees*

CAMP does not charge parties or attorneys for the costs of the conferences.

*Post-conference procedures*

If the parties achieve a settlement, the settlement counsel asks the parties to execute a stipulation of dismissal, which is filed in the Clerk's Office.

If CAMP does not resolve a case, the program administrator sends a memorandum of non-settlement to the Clerk's Office for the appellate case file and also to the referring panel in those cases in which a hearing panel of judges referred the case to the program. An unsettled case remains on the docket and proceeds as if the mediation conference process had never occurred. Even though the case does not settle fully, the conference may result in a request to the court for the issuance of a post-conference order, such as a stipulated order to narrow the issues to be briefed and argued.

The settlement counsel keeps records concerning agreements made during the conference process, including the parties' agreement to file a dismissal stipulation. The program administrator monitors the filing of papers related to those agreements and follows up on any items not received within the time set at the conference. Follow-up may include telephone calls or letters to attorneys.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

The briefing schedule set by the Clerk's Office runs concurrently with the conference process. The scheduling of a pre-argument conference does not automatically stay any aspect of the appellate proceedings.

If the need arises, the settlement counsel may recommend that parties file a motion to extend the time for filing briefs, transcripts, or other documents. The court generally approves motions that the set-

tlement counsel recommends and, if necessary, the clerk issues an amended scheduling order. The filing of a procedural or substantive motion may cause the settlement counsel to reschedule the conference.

#### *Confidentiality*

Local Rule 33 prohibits the settlement counsel from disclosing the substance of the conference. It also bars attorneys from doing so, except to their party-clients or cocounsel, and then only after receiving assurance that they will honor the confidentiality of the information. The settlement counsel directs each party to make express representation in its preconference memoranda as to whether the party, party representative, attorney, and other person assisting such party or attorney will maintain confidentiality with respect to settlement communications made or received during or in connection with the conference. The CAMP rule excludes from the confidentiality requirement the fact that the conference took place, the bare results of the conference (for example, “settled,” “continued”), and any resulting post-conference memorandum or order entered on the docket.

#### *Sanctions*

If the court’s rules are violated, the settlement counsel may send the clerk a recommendation for sanctions. The court decides what sanctions, if any, to impose.

#### *Grievances*

Any grievances as to the handling of a case in the program are sent to the circuit executive to be addressed by the court of appeals. The circuit executive and the court of appeals hold all such grievances confidential, unless the complainant authorizes release of them.

#### *Recusal*

In a case in which the settlement counsel recuses himself, the chief judge may designate a judge to act as the “settlement counsel” and hold a mediation conference in a case. The new settlement counsel might be a judge from the First Circuit or from any other circuit, as long as that judge does not sit on the appellate panel for that case.

FIRST CIRCUIT: CAMP

*Reports and evaluation*

The Office of Settlement Counsel keeps internal records for use in preparing statistical reports on the program.

***For More Information***

Contact Hon. Neil Lynch, Settlement Counsel, U.S. Court of Appeals for the First Circuit, One Courthouse Way, Room 3440, Boston, MA 02210, telephone: 617-748-9339.

Websites:

[www.ca1.uscourts.gov/camp.htm](http://www.ca1.uscourts.gov/camp.htm)

[www.ca1.uscourts.gov/files/rules/rules.pdf](http://www.ca1.uscourts.gov/files/rules/rules.pdf) (see Local Rule 33)

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## **Second Circuit: Civil Appeals Management Plan (CAMP)**

The U.S. Court of Appeals for the Second Circuit inaugurated its Civil Appeals Management Plan (CAMP) in 1974. Under CAMP, the court's Office of Staff Counsel conducts a conference, also referred to as mediation, for most counseled civil cases. The Office of Staff Counsel is part of the Office of Legal Affairs of the Second Circuit. The director of the Office of Legal Affairs oversees the Office of Staff Counsel. There is one senior staff counsel and two other staff counsel. Office staff includes a conference administrative supervisor, a legal assistant, and a clerical assistant.

Staff counsel are required to have the skills necessary to perform as impartial mediators who promote agreements acceptable to all parties; educate parties on law and practice in the Second Circuit; encourage each side to hear and understand the arguments, needs, and concerns of the other; meet privately with attorneys when necessary to get beyond legal positions to a discussion of interests; resolve procedural problems informally; and issue scheduling orders to promote expeditious case disposition.

CAMP's purposes are to encourage case settlement, thereby reducing the number of cases being briefed and orally argued before the court; to prevent unnecessary motions or delay; to resolve procedural problems; and to identify, clarify, and simplify any issues submitted to the court. In addition, a major CAMP goal is to provide the litigants with a problem-solving forum, namely, the mediation conferences. That forum is specifically designed to determine the essential needs, or interests, of each party and to forge an amicable agreement that satisfies the parties more fully than a court-imposed resolution of their conflict.

The Second Circuit believes that, to further its stated goals, the success of each conference depends on the attorneys treating it as a serious and effective procedure that can not only save time and expense for the parties, but also provide an outcome better suited to the needs and interests of the parties.

Attendance at CAMP conferences is mandatory for attorneys except when a staff counsel specifically authorizes telephone conferences.

CAMP rules require that attorneys attending these conferences have full settlement authority.

CAMP held one or more conferences in 982 cases in 2002, 1,331 cases in 2003, and 2,604 cases in 2004. In 2003, 1,010 of the cases that staff counsel referred to conference were immigration appeals, and in 2004, 1,015 of them were immigration appeals. The Office of Staff Counsel conducts CAMP under Federal Rule of Appellate Procedure 33, Rule 5 of the Civil Appeals Management Plan (CAMP), and Second Circuit Rules Appendices C and D.

### ***Selecting Cases for Conferences***

#### *Eligible case types*

Every civil appeal in which all parties are represented by counsel or are proceeding pro se and have a law degree is a CAMP-eligible case. These cases include appeals from final judgments and orders of the district courts and the U.S. Tax Court, bankruptcy appeals, petitions for review of federal administrative orders (e.g., National Labor Relations Board cases, Board of Immigration Appeals cases), and certain appeals of interlocutory decisions under 28 U.S.C. § 1292(b).

Upon receipt of case documents, the Clerk's Office refers all CAMP-eligible cases to the Office of Staff Counsel. The office schedules a pre-argument conference in all cases, with exceptions, including petitions for mandamus, prohibition, asylum or non-immigration-habeas corpus cases. CAMP cases scheduled for conference are referred to as conference-eligible cases.

Referral of civil appeals to a staff counsel is usually done by random assignment, but companion and consolidated cases are assigned to the same staff counsel, and new cases involving cases previously addressed by CAMP are assigned to the staff counsel most familiar with them.

#### *Documents reviewed*

The staff counsel receives case documents from the Clerk's Office prior to the conference, including the notice of appeal, district court docket entries, and the completed pre-argument statement form that the appellant must file with the clerk within ten calendar days after docketing of the appeal. The court-provided pre-argument statement form requires information about the basis of jurisdiction, the nature of the ap-

peal, the result appealed from, the issues proposed to be raised on appeal, and the standard of review for each issue, as well as a copy of the relevant judgment, order, or opinion in the case below.

*Judicial selection*

Occasionally, hearing panels refer cases to the program before or after argument but before decision.

***Scheduling the Conferences***

*Scheduling process*

Shortly after the Clerk's Office refers a case to CAMP, a staff counsel issues to the parties' attorneys a "pre-argument conference notice" and a scheduling order for briefing. Generally, the Office of Staff Counsel schedules the conference for two to three weeks after the staff counsel issues the pre-argument conference notice. The objective is to hold the conference before the parties have made a substantial investment of time and capital in the appeal.

*Conference sites*

Conferences in approximately half of the cases referred to CAMP are conducted in person, and the others are conducted by telephone or videoconference. The staff counsel assigned to the case decides how the conference will be handled. In-person conferences are generally held at the Thurgood Marshall United States Courthouse in Manhattan. Often, an in-person conference is followed up by telephone, or an in-person follow-up may be scheduled. The clients are not ordinarily required to appear for the conference but are expected to be available for discussion, by telephone, for example. If a sufficient number of cases can be scheduled for the same location, staff counsel may hold conferences in other locations within the circuit for purposes of efficiency and economy.

***Mediation Submissions***

The Office of Staff Counsel does not require written mediation statements from the parties, as some other mediation programs do.

### **Mediation Sessions**

#### *Nature of sessions*

The functions of the staff counsel are to act as an impartial mediator seeking an agreement that is acceptable to all parties, to educate parties on law and practice in the court of appeals, to meet privately with each side when appropriate, and to resolve procedural problems informally and expeditiously.

The staff counsel usually begins the conference by explaining the conferencing procedures and discussing the rules of confidentiality. Typically, the substantive discussion begins with the staff counsel's seeking to establish whether the court has jurisdiction. The parties' attorneys then present their respective positions on the issues raised on appeal, and the staff counsel asks questions and sometimes comments substantively.

After listening to both sides, the staff counsel may give a nonbinding advisory opinion on the merits or other aspects of the appeal. In some cases, this may include a recommendation that the appeal be withdrawn. The staff counsel makes clear that the views expressed are the staff counsel's only and not the court's. CAMP rules stipulate that the parties are not required to reach an agreement.

If settlement or withdrawal has not been tentatively agreed to at the initial conference, the staff counsel may ask for a follow-up discussion or may instruct the lawyers for one or both sides to consult with their clients and report back by a specific date. The clients may also be required to participate in any follow-up conferences.

The staff counsel may also resolve procedural matters, including, for example, a consensual stay of the district court judgment; a stipulation on an expedited argument schedule; an agreement on the contents of a joint filing of a deferred appendix; or a recommendation for tandem review or consolidation of cases. Resolving such matters often obviates the need for written motions.

#### *Party preparation and participation*

The court of appeals requires that all sides be thoroughly prepared to discuss, in depth, at the conference the legal, factual, and procedural issues in the case. The court also requires that, prior to the conference, attorneys discuss with their clients the matters, issues, and interests involved in the case; ascertain the clients' goals in resolving the litigation;



and seek to moderate goals that are clearly unrealistic. The court directs attorneys to be prepared to negotiate in good faith and express their views on both the merits of their case and the clients' interests. Attorneys who attend the mediation should be those who have the greatest influence with the clients and the broadest authority from those clients, including advance authority to make such agreements as may reasonably be anticipated for the mediation process.

The staff counsel may ask attorneys to be prepared to cite cases in support of their positions and may ask them to bring to the conference the most important decisions they will rely on in the appeal.

Clients normally do not accompany their attorneys to the initial conference. Clients may attend only with the permission of the staff counsel or if the staff counsel requests or, in exceptional circumstances, requires that they attend. The staff counsel must not speak with any party outside the presence of that party's attorney.

#### *Number and length of sessions*

Initial in-person conferences generally are scheduled at intervals of one to one and a half hours but sometimes may last several hours. Initial telephone conferences may be shorter. Based on input from the parties' attorneys, the staff counsel may conduct follow-up conferences or telephone conferences. Follow-up discussions may continue for days or weeks.

#### *Fees*

The program does not charge party-clients or attorneys for the costs of the conferences. The appellants usually set up long-distance telephone conferences, and the costs are typically borne by the party initiating the call.

#### *Post-conference procedures*

If the parties achieve a settlement, the staff counsel will ask the parties to execute a dismissal stipulation to close the case. If the case cannot be resolved through the conference process, it remains on the docket. In cases in which there is a reasonable likelihood that the appeal may ultimately be withdrawn before a panel's decision, the parties may stipulate to withdraw the appeal from active consideration with leave to reactivate by a certain date.

*Immigration cases*

When a CAMP-eligible non-asylum immigration case—that is, a case in which the petitioner is represented by counsel—is filed with the court, the Clerk’s Office issues a scheduling order that only contains the date the administrative record is due. When the record arrives, the entire case is referred to the staff counsel, who sets the case for conference. The Office of Staff Counsel developed this process because it was difficult to conference the immigration cases without records, and the Executive Office of Immigration Review had a tremendous backlog of requests for producing records. When CAMP receives the records, a pre-argument conference notice is sent to the parties’ attorneys with a scheduling order, as is done for other CAMP cases. All the other rules pertaining to CAMP conferences apply to immigration cases.

In 2005, the Second Circuit instituted the asylum Non-Argument Calendar (NAC), which handles all the fully briefed asylum cases filed with the court, whether counseled or pro se. Conferences in fully counseled asylum cases are no longer automatically referred to CAMP, but parties are free to request a conference that will be arranged right away but will not delay the briefing schedules. Attorneys may request that a case be referred to the Regular Argument Calendar (RAC). The court may also refer a case to the RAC for oral argument and possibly further briefing.

The staff counsel attempts to conference a number of immigration cases on a particular day with the U.S. Attorney’s Office, and the petitioners’ attorneys. If the government will agree not to deport the petitioner during the pendency of the action, any stay motions will be removed from the motions calendar, thus obviating the need for a panel to decide the motions, and a merits panel to consider the appeal.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

When a case is referred to conferencing, CAMP does not automatically stay other activities in the case. The staff counsel is authorized to dispose of a wide variety of procedural motions that arise in a case (e.g., motions to file oversize briefs or supplemental appendices). The staff counsel may grant extensions of time for filing briefs for good cause shown, but the policy of the court is to grant such motions sparingly.

## SECOND CIRCUIT: CAMP

*See* United States v. Delia, 925 F.2d 574 (2d Cir. 1991); United States v. Raimondi, 760 F.2d 460 (2d Cir. 1985). Further applications for extensions of time may be referred to an applications judge. Pursuant to the July 6, 2004, Notice to Second Circuit Litigants, the staff counsel's authority to grant extensions of time are limited, in most circumstances, to thirty days for each side.

### *Confidentiality*

CAMP rules prohibit the staff counsel, the attorneys, and the parties from communicating to the court or any unauthorized third parties actions taken at the conference or the substantive discussions, including the views of the staff counsel. The court strictly enforces this rule. *See* Calka v. Kucker Kraus & Bruh, 167 F.3d 144, 145 (2d Cir. 1999); *In re* Lake Utopia Paper, Ltd., 608 F.2d 928, 930 (2d Cir. 1979) (finding that the appellate panel “deplore[d] any compromising of the confidentiality of [staff counsel’s] comments by counsel for a party to the appeal”).

### *Sanctions*

The CAMP rules authorize sanctions against any party who fails to appear for the mediation or otherwise participate fully. The rules also direct the clerk, if the appellant fails to comply with a pre-argument conference order, to issue a notice that the appeal will be dismissed unless the appellant files an affidavit within ten days explaining the failure and indicating when it will take the necessary action. The staff counsel prepares a memo on which the chief judge or designee may take “appropriate action.”

Appellees who fail to timely comply with scheduling or other conference orders are subject to appropriate court sanction as provided in the Federal Appellate Rules and Second Circuit Rules.

### *Grievances*

CAMP rules require grievances regarding the handling of a case to be presented to the director of the Office of Legal Affairs, who will hold them in confidence pending any action by the court, unless the complainant authorizes release.

*Recusal*

CAMP rules direct staff counsel to recuse themselves from cases that they believe would present a conflict of interest or that for any other reason might make their service in a particular case inappropriate.

*Reports and evaluation*

CAMP administrative staff developed and implemented a case-tracking system that generates monthly statistical reports for the chief judge, including the number of cases that were received, that went to conference, and that resulted in disposition. The monthly reports separate statistics for the large volume of immigration cases from those for other civil appeals (see “Immigration Cases” *supra*).

***For More Information***

Contact Elizabeth Cronin, Director, Office of Legal Affairs, telephone: 212-857-8800

Frank J. Scardilli, Senior Staff Counsel, telephone: 212-857-8765

U.S. Court of Appeals for the Second Circuit

Thurgood Marshall United States Courthouse

40 Foley Square

New York, NY 10007

Website: [www.ca2.uscourts.gov](http://www.ca2.uscourts.gov) (Click on “Legal Affairs Office,” then click on “Staff Counsel”)

### **Third Circuit: Appellate Mediation Program**

Under the Appellate Mediation Program for the U.S. Court of Appeals for the Third Circuit, the mediation office selects from the pool of eligible cases those that seem most amenable to mediation and settlement. The director, in cooperation with the clerk of court, manages the program, which began in 1995. Organizationally, the Appellate Mediation Program office is a separate unit of the court. The director reports to a proctor judge (a circuit judge appointed by the court to be liaison between the court and the director) and to the chief judge of the court of appeals. The director and staff mediation attorney have an administrative assistant and a legal assistant.

The Third Circuit has chosen to draw on the experience of senior judges within its circuit to supplement the mediation work of the program director and the staff mediation attorney. Senior circuit and senior district judges from the Third Circuit serve as mediators for approximately 10% of the cases selected for mediation; the program director and staff mediation attorney mediate the rest. The mediator for a given case is selected by the program director.

Having senior judges mediate in the program enables the court to mediate more cases without the expense of employing additional mediators. In addition, the senior judges are an excellent resource for matching the right case to the right mediator. For instance, a senior judge located in the Newark area can conduct a mediation conference with northern New Jersey-based litigants, rather than requiring the parties to travel to the Appellate Mediation Program's principal office in Philadelphia. Similarly, a particular case may be well suited for mediation by a particular judge because of the judge's background or experience with the subject matter of the case.

The purpose of the Appellate Mediation Program is to facilitate settlement and otherwise facilitate the expeditious handling of the appellate caseload. The program also is designed to maximize both judicial economy and cost savings to the parties.

Generally, once the mediation office schedules mediation, participation in the program is mandatory. The clients are required to attend mediation with their attorneys.

The Appellate Mediation Program held one or more conferences in 349 cases in 2002, 342 cases in 2003, and 341 cases in 2004. The program is governed by Federal Rule of Appellate Procedure 33 and Third Circuit Rule 33.0.

### ***Selecting Cases for Mediation***

#### *Eligible case types*

Nearly all appeals in which all parties are represented by counsel are eligible for the Appellate Mediation Program. The only case types not eligible, whether or not the parties are represented by counsel, are original proceedings, prisoner petitions (including habeas corpus petitions), and Social Security, immigration, and black lung cases.

Third Circuit Rule 33 provides that, in appropriate cases, the mediation office may request pro bono counsel to represent pro se litigants for purposes of mediation only.

The Clerk's Office sends to the mediation office for review and possible mediation only those cases that are eligible for mediation under the program. From those eligible cases, the program director selects cases for mediation, based on the nature of the cases, the issues involved, and the director's prior experience. If uncertain whether a case is appropriate for mediation, the director may talk to the attorneys in the case to get their views on the likelihood of settlement.

Cases may enter the mediation program at the request of one or more parties at any time during an appeal. These confidential requests may be made by telephone or letter to the program director, who generally grants them. Requests made after briefing and designation of a hearing panel, however, need the approval of the court.

#### *Documents reviewed*

The mediation office receives the following case documents: the judgment or order on appeal, any related opinion, the notice of appeal, entries of appearance, district court docket sheets, and relevant motions. The office also receives forms completed by the appellant, including a Civil Appeal Information Statement and a concise summary of the case.

#### *Judicial selection*

Third Circuit Rule 33 provides that "any judge or panel of the court may refer any appeal, petition, motion or other procedural matters for

review and possible amicable resolution.” The court may make such a referral to mediation at any time during the course of an appeal.

#### *Removal from the program*

In exceptional cases (and for good cause shown), counsel may request that a case be removed from the mediation program. All such requests are made to the program director.

#### ***Scheduling the Conferences***

##### *Scheduling process*

The Clerk’s Office forwards eligible cases to the mediation office, usually within four weeks of the filing of the notice of appeal. Within one week and usually within two days after receipt of an eligible case, the program director reviews the case file and decides whether it presents issues capable of being mediated and settled. The program director then mails to the parties’ attorneys and the clerk a Notice of Assignment for Mediation, which identifies the mediator and instructs the parties on their preparation of confidential position papers. The notice sets forth the date and time for the mediation.

The mediation office assigns a mediator to each case selected for mediation. If the director assigns a case to a senior judge, the mediation office sends notice also to the senior judge. For cases not selected for mediation, attorneys receive a briefing schedule from the Clerk’s Office.

The mediation office schedules conferences as soon as practical after the director assigns a case to a mediator. The initial conference is held before issuance of the briefing order.

##### *Conference sites*

The director encourages in-person mediations. In assigning cases, particularly those assigned to senior judges, the director considers the geographic proximity of the parties’ attorneys and the mediator. Generally, conferences conducted by the director or staff mediation attorney are held in the Appellate Mediation Program’s offices in Philadelphia. Occasionally, the director travels to other cities within the circuit to conduct in-person mediation. Conferences conducted by a senior judge are held in that judge’s chambers. Telephone conferences are

used when it is not feasible for the parties to travel to Philadelphia or to the location of a senior judge mediator.

*Mediation submissions*

Within fifteen days of notice of the assignment to mediation, attorneys for each party must prepare and submit to the mediator a confidential position paper of no more than ten pages that states the attorney's views on settlement, describes prior settlement discussions, and identifies other issues or lawsuits that must be resolved to settle the case. Neither the appellate panel nor opposing counsel sees the position papers.

**Mediation Sessions**

*Nature of sessions*

The purpose of the mediation conference is to consider the possibility of settlement and any other matters that the mediator determines may facilitate the handling or disposition of the proceeding. The mediator works with the parties in an attempt to get at the real problems or interests behind the legal issues, to facilitate efforts to settle the case, and to create an amicable solution. The mediation conference usually includes joint sessions, in which all parties and the mediator meet together in the mediation room, and private sessions, in which the mediator meets with parties separately. Related issues or lawsuits not on appeal may also be considered.

*Party participation*

The mediation notice directs the attorneys and the parties to attend the mediation conference. The senior attorney responsible for each party to the appeal and the person or persons with actual authority to negotiate a settlement must also attend the mediation conference.

*Number and length of sessions*

Mediation conferences last an average of two to three hours. At the conclusion of the initial session, the mediator determines whether additional conferences are necessary and notifies the parties of and schedules any necessary follow-up conferences.



*Fees*

The program does not charge parties or attorneys for the costs of the conferences.

*Post-conference procedures*

The director reports any settlement reached by the parties to the clerk and sends all attorneys a letter outlining its fundamental terms. The letter also offers help finalizing any written settlement agreement and fixes a due date for filing a stipulation of dismissal of the appeal with the clerk. Attorneys must file the stipulation with the clerk, and a copy with the director, within thirty days after settlement is reached. The director's assistant monitors due dates for dismissal stipulations. If the parties do not settle, the director notifies the clerk that the mediation was unsuccessful, and the Clerk's Office issues a briefing order.

***Other Rules, Policies, or Practices***

*Mediation in pro se cases*

Third Circuit Rule 33 provides that, in appropriate cases, the mediation office may ask attorneys to represent pro se litigants for purposes of mediation only. An attorney must agree to take the case on a pro bono basis. However, if an applicable statute authorizes the award of attorneys' fees, the attorney may enter into a written agreement with the client, assigning to the attorney any amounts designated as attorneys' fees. The rule directs that the case be treated as any other case subject to mediation would be and that all its provisions will apply. If mediation is unsuccessful, the attorney may discontinue representation, but the rule does not bar representation through the rest of the appeal if the attorney agrees to it.

*Effect on appellate proceedings*

Generally, the Clerk's Office does not issue a briefing order if the mediation office selects a case for mediation. If the scheduling of additional conferences or telephone discussions is required to explore settlement fully, the mediator may continue to postpone issuance of the briefing order.

The court designed the program to minimize delay by requiring a swift case selection process and conferencing schedule. Cases not se-

lected for mediation are promptly returned to the Clerk's Office. Once the director selects a case and a mediator, the mediator effectively asks the parties to stop litigating and focus on the mediation. Mediated cases that do not settle return to a full briefing schedule.

#### *Confidentiality*

All mediation communications are confidential. Court rules prohibit the mediator and attorneys from disclosing the substance of the mediation conference to any person, including the court. Attorneys may disclose information on an as-needed basis to any party-clients and co-counsel who are not personally participating in the mediation, if they get assurances that these recipients of the information will honor the confidentiality rules.

Documents prepared for mediation conferences are not to be filed with the Clerk's Office except for a stipulation of dismissal or a notice of unsuccessful mediation. If a case does not settle, the director destroys all mediation files for that case. If a case does settle, however, the terms of the settlement are not considered confidential unless the parties agree otherwise.

#### *Sanctions*

Failure of an attorney to comply with the requirements of the mediation program could result in sanctions.

#### *Reports and evaluation*

The director maintains data on the number of cases referred to the program, the number of cases mediated, and whether those mediations resulted in settlement. For an extensive law review article on the Appellate Mediation Program, see Joseph A. Torregrossa, *Appellate Mediation in the Third Circuit—Program Operations: Nuts, Bolts, and Practice Tips*, 47 Vill. L. Rev. 1059 (2002) (foreword by the Hon. Edward R. Becker, former chief judge of the U.S. Court of Appeals for the Third Circuit).

THIRD CIRCUIT: APPELLATE MEDIATION PROGRAM

***For More Information***

Contact Joseph A. Torregrossa, Director, Appellate Mediation Program,  
U.S. Court of Appeals for the Third Circuit, 601 Market St., Room  
20716, Philadelphia, PA 19106, telephone: 267-299-4130.  
Website: [www.ca3.uscourts.gov/medhome.htm](http://www.ca3.uscourts.gov/medhome.htm)

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### **Fourth Circuit: Mediation Program**

The Circuit Mediation Program for the U.S. Court of Appeals for the Fourth Circuit, which began operations in 1994, provides a mediation setting in which litigants and their attorneys can confidentially discuss their pending case on appeal with a trained neutral circuit mediator. The Office of the Circuit Mediator reviews all eligible cases shortly after docketing to determine whether a pre-argument mediation conference might assist the court or the parties.

Program staff are the chief circuit mediator and one support person in Beaufort, S.C., two circuit mediators and the program administrator in Durham, N.C., and one circuit mediator in Charlottesville, Va. The chief circuit mediator reports that the program is headquartered in Beaufort, rather than at the seat of the court of appeals in Richmond, Va., because separating the judges of the court from the mediation program and its management helps to further the goal of confidentiality.

Each mediation conference is conducted by one of the four circuit mediators. Although the process of assigning cases to the circuit mediator is generally random, the chief circuit mediator may assign a case on the basis of the location of a circuit mediator and lead counsel in the case.

Court personnel report that the circuit mediators are experienced and specially trained attorneys and mediators. They are informed neutrals who can facilitate discussions by parties in a case in a confidential, risk-free environment, so that the parties can evaluate the case candidly and explore possibilities for voluntary disposition of the appeal. The mediators are trained to give significant attention, when necessary, to procedural questions and problems raised by attorneys in a case.

Program objectives include reducing the caseload of circuit judges, thereby saving taxpayer money as well as time and money for the parties.

Only cases in which attorneys represent all parties are eligible for the program. If the Clerk's Office schedules a conference in a given case, attorney participation in the conference is mandatory. All attor-

neys attending a conference must have authority to initiate and respond to settlement proposals.

The program held at least one mediation conference in 675 cases in fiscal year 2002, 600 cases in fiscal year 2003, and 623 cases in fiscal year 2004. The mediation program is governed by Federal Rule of Appellate Procedure 33 and Fourth Circuit Rule 33.

### ***Selecting Cases for Mediation***

#### *Eligible case types*

All docketed civil cases are eligible for the program. Exceptions are habeas corpus petitions, certain cases involving a government agency as a party, and cases in which a party is appearing pro se. Original proceedings, such as mandamus petitions, are not mediated unless an appellate panel requests it. On rare occasions, the mediation program accepts prisoner civil rights cases in which the prisoner is represented by an attorney.

#### *Selection process*

Shortly after receiving the docketing statement from the Clerk's Office, the circuit mediators screen all eligible cases to assess whether mediation will help the court or the parties. The circuit mediators consider any potential interest in settling, including whether a party requested mediation; the complexity of the case; the monetary relief requested; and the nature of the issues (for example, constitutional issues might not be appropriate for mediation, whereas issues of monetary damages might be). Occasionally, a circuit mediator may talk to the parties' attorneys about prospects for settlement before selecting a case for mediation.

The Office of the Circuit Mediator encourages attorneys for the litigants in a case to request a conference if they believe mediation will be helpful. A small but increasing percentage of cases are scheduled for mediation at the request of a party. The Office of the Circuit Mediator screens the cases and accepts almost all civil cases in which a party requests mediation and the parties are represented by attorneys. A party may request a mediation conference at any time during an appellate case.

At any time after the beginning of the first mediation session, the circuit mediator may terminate mediation proceedings if he or she

concludes that further participation in the program would not be beneficial.

*Documents reviewed*

Upon filing of the notice of appeal, the Clerk's Office sends the parties a docketing statement form, information concerning the Circuit Mediation Program, and procedures for requesting a mediation conference. The appellant must file with the clerk a completed docketing statement form that identifies the issues to be raised on appeal, lists relevant citations to governing statutes or dispositive cases, and includes any order or judgment that is the subject of the appeal. For each program-eligible case, the Clerk's Office sends the Office of the Circuit Mediator the docketing statement form and related papers filed by the parties.

*Judicial selection*

Occasionally, judicial panels refer cases to the program before or after oral argument.

***Scheduling Mediation***

*Scheduling process*

For cases selected for mediation, the Office of the Circuit Mediator gives written notice of the conference to the parties, usually within seven days after receiving the case, and assigns the case to a circuit mediator. To maximize the reach of the program and provide the earliest possible intervention point, the office reschedules conferences only in exceptional circumstances or when there is a conflict with a court hearing or trial. Consolidated appeals and appeals in companion cases are generally consolidated for mediation. Nearly all mediation conferences are scheduled for a date before briefs are due.

*Conference sites*

More than 95% of the mediation conferences are telephone conferences in which the circuit mediator initiates the calls. In-person mediation conferences are scheduled at the direction of an appellate panel, at the request of the parties, or as determined by the Office of the Circuit Mediator. Mediation offices are located in Beaufort, S.C.; Durham, N.C.; and Charlottesville, Va. When a case involves attorneys at locations not too far from Beaufort, Durham, or Charlottesville, in-person

conferences may be scheduled at the mediation offices in one of those cities. Circuit mediators travel to mediation sites at other locations only on rare occasions—for example, if the circuit mediator determines that an in-person mediation conference is essential but a party is unable to travel.

*Mediation submissions*

The mediation program does not require written mediation statements from the parties, as some other mediation programs do.

***Mediation Sessions***

*Nature of sessions*

Objectives of the mediation conferences include identifying and clarifying the main issues raised in the appeal, exploring settlement possibilities, preventing unnecessary motions or delay by attempting to resolve any procedural problems, and considering any other matter relating to the management and disposition of the appeal. Although the mediation conference may give significant attention to procedural questions and problems raised by attorneys, its primary purpose is to offer participants a confidential, risk-free opportunity to evaluate their case candidly, with an informed neutral, and explore whether settlement is possible.

Before a conference, the circuit mediator usually reads the district court opinion, if any, as well as cases cited in the docketing statement form. Lead counsel are asked to be prepared to articulate their views of the merits of the case as well as their clients' interests and needs. Generally the circuit mediator facilitates or leads an exploration of settlement with each party, often in private meetings, called caucuses. The circuit mediator works to generate offers and counteroffers until the parties settle or, if the case cannot be settled at the conference, until the parties can determine how far apart they are. The circuit mediator does not predict how the court will rule on any issue or on the appeal as a whole.

*Party participation*

The court's mediation rule requires participation of all lead counsel of record if the case is referred to the program. The rule does not require



#### FOURTH CIRCUIT: MEDIATION PROGRAM

clients to participate in most initial mediation sessions, although they may.

The Office of the Circuit Mediator expects attorneys attending the mediation conference to have authority to initiate and respond to settlement proposals, but circuit mediators do not necessarily expect them to have absolute settlement authority. The circuit mediator sometimes invites participation by individuals or groups who are not parties to the appeal if the purposes of the mediation conference cannot be achieved without their involvement.

#### *Number and length of sessions*

Initial telephone conferences last, on average, forty-five minutes to one hour; initial in-person conferences last an average of three hours. In some cases, discussions end after the initial conference, but almost always there is more than one conference, as well as many separate follow-up telephone calls between the circuit mediator and each attorney before agreement is finally obtained. Follow-up discussions may continue for days or weeks.

#### *Fees*

The program does not charge parties or attorneys for the costs of the mediation conferences.

#### *Post-mediation procedures*

The mediation conference must not result in any action affecting the interests of any party, or the case on its merits, without the consent of all parties. If the parties agree to settlement, the circuit mediator gives the appellant's counsel a motion for entry of dismissal. Once the motion is signed and returned to the Office of the Circuit Mediator, the circuit mediator forwards it to the clerk, who enters the dismissal and closes the case.

If the mediation process does not result in dismissal of the case, the Office of the Circuit Mediator returns the case to the clerk for further appellate proceedings.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

Although the mediation process does not automatically toll the time allowed for filing briefs, parties who want to pursue settlement or are engaged in settlement discussions may move to suspend or extend the briefing schedule for a reasonable time. Program personnel report that circuit mediators may grant an extension if all parties consent to it, if the mediator determines that significant progress toward settlement is occurring, and if an extension is likely to facilitate a settlement. The circuit mediators report that extending briefing schedules can sometimes indeed facilitate settlement. In extraordinary circumstances, the circuit mediator may extend the due date of a brief in the absence of consent by opposing counsel.

In addition, the circuit mediator may send the clerk recommendations for other consent orders that control the course of proceedings or that may dispose of the case. Examples include an order staying the appeal until a motion in the district court is ruled on and an order staying the appeal until another case is decided.

*Confidentiality*

Fourth Circuit Rule 33 requires confidentiality of “all participants in the mediation process” and directs that all statements and comments made during mediation conferences, and papers and electronic information generated in the process, neither be included in court files except by court order nor disclosed to the judges deciding the appeal “or to any other person outside the . . . program participants.” The appellate docket sheet contains no record of the mediation conference process, and the Office of the Circuit Mediator’s files and computer database are not accessible to other units of the court. The court of appeals applied the court’s mediation rule in *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002), holding in part that an attorney who was in a mediation conference but not acting as counsel was nevertheless bound by the confidentiality requirement.

The court keeps confidential any request by a party for a mediation conference and the reason for the request; however, requesting parties may disclose their request at their option.

#### FOURTH CIRCUIT: MEDIATION PROGRAM

##### *Sanctions*

The circuit mediator has no authority to impose sanctions. However, if a party refuses to participate in a mediation conference, unreasonably delays the scheduling of a conference, or otherwise unreasonably impedes the conduct of the program, the circuit mediator may recommend that the court initiate disciplinary action. The court's Standing Order 01-01 vests in the Standing Panel on Attorney Discipline the authority to rule on any issues that may arise in mediation, including alleged violations and applications for exceptions to Local Rule 33.

##### *Reports and evaluation*

The Office of the Circuit Mediator conducts periodic internal evaluations of the program and makes quarterly reports to the chief judge.

##### ***For More Information***

Contact William T. Howell, Chief Circuit Mediator, U.S. Court of Appeals for the Fourth Circuit, 1501 Bay Street, POB 1286, Beaufort, SC 29901, telephone: 843-521-4022.

Website: [www.ca4.uscourts.gov/mediation.htm](http://www.ca4.uscourts.gov/mediation.htm)

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### **Fifth Circuit: Appellate Conference Program**

The U.S. Court of Appeals for the Fifth Circuit launched an appellate conference program in November 1996. The court's Office of the Appellate Conference Attorney comprises the senior conference attorney, four other conference attorneys, and support staff. The staff's duties include office management, case-related work as assigned by conference attorneys, and liaison with the Clerk's Office and other court units. Organizationally, the office is a separate unit of the court, physically and administratively distinct from other court offices. The senior conference attorney manages the program under the direction of the court. One of the judges has been appointed proctor for the conference program, but has no access to confidential information about conference proceedings.

Court personnel report that the five conference attorneys are all experienced lawyers who come from a wide variety of backgrounds. They were selected because of their ability to analyze the kinds of situations that arise in appellate litigation and their skills in resolving disputes through interaction with attorneys and litigants. All of the conference attorneys have had formal training or substantial experience in mediation, negotiation, and the settlement of litigation. Nevertheless, the program also provides in-house training.

The conference attorneys conduct all conferences in the program. The conference program also provides procedural assistance to parties who want to use the services of an outside mediator, but the program does not select, approve, or recommend particular mediators. Occasionally, two conference attorneys handle cases on a team basis. Conference attorneys often assist each other by providing consultation and second opinions.

The purposes of the conferences include discussion of settlement; clarification and reduction of issues; and consideration of any other matter relating to the efficient management and disposition of the appeal. If the parties are engaged in settlement discussions, the conference attorney may reset the briefing schedule. The conference attorney may also arrange for or recommend the entry of other orders controlling the course of proceedings.

The lead counsel are required to participate in any scheduled con-

ference, and the conference attorney may also require attendance by clients or their corporate representatives. However, a party may decline to participate in settlement discussions by submitting a formal written request for removal from the program.

The conference program is governed by Federal Rule of Appellate Procedure 33 and the General Order Governing the Appellate Conference Program Effective March 27, 2000 (the “General Order”).

### ***Selecting Cases for Conferences***

#### *Eligible case types*

All civil cases docketed in the court are considered eligible for selection into the program, with the exception of prisoner cases and cases in which at least one party appears pro se. The conference program usually does not schedule Social Security and immigration matters for conferences because the conference attorneys do not consider such cases conducive to settlement except in unusual situations.

Conferences are held in almost all of the court’s eligible cases. The senior conference attorney reviews cases that are eligible for the program, after they clear the court’s jurisdictional review. He assigns cases to particular conference attorneys on the basis of a number of factors, including the attorneys’ caseloads and the subject matter of the cases. A party may request inclusion in the program at any time. The senior conference attorney generally grants the request in any eligible case.

#### *Documents reviewed*

The conference attorney might also review information contained in the district court’s docket sheet, the opinion below, and other pleadings that the conference attorney may request from the district court.

#### *Judicial selection*

Occasionally, judicial panels refer cases to the program.

#### *Removal from the program*

The General Order permits any party to ask the conference attorney, in writing, to terminate settlement discussions or to remove the case from the program. The rule directs the conference attorney to honor the request in cases that the senior conference attorney selected for the program, and to restrict any further proceedings to the program’s other

purposes. If the court referred the case to the program, a party's request for removal goes to the court, and conference proceedings are stayed pending the court's directions.

### ***Scheduling the Conferences***

#### *Scheduling process*

The conference attorney assigned to a case sends the lead attorneys a letter setting the date and time for the conference and explaining the purposes of the program. The letter is usually sent within two weeks of the filing of the notice of appeal and ten days to two weeks before the conference date. Conferences may be rescheduled when necessary at the request of a party. In some cases, a less formal process is used, in which the conference attorney assigned to the case contacts the lawyers directly (and separately) by telephone.

Conferences are ordinarily set for a date well before briefs are due.

#### *Conference sites*

Most conferences are conducted by telephone. The conference attorney assigned to the case initiates and controls the initial conference, which is used to assess what kind of further conference proceedings will best serve the needs of the case. The conference attorney will accept case-related calls whenever he or she is available. Much of the telephone follow-up is accomplished through two-party calls initiated either by the conference attorney or by the attorneys, rather than through scheduled conferences involving all parties. If all counsel have offices near New Orleans, they may be invited to an initial conference in the conference attorney's office. Likewise, the preferred method of attempting to reach settlement is a follow-up mediation conference in New Orleans for both the lawyers and party-clients or representatives. Travel to New Orleans would involve too much expense in many cases, however, and in the majority of cases, follow-up conferences are held by telephone.

#### *Mediation submissions*

The Office of the Appellate Conference Attorney does not require written mediation statements from the parties, as some other mediation programs do.

### ***Mediation Sessions***

#### *Nature of sessions*

At the initial conference, the conference attorney sets out the ground rules, emphasizes the confidentiality rules, and answers questions about the conference procedures. Counsel for the parties explain their views on the issues raised on appeal, and the conference attorney makes comments and poses questions. The conference attorney facilitates each side's understanding of the issues on appeal and may meet (caucus) with each party separately, exploring each party's interests and soliciting settlement ideas, with a view toward planning further settlement-related efforts.

The conference attorney may also help the parties resolve procedural issues. Since cases ordinarily continue beyond the initial conference, the conferences conclude with a discussion of next steps in the negotiations, which might include follow-up conferences, submission or exchange of information, or a discussion between the attorneys and their clients. In some cases, the conference attorney concentrates on helping resolve complicated procedural issues rather than acting as an active participant in settlement negotiations. In those situations, the conference attorney acts as a liaison between the attorneys and the court, and the conference procedures are adapted to the requirements of the situation.

#### *Party participation*

The lead counsel for each of the parties is required to participate in any conference, subject to the right to request removal of the case from the program under certain circumstances, as described *supra* under "Removal from the program." The conference attorney may also require attendance by the clients or their corporate representatives.

#### *Number and length of sessions*

Initial telephone conferences last up to two hours; initial in-person conferences last as long as necessary. After the initial conference, the conference attorney conducts follow-up conferences with the attorneys and with or without clients, as necessary.



*Fees*

The program does not charge parties or attorneys for the costs of the conferences.

*Post-conference procedures*

If the conference results in settlement, the case is disposed of through motions to dismiss or other appropriate motions. Cases that do not settle proceed normally on the court's docket, and the conference attorneys monitor the cases in order to assess the results of efforts to narrow the issues and to take advantage of any later opportunity to reopen negotiations.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

Absent the consent of all parties, the conference process may not result in any actions that affect the interests of any party or the case on its merits. While the conference attorney has practical control over scheduling the conferences, no automatic stay or delay results from a case being made active in the conference program.

*Confidentiality*

The General Order requires confidentiality as to all program settlement discussions and directs the conference attorney, the parties, and their attorneys not to disclose information about settlement discussions to the court or to anyone else who is not entitled to know. There is an exception for information that may be admissible in a proceeding to enforce a settlement agreement.

The order also directs the parties' attorneys and the clerk not to make public information about the assignment of particular cases to the program. It does permit a party to release such information (but not information about settlement discussions) "for good cause" and absent an explicit agreement to the contrary, as long as the disclosure is not part of an effort to gain an advantage over another party. The penalty for an improper disclosure is the removal of the case from the program. The order permits telling the court about cases assigned to the program in statistical reports, in response to inquiries, and in connection with recommendations about procedural orders.

## MEDIATION & CONFERENCE PROGRAMS IN THE COURTS OF APPEALS

### *Sanctions*

The General Order provides that sanctions may be assessed against a party or attorney who fails to comply with conference procedures.

### *Reports and evaluation*

The Office of the Appellate Conference Attorney keeps internal records for use in preparing statistical reports on the program.

### ***For More Information***

Contact Joseph L. S. St. Amant, Senior Conference Attorney, U.S. Court of Appeals for the Fifth Circuit, John Minor Wisdom U.S. Courthouse, 600 Camp Street, Rm. 229, New Orleans, LA 70130, telephone: (504) 310-7799.

Websites:

[www.ca5.uscourts.gov/acap.aspx](http://www.ca5.uscourts.gov/acap.aspx)

[www.ca5.uscourts.gov/clerk/docs/order.pdf](http://www.ca5.uscourts.gov/clerk/docs/order.pdf)

### **Sixth Circuit: Mediation Program**

The U.S. Court of Appeals for the Sixth Circuit established a Pre-Argument Conference Program on a trial basis in 1981 and implemented the permanent program in 1983. During the 1990s, the permanent program became known as the court's mediation program.

The court's mediation office consists of the chief circuit mediator, four circuit mediators (three full-time equivalents), the conference administrator, and two secretaries. The office is a separate unit of the court, and is physically and administratively separate from other court offices, although its budget and personnel records are administered by the Circuit Executive's Office. The chief circuit mediator manages the program under the policy direction of the court, usually through the chief judge. The conference administrator's duties include managing the clerical operations of the office, scheduling the conferences, and monitoring due dates for briefs and other filings.

Court personnel report that in selecting mediators, the court seeks attorneys who have a working knowledge of law, legal analytical and problem-solving skills, group process and facilitation skills, maturity, and good judgment. All mediators complete a mediation or negotiation training course within the first year of their employment; most have attended a one-week program at Harvard University. The mediation office also provides in-house training and encourages other continuing education in the mediation and negotiation fields and in the areas of substantive law typically involved in cases in the program.

The primary purpose of the program is to facilitate settlement. The program also seeks to identify, clarify, and simplify issues; resolve procedural problems to prevent unnecessary motions or delays; and consider other appropriate case-management measures.

The court's local rules require that all parties to the appeal participate in scheduled mediation conferences, at least through their attorneys.

The mediation office schedules conferences in 80% or more of mediation-eligible appeals and holds conferences in nearly all cases so scheduled. In recent years, the mediation office has scheduled about 1,000 cases per year for mediation conferencing. Federal Rule of Ap-

pellate Procedure 33 and Sixth Circuit Rule 33 govern the mediation conference process.

### ***Selecting Cases for Mediation Conferences***

#### *Eligible case types*

By Local Rule 33, all civil cases docketed in the court are eligible for the program. In practice, however, the mediation office generally does not schedule a mediation conference in prisoner cases; tax appeals (from the district court and the U.S. Tax Court); agency cases, such as review of administrative orders from the Social Security Administration (SSA) and National Labor Relations Board; cases in which there are motions pending; cases in which any necessary party appears pro se; and cases with unresolved jurisdictional problems.

Generally, the mediation office first reviews a computer-generated report from the court's Appellate Information Management System to identify available cases. The office then reviews the jurisdictional screening forms, sent by the Clerk's Office, to avoid scheduling mediation in cases with evident jurisdictional defects. After reviewing these documents, the mediation office randomly schedules mediation conferences in as many mediation-eligible cases as the resources of the office will allow.

A party may request a conference anytime before the court calendars the case for oral argument. The mediation office generally grants the request in any non-prisoner civil appeal in which all parties are represented by counsel. Upon docketing of a case, the Clerk's Office sends all parties a package of case-opening materials that includes, for program-eligible cases, a separate form that a party may use to request a mediation conference. The mediation office keeps such requests confidential, but the requesting party need not keep a request confidential.

#### *Documents reviewed*

Attorneys for the parties send the mediation office a completed Civil Appeal Statement of Parties and Issues. The statement identifies the parties to the appeal and the primary issues on appeal. Usually, circuit mediators also review the opinions or decisions below, when they are available, to prepare for mediation in the cases to which they are assigned.

*Judicial selection*

Occasionally, judicial panels refer cases to the program just before or after oral argument, either by contacting the mediation office directly or by directing the parties to do so.

***Scheduling Mediation Conferences***

*Scheduling process*

For cases selected for mediation, the mediation office sends lead attorneys a notice setting the date and time for the mediation conference and explaining the purposes of the program. Ordinarily, the mediation office sets conferences for a date before briefs are due. The notice is usually sent two to three weeks before the conference date. An entry is made on the court's docket noting that the appeal is in the program. Conferences may be rescheduled when necessary at a party's request. The court's local rules require all parties to the appeal to participate in scheduled mediation conferences, at least through their attorneys.

*Conference sites*

The circuit mediators conduct over 90% of all conferences by telephone, and they initiate the calls. Circuit mediators conduct conferences in person in Cincinnati, usually at the courthouse of the court of appeals, if all the attorneys work within roughly fifty miles of Cincinnati, if the attorneys request an in-person conference, or if the circuit mediator believes that an in-person meeting will be more effective. Circuit mediators conduct in-person conferences outside Cincinnati on rare occasions, such as when large numbers of people in the same city must participate.

*Mediation submissions*

The mediation office requires attorneys for each party to submit a completed Mediation Background Information Form. The form, which attorneys must submit at least five business days before the date of the initial conference, is only to be reviewed by the mediation office. The form asks for contact information for all attorneys who will be participating in the conferences on behalf of the submitting attorney's clients; the name of the lead attorney; the names of the clients the attorney will

be representing; and the names and positions of the attorney's clients or client representatives who will be participating in the conferences.

The form also asks for additional information that the mediation office will not share with the other parties or their attorneys. This confidential information includes any specific interests or concerns, other than money, that the attorneys would like the mediation to address; the primary obstacles to settlement to date; and anything else that the attorneys can tell the circuit mediator before the conference that might enable the mediator to be more helpful or efficient.

### ***Mediation Sessions***

#### *Nature of sessions*

In the initial mediation conference, the circuit mediator reviews the ground rules, explains the confidentiality requirements, and answers questions about court rules and procedures. Attorneys for the parties explain their views on the merits of the claims, the issues raised on appeal, and their clients' interests. The circuit mediator guides the discussion, commenting and questioning as necessary. The circuit mediator tries to facilitate each party's understanding of the issues on appeal and usually caucuses with each party separately, exploring each party's interests and soliciting settlement ideas, offers, and counteroffers.

In about 25% of the cases, settlement is clearly impossible and negotiations go no further than the initial conference, although the circuit mediator may help the parties resolve procedural issues before the conference ends. In cases that continue beyond the initial conference, the conferences conclude with agreement on the next steps in the negotiations, which might include follow-up conferences or briefing extensions.

#### *Party participation*

If the mediation office schedules a conference, the program requires that lead attorneys for all parties participate in the conference. The attorneys are expected to come with an understanding of their clients' interests in settlement and authority to make and respond to settlement proposals. Circuit mediators encourage attorneys to invite their clients to participate in initial conferences, but do not require participation.

*Number and length of sessions*

Initial conferences last an average of one to one and one-half hours. Approximately 25% of scheduled cases do not go beyond the initial conference. In the balance of cases, after the initial conference, the circuit mediator conducts follow-up telephone or in-person negotiations, with the attorneys and with or without clients, as necessary to thoroughly explore all settlement possibilities.

*Fees*

The program does not charge parties or attorneys for the costs of mediation.

*Post-mediation procedures*

If the mediation conference results in settlement, the parties sign a stipulation to dismiss the appeal or a joint motion to remand. When the mediation office receives the signed papers, it prepares the order of dismissal or other appropriate order and sends the completed papers to the clerk for entry.

If the parties resolve one or more procedural issues, such as a revised briefing schedule, the circuit mediator enters the agreed-on due dates on the case docket and notifies the Clerk's Office.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

The mediation conference process does not automatically stay other events or filing deadlines in a case. However, the mediation office may extend deadlines for ordering the transcript or for briefing as necessary to allow parties to avoid unnecessary litigation expenses if the case settles. Typically, briefing is extended so that the first brief is due no earlier than ten days after the date scheduled for the conference. If negotiations continue productively and all parties and the circuit mediator agree, the circuit mediator may further postpone briefing for a reasonable time until negotiations are completed. The conference administrator in the mediation office monitors cases for briefing due dates, status reports, submission of stipulations on settled issues, and other events.

Motions during the conference process are rare. When briefing motions or other procedural motions are filed, the Clerk's Office typi-

cally refers them to the mediation office. Circuit mediators often facilitate the parties' agreement on such motions, but if the parties cannot resolve the motion by agreement, the Clerk's Office handles the motion as it would any other contested motion.

#### *Confidentiality*

By court rule, the statements and comments made by the parties and the circuit mediator during the conference, and in all follow-up communications, are confidential and may not be disclosed to the court in briefs or argument unless all parties and the circuit mediator give their consent.

The fact that a conference was scheduled is entered on the docket to facilitate coordination of the case within the court, but whether the conference actually occurred, what happened at it and resulted from it, and events in the mediation conference program are not entered on the docket or in case files. Files relating to the conferences are kept separate from case files of the court of appeals.

#### *Sanctions*

If a party or attorney fails to comply with mediation procedures, the court may assess sanctions, including costs and attorneys' fees, or dismiss the appeal.

#### *Reports and evaluation*

The Federal Judicial Center published an evaluation of the court's pre-argument conference program in 1990; see James B. Eaglin, *The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals* (Federal Judicial Center 1990). See also generally Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. Disp. Resol. 227; Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 Ohio St. J. on Disp. Resol. 609 (2002) (regarding issues and methods for ensuring quality in a staff mediation program); and Robert W. Rack, Jr., *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 Tol. L. Rev. 921 (1984) (description of settlement negotiations at the appellate level and of the court's program in 1984).



SIXTH CIRCUIT: MEDIATION PROGRAM

***For More Information***

Contact Robert W. Rack, Jr., Chief Circuit Mediator, U.S. Court of Appeals for the Sixth Circuit, 245 Potter Stewart U.S. Courthouse, 100 E. Fifth St., Cincinnati, OH 45202, telephone: 513-564-7330.

Website: [www.ca6.uscourts.gov/internet/mediation/index.htm](http://www.ca6.uscourts.gov/internet/mediation/index.htm)

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## **Seventh Circuit: Settlement Conference Program**

The Settlement Conference Office in the U.S. Court of Appeals for the Seventh Circuit schedules about seven out of ten eligible appeals for mediation conferences. The Settlement Conference Office selects most of the cases scheduled, but sets some appeals for conference at the request of one or more parties. Three full-time conference attorneys conduct the conferences. They include the senior conference attorney, who also administers the program. In addition, the Settlement Conference Office includes two administrative assistants. The program operates under the general supervision of the chief judge and the circuit executive.

Court personnel report that in selecting the conference attorneys, the court seeks experienced lawyers with the skills and temperament needed to help litigants overcome obstacles to settlement. All conference attorneys the court appoints have been civil litigators in private practice.

The Seventh Circuit implemented the appellate Settlement Conference Program in November 1994. The program became fully operational in January 1995.<sup>14</sup>

The purpose of the program is to encourage and facilitate the settlement of civil cases docketed in the court of appeals. As part of the conference process, the conference attorneys explore the possibility of settlement, address procedural issues with the parties, and modify briefing schedules as necessary.

Participation by the attorneys, with their clients if the Settlement Conference Office so directs, is mandatory in any conference the office schedules under the program, as explained further below.

From 500 to 600 cases are scheduled for appellate settlement conferences annually. The program operates pursuant to Federal Rule of Appellate Procedure 33 and Seventh Circuit Rule 33.

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14. A previous conference program, initiated in 1972, continued into the 1980s.

### ***Selecting Cases for Conferences***

#### *Eligible case types*

Program-eligible case types include all docketed civil cases except pro se, prisoner, and Social Security cases, and original proceedings. Immigration cases are not regularly noticed for conference but are sometimes conferenced by request. Cases with unresolved jurisdictional problems are excluded from the program if it appears that appellate jurisdiction will not be established.

The senior conference attorney reviews all program-eligible cases. He determines which cases will not be set for a conference, considering primarily the nature of the dispute. If issues of policy or statutory construction predominate, it is less likely that the case will be set for mediation.

Generally, party requests for mediation are accepted in any program-eligible appeal. Requests may be made by telephone, letter, fax, or e-mail to the Settlement Conference Office. A written motion is not necessary. If a party requesting a conference tells Settlement Conference Office staff that it prefers to keep its request confidential, the Settlement Conference Office will not disclose it to other parties or to the court.

#### *Documents reviewed*

Before an initial conference, the conference attorney becomes familiar with the appeal by reading the short record of the case, which consists of the notice of appeal, the docketing statement (a statement setting forth the basis of jurisdiction, which the appellant must file with its notice of appeal or at least seven calendar days thereafter), the district court docket sheet, and the decision appealed from. Often the conference attorney reviews additional portions of the record and conducts preliminary legal research.

#### *Judicial selection*

Judges do not ordinarily refer cases to the settlement program.

### ***Scheduling the Conferences***

#### *Scheduling process*

The Settlement Conference Office sends attorneys for all parties a Notice of Rule 33 Conference, which advises them of the date and time of the conference, whether it will be in person or by telephone, and how they and their clients are expected to prepare.

The Settlement Conference Office schedules conferences as soon after docketing the appeal as the office's calendar permits. The conference attorney usually extends merits briefing as necessary to permit the litigants to focus on settlement.

#### *Conference sites*

When all participants reside in the Chicago metropolitan area, conferences are usually held in the Settlement Conference Office. Conference attorneys conduct in-person conferences outside Chicago only occasionally. The majority of mediation conferences are conducted by telephone. The conference attorneys report that telephone conferences have been as productive as in-person conferences in bringing about settlements.

#### *Preconference submissions*

The Settlement Conference Office does not ordinarily require attorneys to submit a pre-argument statement other than the docketing statement described above. However, the Settlement Conference Office occasionally asks attorneys to furnish copies of designated pleadings or opinions from the district court before the initial conference.

### ***Mediation Sessions***

#### *Nature of sessions*

At the initial mediation conference, the conference attorney gives some attention to procedural matters, but the primary purpose of the conference is to explore possibilities of settlement. The focus is on realistically assessing the prospects of the appeal, the risks and costs of further litigation, the interests of the parties, and the benefits each side can gain through settlement.

The conferences are official proceedings of the court but are relatively informal. Discussion is conversational rather than argumentative.

The conference attorney ordinarily meets with the attorneys first in a joint session and then separately in meetings referred to as caucuses. Although they discuss settlement proposals at the initial conference, settlement might not be reached at that conference. Often, the conference attorney schedules follow-up conferences. By the conclusion of the process, the parties either have reached an agreement to settle or have learned how far apart they are and what obstacles to settlement remain.

If settlement of the appeal will not dispose of the entire case, or if related litigation is pending in other forums, the parties are invited and encouraged to explore the possibility of a global settlement.

*Party participation*

The program requires that each party be represented at the conference by an attorney who is conversant with the case and on whose advice the party relies. If two attorneys meet these criteria, either or both of them may represent the client in the conference. Whether to settle is the decision of each party, but the program requires good-faith participation in the settlement process.

The program's procedures require that party-clients and insurance representatives, in addition to attorneys, attend conferences whenever the Settlement Conference Office so directs. For example, the office often directs parties to participate in a joint follow-up conference or in separate meetings (caucuses) with their attorneys and the conference attorney. When the office has not directed parties or insurance representatives to attend the initial conference, they must be available by telephone—with full settlement authority—for the duration of the conference.

*Number and length of sessions*

Initial conferences, whether in-person or on the telephone, often last two hours or more. Participants are expected not to schedule competing activities for the morning or afternoon of the conference. Most initial conferences are followed by additional conversations. Subsequent conferences with all attorneys may be required.

## SEVENTH CIRCUIT: SETTLEMENT CONFERENCE PROGRAM

### *Fees*

The program does not charge for the costs of the settlement conferences.

### *Post-conference procedures*

If the parties achieve a settlement, the conference attorney provides the attorneys with a form of agreed motion to dismiss the appeal, but attorneys are free to document the settlement in any form mutually acceptable to them. Although the conference attorney may assist in devising specific language to be used in memorializing the settlement, the conference attorney does not otherwise participate in drafting settlement documents.

If a case cannot be resolved through the conference process, the appeal proceeds in the ordinary course. After briefing has been completed, the conference attorney may renew contacts with the attorneys to explore again any possibilities of settlement. However, the assistance of the conference attorney is not available on the eve of or after oral argument.

### ***Other Rules, Policies, or Practices***

#### *Effect on appellate proceedings*

The court's preliminary consideration of its jurisdiction and attorneys' filing of jurisdictional memoranda, when ordered, are not ordinarily stayed pending the outcome of the settlement conferences, nor is briefing on the merits automatically suspended. By circuit rule, the standard briefing schedule begins on the date the appeal is docketed in the court of appeals. Except in agency cases, there is no initial briefing schedule order. Merits briefing is ordinarily extended until thirty days following the initial conference to permit the litigants to focus on settlement. The conference attorney may further extend the time for briefing or stay the appeal if that will facilitate negotiation and settlement.

#### *Confidentiality*

Although the scheduling of a mediation conference is a matter of public record, the substance of all discussions held under Rule 33 is not. The Notice of Rule 33 Conference sets forth the court's confidentiality rule, and at the beginning of the initial conference, each participant

expressly agrees to hold the content of the conference proceedings in the strictest confidence. As part of this agreement, all participants, including the conference attorney, are forbidden to disclose to any judge or other court personnel what is said in the conferences or in any related conversations or correspondence.

If a party requesting a conference tells Settlement Conference Office staff that the party prefers to keep its request confidential, the Settlement Conference Office will not disclose it to other parties or to the court.

#### *Sanctions*

The court has not promulgated rules governing sanctions for misconduct in connection with settlement conferences under the program, nor has the court had occasion to impose such sanctions. However, the court has specifically held that an attorney's refusal to make a party available for discussions with the conference attorney is sanctionable.

#### *Recusal*

It is the conference attorneys' practice to recuse themselves from cases in which they believe they would have, or appear to have, a conflict of interest. At or before the conference, the conference attorney discloses any affiliation or prior representation he or she is aware of that could call his or her neutrality into question.

#### *Reports and evaluation*

The senior conference attorney reports frequently to the court on the progress of the program. For purposes of ongoing program assessment and to facilitate independent evaluation of the program, the Settlement Conference Office maintains a database of information on cases selected for conferences, including the subject matter of the appeal, the disposition at the trial level, the number of contacts between the conference attorneys and the litigants, and the outcome of the settlement conferences.

In 1978–1979, the Federal Judicial Center conducted a study of the court's prehearing conference program, the predecessor of the court's current settlement conference program. *See generally* Jerry Goldman, *The Seventh Circuit Preappeal Program: An Evaluation* (Federal Judicial Center 1982).



SEVENTH CIRCUIT: SETTLEMENT CONFERENCE PROGRAM

***For More Information***

Contact Joel N. Shapiro, Senior Conference Attorney, U.S. Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Room 1120, Chicago IL 60604, telephone: 312-435-6883.

Website: [www.ca7.uscourts.gov/conf\\_aty/](http://www.ca7.uscourts.gov/conf_aty/)

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## **Eighth Circuit: Settlement Program**

The U.S. Court of Appeals for the Eighth Circuit established the appellate Settlement Program in 1981. The director of the program reviews all program-eligible cases filed in the court of appeals and looks for settlement potential.

The director manages the program. An assistant performs clerical and other tasks, such as initial screening for cases that do not meet program criteria, retrieving district court opinions when not furnished with the case file, and obtaining updated information from the Clerk's Office. The Settlement Program is a separate unit of the court; the director reports to the chief judge and to the court generally through a judge committee.

The court reports that the director of the Settlement Program serves as the sole mediator for the court at all conferences. The court's rule, however, provides that a senior district judge on special assignment from the chief judge may mediate cases in the Settlement Program. The court reports that this provision has not been used in many years.

Court personnel report that the director is a lawyer with an extensive background in mediation, negotiation, and general litigation. Before joining the court's program in 1983, the director was a mediator with the Federal Mediation and Conciliation Service.

The primary purpose of the program is settlement—to reduce the judges' workload and to assist the parties in consensual resolution. The program also is designed to limit or clarify issues on appeal as a by-product of settlement discussions.

Participation in the Settlement Program is completely voluntary.

The program director held joint mediation conferences in 68 cases in 2002, 76 cases in 2003, and 63 cases in 2004. In addition, approximately 60% of an additional 320 cases in 2002, 316 cases in 2003, and 323 cases in 2004 involved separate discussions with one or more parties to determine whether they would be scheduled for a joint mediation conference. These discussions occur when the documentation filed by the parties with the appeal is lacking or is unclear about a willingness to participate. The program is governed by Federal Rule of Appellate Procedure 33 and Eighth Circuit Rules 3B and 33A.

### ***Selecting Cases for Conferences***

#### *Eligible case types*

Nearly all counseled civil cases are eligible for the Settlement Program except Social Security, disability, immigration, and tax cases; cases dismissed for lack of jurisdiction; cases with unresolved appellate jurisdictional problems; original proceedings (e.g., mandamus petitions); certified interlocutory appeals and appeals of injunctions under 28 U.S.C. § 1292; and prisoner cases.

At its inception, the program concentrated on monetary cases. Currently a large number of cases in the program are in the employment field and involve summary judgment disposition by the trial courts.

The director selects cases that appear appropriate for settlement discussions after reviewing documents from the Clerk's Office, placing special importance on any trial court opinions and any settlement interest indicated on the appeal information form, which parties generally file with the Clerk's Office. If a party indicates a lack of interest, a conference is not scheduled, except by subsequent consent of the parties. In most cases, the director telephones the parties' attorneys to determine interest in settlement and to arrange conferences. Frequently the director discusses highlights of the issues on appeal with each party to gain insight before scheduling the mediation conference.

In large monetary cases that offer some potential for settlement, the director schedules joint conferences by agreement of the parties. In apparently uncomplicated cases involving smaller dollar amounts, the director may schedule a joint telephone conference by letter without prior contact with counsel. The letter states that participation is voluntary and a party has the right to cancel a conference. Typically, one or more parties in these cases have indicated, on the appeal information form, a willingness to participate in the Settlement Program.

When contacted by the director, attorneys sometimes indicate that direct settlement negotiations are under way and they want to defer participation in the program until concluding their own efforts. In these situations, absent a subsequent joint request by the parties, the director will not maintain further contact. Normally, there is not enough time to allow for both the direct negotiations and a program-scheduled conference before the parties become substantially involved

in the briefing and argument preparation process, which works against settlement efforts (see “Number and length of sessions,” *infra*).

The director reports that he does not generally contact attorneys in cases involving state or federal agencies, because the public interests involved frequently are not subject to compromise and government attorneys often lack the authority for or an interest in settlement. The director also sometimes screens out private-sector cases with policy or precedential considerations not amenable to a settlement effort (for example, insurance declaratory judgment actions and antitrust cases). However, if a governmental or private-sector entity expresses an interest in settlement on the appeal information form, the director normally will attempt to obtain agreement from all parties to schedule a settlement conference.

Although the program functions primarily before briefing is begun, parties may ask to participate at any time. The director then schedules a conference if possible. For example, attorneys occasionally request a conference during or after preparation of their briefs in a case that the director had previously screened out for lack of interest.

*Documents reviewed*

The Clerk’s Office sends the director the notice of appeal, district court docket entries, any trial court opinion, appellate docket entries, any appeal information form filed by the appellant, and any response form filed by the appellee. The appeal information form calls for identification of the issues raised on appeal. Both forms include a section in which the parties indicate interest (or lack of interest) in settlement. Local Rule 33 directs the appellant to file the appeal information form with the notice of appeal in the district court; however, the form is not jurisdictional in nature and failure to file it does not result in any penalty. The appellee may file a response form.

*Judicial selection*

Judicial panels occasionally refer cases to the program during or immediately after oral argument.

### ***Scheduling the Conferences***

#### *Scheduling process*

The director attempts to contact attorneys and schedule settlement conferences at the early stages of an appeal, before filing of the transcript and briefs. Generally the conference occurs before the due date for the appellant's brief, which is normally six weeks after docketing of the appeal.

#### *Conference sites*

The vast majority of the joint conferences are conducted by telephone, but the director conducts conferences in person with parties and their attorneys whenever possible. In-person conferences are usually conducted in the court's St. Louis headquarters for St. Louis cases. This is also true for cases from other parts of the circuit that involve large dollar amounts if the parties are willing to bear the travel expense. The director occasionally travels to conferences outside St. Louis, depending on the time and cost of travel and the number or complexity of cases scheduled for conference in a given location. The director usually holds these in-person conferences in St. Paul or Little Rock, or in cities within a half-day drive.

#### *Preconference submissions*

For a better understanding of a case, the director usually requests additional materials, such as post-trial briefs, before the conference. Normally, however, he does not receive copies of appellate briefs. No separate submission statements are requested before the conference, although the parties are free to furnish them.

### ***Mediation Sessions***

#### *Nature of sessions*

The primary goal of the mediation conference is settlement. Typically, in cases that are not settled, issue reduction occurs as a natural by-product of settlement discussions.

At the joint conference, the director explains the court's rule on confidentiality of settlement discussions. He usually initiates discussion of the case by requesting that the appellant list the issues on appeal and

assess the likelihood of success on each issue. Sometimes, prior settlement discussions form the basis for starting the conference discussions.

After the introductory joint session, the director functions in a mediation role, usually meeting separately with the parties to assist them in the development of offers and to convey offers and counteroffers to each side. He considers these separate meetings (also called caucuses) essential to the mediation process. He says he does not render judgment, try to pressure the parties, or impose a settlement. He does, however, question unrealistic assessments when they prevent meaningful bargaining, and he tries to suggest meaningful offers and alternatives whenever possible. The director tries to develop options that the parties may not have considered. He sometimes asks the parties whether they should consider any matter or dispute other than the subject of the appeal. Examples of other matters are settlement of related litigation and forming altered or new business relationships prospectively.

*Party participation*

Attorneys and their clients are strongly encouraged to attend settlement conferences. In most situations the client, or client representative with discretionary settlement authority, is present for in-person conferences and for joint telephone conferences. In telephone conferences, attorneys are asked to have their clients present with them or patched into the call placed to the attorneys by the director. The director conducts few joint settlement conferences without the involvement of decision-making clients for both parties.

*Number and length of sessions*

In-person conferences last from several hours to all day, depending on the progress being made. On average, an in-person, joint conference lasts five to six hours, and a telephone conference lasts one to three hours. The director says he tries to plan only one conference for the parties to maximize settlement efforts and to avoid the delay and loss of momentum associated with numerous conferences. Numerous conferences tend to be less effective because parties are engaged in efforts to implement the briefing schedule and are less focused on settlement.

The preset briefing schedule is typically not postponed prior to the conference, and the appellant's first brief date acts as a deadline for negotiations. However, if settlement appears within reach after a confer-

ence, the director occasionally continues settlement efforts and makes follow-up telephone calls as necessary to obtain settlement or exhaust settlement possibilities. Extensions of the briefing schedule are officially discouraged, but a party may obtain an extension through application to the clerk of the court.

*Fees*

The program does not charge parties or attorneys for the costs of the conferences.

*Post-conference procedures*

When a settlement is achieved, the director informs the Clerk's Office and asks the attorneys to execute a dismissal stipulation to close the case, but the director does not usually get involved in drafting settlement agreements. The Clerk's Office sends the attorneys a letter setting a three-week deadline for submission of the stipulation of dismissal. This deadline can be extended if necessary. If the case does not settle, the preset briefing schedule controls.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

No aspect of the appeals process is stayed automatically while a case is in the settlement program. The Clerk's Office handles briefing schedules, requests for extensions, and all other case-management functions for all cases, including cases referred to the Settlement Program. The director reports that this separation insulates the Settlement Program from any aspect of the decisional process or enforcement mechanisms of the court. If a scheduled settlement conference is near a briefing date and the parties request a briefing extension to accommodate a conference, the director refers them to the clerk of court.

*Confidentiality*

Under court rule, settlement-related material and settlement negotiations are maintained in confidence by Settlement Program staff. The director has no contact with the judges of the court or the court's legal staff about matters discussed in the conferences.



## EIGHTH CIRCUIT: SETTLEMENT PROGRAM

### *Recusal*

The director recuses himself from cases in which he believes he would have a conflict of interest. Before he proceeds as a mediator, he notifies the parties of any prior personal or professional relationship with any party and obtains the parties' consent to function as a mediator.

### *Reports and evaluation*

The director keeps internal records on the program for use in preparing statistical reports, including a description of the main issues on appeal. The reports are sent monthly to the judges of the court.

### ***For More Information***

Contact John H. Martin, Director, Settlement Program, U.S. Court of Appeals for the Eighth Circuit, Thomas F. Eagleton U.S. Courthouse, 111 South Tenth Street, Room 24.342, St. Louis, MO 63102, telephone: 314-244-2499.

Websites:

[www.ca8.uscourts.gov/newcoa/publs/publs.htm](http://www.ca8.uscourts.gov/newcoa/publs/publs.htm) (Click on "Local Rules of the Eighth Circuit" and go to "Rule 33A")

[www.ca8.uscourts.gov/newrules/coa/IOP-complete.pdf](http://www.ca8.uscourts.gov/newrules/coa/IOP-complete.pdf) (Go to subsection I.C.2, "Prehearing Conference Program")

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## **Ninth Circuit: Settlement Program**

The Settlement Program in the U.S. Court of Appeals for the Ninth Circuit was established in 1992.<sup>15</sup> The program is an independent unit in the court of appeals. The program staff consists of five circuit mediators and three support positions in San Francisco, and one circuit mediator and one support position in Seattle. The chief circuit mediator manages the program and reports to the chief circuit judge.

Circuit mediators review all eligible cases and select those with settlement potential. Cases are then randomly assigned to the circuit mediators, who conduct the mediation conferences. In exceptional circumstances, the circuit mediator may refer a case to a circuit, district, or magistrate judge or to another circuit mediator for mediation. Court personnel report that the circuit mediators are experienced litigation attorneys who have extensive training and expertise in negotiation, mediation, and settlement.

The primary purpose of the Settlement Program is to facilitate settlement of civil cases docketed in the court. Once the program schedules a mediation conference, participation by attorneys is mandatory. When appropriate, the circuit mediator directs party-clients to attend the conference as well.

If settlement is not reached in a mediation conference, the circuit mediator addresses any jurisdictional issues and works with the attorneys to develop the most efficient and expeditious plan for disposition of the case. This plan may include limiting the issues, limiting briefing, defining the record on appeal, or staying the appeal pending some contingency, such as disposition of a related case.

The Settlement Program Office selects for mediation conference approximately 40% of the cases that are eligible for the program. Eligible case types are described in the next section. If the circuit mediators do not have sufficient information to determine whether they should schedule a case for mediation, they first conduct an initial assessment

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15. The Settlement Program's precursor began in 1984 and evolved into the current program, which is governed by Federal Rule of Appellate Procedure 33 and Ninth Circuit Rules 3-4, 15-2, and 33-1. In the 1984 version of the program, the emphasis was not on settlement but on improving presentation of issues before the court. The program evolved into one with an emphasis on settlement, and in 1992, the court modified the program and officially recognized it as a settlement program.

conference. This occurs in about 80% of the cases the circuit mediators review. The primary purpose of an assessment conference is to determine whether a mediation conference should be scheduled. The primary purpose of a mediation conference is to explore settlement of the dispute.

### ***Selecting Cases for Conferences***

#### *Eligible case types*

Most non-prisoner civil cases are eligible for the program. Exceptions are pro se cases, petitions for writs (other than habeas corpus), and original proceedings. Among the cases in the program are bankruptcy appeals, petitions for review of Board of Immigration Appeals decisions under 8 U.S.C. § 1105(a), and petitions for review of National Labor Relations Board decisions under 29 U.S.C. § 160(e).

#### *Selection process*

The Clerk's Office docket each program-eligible case, and soon thereafter sends the Civil Appeals Docketing Statement to the Settlement Program Office. The circuit mediators review these statements to help them determine which program-eligible cases appear to be good candidates for the Settlement Program and to facilitate case management. Following this review, and in some cases after making telephone calls to the counsel of record, the mediators select cases for conference scheduling.

Case selection is based on a number of factors, including the parties' interest in participating in settlement negotiations. Also, the circuit mediators consider whether the case appears likely to settle and whether the settlement program could otherwise benefit the parties. If the circuit mediator finds a jurisdictional defect or jurisdictional dispute that he or she cannot resolve with the attorneys by agreement, the circuit mediator refers the case to the civil motions unit in the Clerk's Office for processing.

The presumption is that a case is not selected for the program unless the Settlement Program Office enters an order scheduling an assessment or mediation conference. The office sends the attorneys that order, which acts as notice of the assessment or mediation conference.

In about 5% of cases in the program, attorneys request a settlement conference by either letter or telephone call to the chief circuit media-

tor. The Settlement Program Office keeps the request confidential if the attorney so specifies. Circuit mediators may ask for specific information from attorneys before determining whether to schedule a case for an assessment or mediation conference. Only in extraordinary circumstances, and with permission of the chief circuit mediator, will a circuit mediator participate in negotiations involving pro se litigants.

The circuit mediator may determine that further participation in the program would not be beneficial and may remove a case from the program. There is a presumption that a case is not in the Settlement Program if the program office has not sent the attorneys an order scheduling a conference within fifty-six days of the docketing of the appeal or petition.

#### *Documents reviewed*

The Settlement Program Office receives a copy of the Civil Appeals Docketing Statement (CADS) filed for each program-eligible case. In all civil cases eligible for the program, the appellant must submit a CADS to the district court upon the filing of the notice of appeal or to the court of appeals in cases in which court rules do not require a notice of appeal. The CADS provides information on jurisdiction, the nature of the action, the result at the trial level, and issues on appeal. The CADS also asks the appellant to identify any case in which this matter has been before the Ninth Circuit Court of Appeals previously and any other legal proceeding that may have a bearing on the instant case on appeal. The appellant attaches copies of judgments, orders, opinions, and findings of fact and conclusions of law that will be relevant to the major issues on appeal. Within seven days of service of the CADS papers, the appellee may file a response with the court of appeals.

#### *Judicial selection*

Occasionally, a judicial panel refers a case to the program. This can occur at any time during a case, but usually occurs after briefing and argument.

### ***Scheduling the Conferences***

#### *Scheduling process*

If a case is selected for either an assessment conference (to determine whether a mediation conference should be held) or a mediation con-

ference, the Settlement Program Office sends the attorneys an order, which is entered in the case, that sets the date and time of the conference, provides some basic information about the program, identifies who should participate, states whether the conference will be in person or by telephone, and advises attorneys about how to prepare.

The court looks with disfavor on requests to reschedule a conference date, unless a date conflicts with a previously scheduled court appearance or significant event.

Conferences typically occur in the prebriefing stage of an appeal.

#### *Conference sites*

Nearly all assessment conferences, and approximately 70% of the mediation conferences, are conducted by telephone. About 30% of the mediation conferences are conducted in person. Generally, the circuit mediator will not schedule an in-person conference unless there has been groundwork for settlement. Most in-person conferences are held at the court offices in San Francisco or Seattle; however, after consideration of the particular circumstances in a case, the circuit mediator may conduct a conference elsewhere in the circuit. Each circuit mediator spends two to five days per month traveling.

#### *Mediation submissions*

Before most in-person mediation conferences and some telephone mediation conferences, the circuit mediator may ask the parties to submit mediation statements. The circuit mediator determines the contents of the statements and whether they will be exchanged with the other parties. In some cases, the circuit mediator also may want to review relevant authority before the initial conference.

### ***Mediation Sessions***

#### *Nature of sessions*

*Assessment conference.* The primary purpose of an assessment conference is to determine whether a mediation conference should be scheduled. Usually, all attorneys intending to file briefs in the case are required to attend the assessment conference, typically by telephone, and to discuss the litigation history of the case. Before the assessment conference, attorneys must discuss settlement with their clients.

## NINTH CIRCUIT: SETTLEMENT PROGRAM

*Mediation conference.* The primary purpose of a mediation conference is to explore settlement of the dispute. The circuit mediator considers each case's unique circumstances and personalities in determining an appropriate settlement procedure. Program rules require that attorneys attend mediation conferences with appropriate authority to make and respond to settlement proposals and to settle. The circuit mediator may conduct follow-up in-person or telephone conferences, in either separate or joint sessions. In exceptional circumstances, the circuit mediator may refer a case to a judge or another circuit mediator for mediation.

### *Party participation*

Before a conference, attorneys must discuss settlement with their clients. If more than one attorney is representing a client, the attorney with the most direct relationship with the client must attend the conference. Cocounsel and other attorneys in the lead counsel's firm may attend the conference if their presence would be beneficial.

Although clients generally do not participate in assessment conferences, they usually attend and participate in mediation conferences; circuit mediators sometimes require their attendance in mediation conferences. Conferences may also include representatives of third parties upon whom settlement depends (such as insurance carriers), as requested by the attorneys or the circuit mediator.

For in-person mediation conferences, each party-client must have present an individual who is fully informed and vested with full settlement authority. For telephone mediation conferences, if the person representing a party-client does not have authority to make and respond to settlement proposals, someone with authority must be readily available.

### *Number and length of sessions*

The assessment conference typically lasts about thirty minutes. For the initial mediation conference, the average length is four to eight hours if in-person and one to two hours if by telephone. To pursue opportunities for negotiated settlement fully in cases with good settlement prospects, the circuit mediator conducts extensive follow-up activities, such as additional telephone conferences, including conversations (cau-

cuses) with each side separately, and possibly in-person conferences. These activities may continue for days or weeks.

*Fees*

The program does not charge parties or attorneys for the costs of the conferences.

*Post-conference procedures*

If the parties reach a settlement, the circuit mediator occasionally helps them draft a preliminary settlement agreement; the parties prepare the final settlement agreement. For settled cases, the parties send a request (or stipulation) for dismissal to the circuit mediator; if the circuit mediator approves the dismissal, he or she sends an order to the Clerk's Office for entry in the case. The Settlement Program Office monitors cases in the program to ensure that parties submit the dismissal papers they have agreed to.

If the parties do not reach a settlement, the circuit mediator and the other parties determine whether they should continue in the program and how to do so. At the last conference, the circuit mediator usually works with the attorneys to establish a briefing schedule for the case and issues an order, filed in the case file, releasing the case from the program. After a case is released, attorneys direct all subsequent procedural issues and all inquiries and filings to the Clerk's Office.

In the context of a settlement or mediation, parties who have otherwise settled the case may stipulate to have one or more issues in their appeal referred to an appellate commissioner for a binding determination. If the parties so stipulate, the appellate commissioner may handle the matter with abbreviated and accelerated briefing and a guaranteed opportunity for in-person or telephonic oral argument before the commissioner. The appellate commissioner will issue a determination and, if requested, a written statement of reasons. The appellate commissioner's determination will be final and nonreviewable for the stipulating parties; however, it has no precedential effect. Cases would ordinarily be referred to the appellate commissioner through the court's mediation program.



***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

For a case selected for the program, the conference process does not automatically stay any events in the case. For example, the briefing schedule (time-schedule order) the Clerk's Office established when it docketed the appeal remains in effect, unless the circuit mediator adjusts it to facilitate settlement or the Clerk's Office adjusts it pursuant to court rules.

*Procedural motions.* The court requires that program participants consult with the circuit mediator before filing any procedural motion. The circuit mediator is authorized to rule on certain procedural matters while cases are in the program, including vacating or resetting the appeal schedule. Usually, the circuit mediator resolves procedural matters over the telephone and attorneys need not file a procedural motion. For example, if the briefing schedule would require substantial work on the opening brief before the scheduled conference date, an attorney may ask the circuit mediator by telephone, before the conference, to vacate the briefing schedule. In addition, the appellant may make a telephone request to the circuit mediator to suspend preparation of the record if it appears that there is a reasonable possibility of settlement and preparation of the record would be expensive.

If during a conference the circuit mediator is unable to resolve a procedural issue with attorneys by consensus, the circuit mediator may direct the attorneys to file a motion with the clerk. Either the circuit mediator or the clerk will decide the motion.

*Case-management conferences.* The purpose of a case-management conference is to manage the appeal effectively and develop a briefing plan for complex cases. A case-management conference occurs only in exceptional circumstances, such as in complex cases involving numerous separately represented litigants or extensive proceedings below.

For a case in the Settlement Program, the circuit mediator may conduct a case-management conference either as part of an assessment or mediation conference or as a separate telephone conference. If the circuit mediator selects a case for a case-management conference, the Settlement Program Office notifies the attorneys by order of the date and time of the conference.

If a case is not in the Settlement Program and the court directs, either sua sponte or on request of a party, that the parties participate in a

case-management conference, the Clerk's Office notifies the attorneys by order of the date and time of the conference. A civil motions attorney from the Clerk's Office conducts the conference by telephone.

#### *Confidentiality*

To encourage open and frank settlement discussions, the court exercises great care to ensure confidentiality in the settlement process. The content of settlement discussions is confidential and is not disclosed to the judges who might decide the case or to any other person. Attorneys are prohibited from disclosing any such content in briefs or arguments.

The program functions independently from the judicial decision-making arm of the court. Documents and correspondence related to settlement are kept in files that are not accessible to any court personnel outside the Settlement Program. Court personnel report that the files are never made part of the main case file.

If the circuit mediator confers separately (caucuses) with participants, those discussions are also confidential to the extent the participants request confidentiality. Requests by attorneys to include a case in the program also are kept confidential at the attorney's request.

A judge who conducts a settlement conference in the role of a mediator pursuant to the rules of the Settlement Program does not participate in any judicial decision on any aspect of the case, except that the judge may vote on whether to take the case en banc.

#### *Sanctions*

Failure to participate in a conference scheduled under the program may result in sanctions, including dismissal of the case. *See Kajioka v. Commissioner of Internal Revenue*, 883 F.2d 57, 58 (9th Cir. 1989) (dismissing appeal for failure to prosecute after counsel repeatedly failed to appear at scheduled conferences). The court may take other action it deems appropriate, including imposition of disciplinary and monetary sanctions pursuant to local rule.

#### *Reports and evaluation*

The Settlement Program Office reports periodically on the number of cases in which conferences are held and the number of cases settled in the program. These reports are sent to the executive committee of the court and to the judges of the court. For a description and commen-

NINTH CIRCUIT: SETTLEMENT PROGRAM

tary on the rules and operation of the program, see Christopher A. Goelz & Meredith J. Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice (2004).

***For More Information***

Contact David E. Lombardi, Chief Circuit Mediator, U.S. Court of Appeals for the Ninth Circuit, 95 Seventh St., P.O. Box 193939, San Francisco, CA 94119-3939, telephone: 415-556-9900.

Website: [www.ca9.uscourts.gov/ca9/Documents.nsf](http://www.ca9.uscourts.gov/ca9/Documents.nsf) (See Ninth Circuit Rules 3-4, 15-2, and 33-1 and the related Circuit Advisory Committee Note)

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### **Tenth Circuit: Circuit Mediation Program**

The U.S. Court of Appeals for the Tenth Circuit's Circuit Mediation Office consists of three circuit mediators and one conference administrator. Organizationally, the office is a separate unit of the court. The chief circuit mediator reports to the chief judge. Court personnel report that the program's circuit mediators are experienced attorneys with mediation skills.

The Circuit Mediation Office, which began operations in 1991, attempts to schedule a mandatory settlement conference (mediation) with a circuit mediator for most civil cases in which all parties are represented by counsel.

The primary purpose of the mediation is to explore the possibilities of settlement. A second purpose is to identify and resolve, by agreement of the parties, any matters that may interfere with the smooth handling or disposition of the case. The mediation program is based on four assumptions:

1. Lawyers are frequently reticent about initiating settlement negotiations.
2. The appellate process, unlike trial proceedings, presents few opportunities for the parties to meet to discuss settlement.
3. A mediator can help parties accomplish what they cannot accomplish alone.
4. A mediation office, operating with confidentiality apart from the court's decisional process, can offer flexibility otherwise unavailable in a formal court setting.

The Circuit Mediation Office scheduled one or more mediation conferences in 477 new cases in 2002, 435 new cases in 2003, and 438 new cases in 2004. In each of these years, a few cases scheduled for mediation conference settled before the initial conference; mediation occurred in all the other cases scheduled for mediation conference. Federal Rule of Appellate Procedure 33 and Tenth Circuit Rule 33 govern the mediation program.

### ***Selecting Cases for Conferences***

#### *Eligible case types*

Most civil cases are eligible for selection into the mediation program. Exceptions are pro se cases, habeas corpus cases, and cases with unresolved jurisdictional problems. Therefore, eligible cases reflect the variety of the court's civil docket. Among the many types of cases in the mediation program are bankruptcy appeals, tax appeals, and agency cases.

The conference administrator schedules as many program-eligible cases for a mediation conference as the Circuit Mediation Office staffing will allow. If there are more new cases than the office can handle, the office randomly selects cases from the pool of all newly docketed eligible cases. The office uses random selection because it finds it difficult to predict from case documents alone which cases are more likely to settle.

If the Circuit Mediation Office does not schedule a case for a conference, attorneys for any party may call the office and request a conference at any time. The office almost always grants such requests.

#### *Documents reviewed*

For all civil cases docketed in the court, the Clerk's Office sends docketing statements to the Circuit Mediation Office. (The appellant files a docketing statement within ten days after the docketing of a case on appeal, or fourteen days in agency cases.) The docketing statement includes a brief procedural history and factual background of the case, the issues to be raised on appeal, a copy of the decision or order appealed from, and a copy of the district court docket sheet.

#### *Judicial selection*

Judicial panels occasionally refer cases to the Circuit Mediation Office before or after oral argument.

### ***Scheduling the Conferences***

#### *Scheduling process*

The Circuit Mediation Office schedules the mediation conference, and sends conference notices to the lead attorneys, ordinarily within a week of receiving the docketing statement from the Clerk's Office. The

conference notice informs the attorneys of the time and date of the conference and whether it will be in person or by telephone. An attorney with an unavoidable scheduling conflict may ask that the conference be rescheduled.

The Circuit Mediation Office usually holds conferences about two weeks after notices are sent.

#### *Mediation sites*

About 95% of the mediation conferences are conducted by telephone, but the circuit mediator occasionally requires an in-person conference, sometimes outside Denver, which is the court's headquarters.

#### *Mediation submissions*

The Circuit Mediation Office does not require written mediation statements from the parties, as some other mediation programs do.

### **Mediation Sessions**

#### *Nature of sessions*

A circuit mediator conducts each mediation conference, discussing the possibility of settlement and any other matter relating to the management and disposition of the appeal.

During the mediation conferences, the circuit mediator usually leads a discussion of the legal merits of the case in order to understand the key issues on appeal and to evaluate the risks of continuing with the case. The Circuit Mediation Office expects the attorneys to be fully prepared to discuss these matters. The circuit mediators report frequently having candid, private discussions with attorneys to determine the party's reasons for pursuing the case, learn the parties' underlying interests, explore common ground, and examine bases for settlement. If further negotiations beyond the initial conference are warranted, the circuit mediator may conduct follow-up conversations or additional conferences.

The circuit mediator also discusses procedural matters in order to streamline the appeal process and avoid unnecessary paperwork. For example, the parties may resolve transcript difficulties, agree to modify briefing schedules, or agree to consolidate appeals.

Before the conference, the circuit mediator reviews the order or opinion from the trial court and in some cases other materials; the cir-

circuit mediator also may try to anticipate settlement options. During the conference, the circuit mediator ensures fairness in the negotiating process, acts as a catalyst to bring the parties together, acts as a buffer when parties or attorneys clash, helps parties objectively assess the strengths and weaknesses of the case, and may propose settlement alternatives.

*Party participation*

Once the Circuit Mediation Office schedules a case for a mediation conference, participation in the process is mandatory. The court requires lead counsel to participate, and their clients may attend. Before the conference, lead counsel must obtain authority to settle the appeal.

*Number and length of sessions*

The initial conference usually lasts one to two hours. Generally, there is only one joint conference, and follow-up discussions after this initial joint conference constitute much of the workload of the Circuit Mediation Office.

*Fees*

The program does not charge parties or attorneys for the costs of the conferences.

*Post-conference procedures*

At the conference, any action that affects the interest of any party requires the agreement of all parties. If a settlement is reached, the circuit mediator gives the parties a date for filing a settlement stipulation.

If the parties reach agreement on matters that would facilitate the handling of the appeal (such as elimination of duplicative briefs or motions or stipulations regarding the record), the circuit mediator enters an appropriate order reflecting such agreement.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

The scheduling of a conference does not automatically stay any aspect of the appellate process. The conference procedure runs parallel to the regular appeal process and normally does not interfere with it. In cases



in which briefing has started before the initial conference is scheduled, however, the Circuit Mediation Office will extend briefing until after the conference to preserve a more flexible atmosphere for settlement. After the initial conference, the office may extend briefing further if the circuit mediator thinks that doing so will further negotiations.

*Confidentiality*

Court rules forbid disclosure of statements made during a conference and in related discussions to anyone outside the mediation process. Attorneys may not refer to or quote any such statements in briefs or at oral argument. *See Clark v. Stapleton Corp.*, 957 F.2d 745 (10th Cir. 1992). The Circuit Mediation Office keeps all records it produces within the office and out of any court file. If a party requests a conference, the office keeps that request confidential.

*Sanctions*

The court may impose sanctions for the failure of an attorney or a party to comply with the provisions of the court's mediation program rules or orders. *See Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996).

*Reports and evaluation*

The office reports its workload statistics to the judges of the court every month.

***For More Information***

Contact David W. Aemmer, Chief Circuit Mediator, U.S. Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout St., Denver, CO 80257, telephone: 303-844-6017.

Websites:

[www.ck10.uscourts.gov/cmo/index.php](http://www.ck10.uscourts.gov/cmo/index.php)

[www.ck10.uscourts.gov/clerk/rulesandforms.php](http://www.ck10.uscourts.gov/clerk/rulesandforms.php) (Go to 10th Circuit Rule 33)

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## **Eleventh Circuit: Appellate Mediation Program**

The U.S. Court of Appeals for the Eleventh Circuit launched its appellate mediation program in 1992. In 2001, the court changed the name of its Circuit Mediation Office to the Kinnard Mediation Center (Mediation Center).<sup>16</sup> The court's mediation program provides opportunities for parties to resolve their disputes confidentially with the help of a neutral third party.

The circuit mediators are court employees. As of May 2005, the Mediation Center consisted of six circuit mediators (three in Atlanta, including the chief circuit mediator; one in Tampa; and two in Miami), an administrative manager, and three administrative assistants (one in each location). The chief circuit mediator manages the mediation program and reports to the circuit executive on administrative matters and to the court on policy matters. For operational purposes, the Mediation Center is a separate unit of the court.

Court personnel report that the circuit mediators have extensive trial and appellate experience, as well as significant training and experience in mediation.

The Mediation Center mediated a total of 843 appeals in 2002, 893 appeals in 2003, and 925 appeals in 2004. The Mediation Center conducts mediation of civil appeals under Federal Rule of Appellate Procedure 33 and Eleventh Circuit Rule 33-1.

The court of appeals amended its local rules effective October 2004 to provide that, upon agreement of all parties, the parties at their expense may employ a private mediator to mediate an appeal that the Mediation Center selected for mediation, as described below.

### ***Private Mediators***

Since October 1, 2004, the court of appeals has allowed for the use of private mediators upon agreement of all parties and at their expense.

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16. The naming of the office honors the late Stephen O. Kinnard, the mediation program's first chief circuit mediator, and his "extraordinary service in making mediation a fundamental component in the Eleventh Circuit's appeals process." See *Mediation and Guidelines for Effective Mediation Representation 1* (Aug. 2005), <http://www.ca11.uscourts.gov/offices/mediation.php> (click on "Mediation and Guidelines for Effective Mediation Representation" (last visited July 18, 2006)).

Eleventh Circuit Rule 33-1(g) provides the procedures and requirements that govern the use of a private mediator for this purpose. For example, the private mediator

- must have been certified or registered as a mediator by the state of Alabama, Florida, or Georgia for the preceding five years;
- must have been admitted to practice law in the state of Alabama, Florida, or Georgia for the preceding fifteen years and be currently in good standing; and
- must be currently admitted to the bar of the U.S. Court of Appeals for the Eleventh Circuit.

Those employed as private mediators under this rule must follow the Eleventh Circuit's Private Mediator Procedures for Mediation of Appeals issued by the Kinnard Mediation Center. These procedures are available on the Internet at [www.ca11.uscourts.gov/offices/mediation.php](http://www.ca11.uscourts.gov/offices/mediation.php). The provisions of the rule are in effect until September 30, 2006, and after that date if an order of the court reauthorizes the provisions.

If the parties opt to use a private mediator, the Mediation Center does not stop monitoring the appeal's progress; rather, the circuit mediator first assigned to the appeal continues to monitor its progress as the appeal proceeds through private mediation until either the appeal is resolved or the Mediation Center determines that further mediation would not be productive. At the time this sourcebook was written, parties in program-eligible appeals were infrequently opting to use a private mediator.

### ***Selecting Appeals for Mediation***

#### *Eligible case types*

All fully counseled civil appeals except prisoner, habeas corpus, and immigration appeals are eligible for mediation conducted by the court's circuit mediators. The Mediation Center mediates all eligible appeals except those in categories with low probabilities of settlement. However, some cases in those categories may be selected for mediation, depending on the workload of the Mediation Center.

Attorneys for any party may request mediation in eligible appeals by calling the Mediation Center.

*Documents reviewed*

Appellants and petitioners file with the clerk of the court of appeals a Civil Appeal Statement, accompanied by portions of the record, setting forth the information necessary for an understanding of the nature of the appeal. The clerk forwards the completed Civil Appeal Statement with required attachments, the notice of appeal, and the district court docket sheet to the Mediation Center.

*Judicial selection*

Either before or after oral argument, a panel of judges may direct attorneys and parties in the appeal to participate in mediation conducted by the court's circuit mediators.

*Removal from the program*

Participation in the mediation program is mandatory. If, however, the parties consult and all agree that mediation would not be productive, they may contact the circuit mediator handling the appeal to discuss changing the scheduled mediation conference to a half-hour assessment conference. The decision on whether to hold a half-hour assessment conference rests with the circuit mediator.

***Scheduling Mediation***

*Scheduling process*

Upon receipt of the Civil Appeal Statements from the Clerk's Office, the appeals are sorted by district and rotationally assigned to the Mediation Center's circuit mediators. The Mediation Center sends written notice of the initial mediation to lead attorneys, to be received at least two weeks before the mediation date. The Mediation Center schedules most mediation sessions soon after court of appeals docketing and before briefing.

*Conference sites*

Initial mediation sessions may be held by telephone, and the circuit mediators initiate the calls. If the attorneys are located in the Atlanta, Tampa, or Miami areas, the initial mediation may be held in person at the mediation center in those cities.

*Mediation submissions*

The court's Local Rule 33 directs attorneys in appeals selected for mediation to send a Confidential Mediation Statement in letter format to the circuit mediator to be received at least two days prior to the initial mediation conference. The Mediation Center's guidelines for mediation tell attorneys to do the following in the statement:

- recite the circumstances that gave rise to the litigation, including facts underlying any procedural issues in the appeal;
- describe any matters pending in the lower court or in related litigation;
- describe any recent developments that may affect the resolution of the appeal;
- describe any other efforts to settle the appeal, including prior offers or demands;
- summarize the parties' legal positions and provide a candid statement of their respective strengths and weaknesses;
- identify individuals who they believe should be directly involved in the settlement discussions;
- describe any sensitive issues that may not be apparent from the court records but will influence the settlement negotiations;
- describe the nature of the relationship between the attorneys and between the parties;
- present the party's priority of interests;
- suggest creative solutions or approaches for the circuit mediator to take in an attempt at settlement ("problem" to be settled, sequence of issues);
- give the necessary terms in any settlement;
- explain limitations on their authority to make commitments on behalf of their client;
- list any concerns about confidentiality; and
- describe any additional information their client or the other party needs to settle the appeal and indicate whether the information is needed before the mediation.

### ***Mediation Sessions***

#### *Nature of mediation*

The circuit mediator begins the mediation session by describing the mediation process, discussing confidentiality, and inquiring whether any procedural questions or problems can be resolved by agreement. The parties and the circuit mediator then discuss, either jointly or separately,

- the legal issues and the appellate court's decision-making process regarding these issues (e.g., preservation of error, waiver, standards of review);
- any efforts to settle the appeal;
- the parties' underlying interests, preferences, motivations, and assumptions, and new information or other changes that may have occurred since the decision below;
- future events based on the various possible outcomes of the appeal;
- how resolution of the appeal could affect the underlying problem;
- cost–benefit and time considerations; and
- procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand).

The discussion is not limited to these topics and will vary considerably depending on the circumstances of each appeal. The circuit mediator also attempts to generate offers and counteroffers and may conduct several follow-up mediation sessions, by telephone or in person, until the appeal settles or the circuit mediator reaches the conclusion that it will not settle.

When the parties agree to employ a private mediator, the court requires the private mediator to follow the Eleventh Circuit's Private Mediator Procedures for Mediation of Appeals issued by the Mediation Center. These procedures are available on the Internet at [www.ca11.uscourts.gov/offices/mediation.php](http://www.ca11.uscourts.gov/offices/mediation.php).

#### *Party participation*

The Mediation Center attempts to identify lead attorneys for all parties and instructs them to promptly advise the center if the purposes of the

mediation would be accomplished more effectively with different or additional attorneys or participants.

Local Rule 33 directs attorneys to have their client present at the mediation or available by telephone. The rule authorizes the circuit mediator to waive client participation, in which case attorneys must have the authority to respond to settlement proposals. The circuit mediator may require that the clients be present during in-person mediation or participate in telephone mediation. Government agencies or other parties that have to make settlement decisions collectively may provide a representative authorized to negotiate on behalf of that agency or party and to make settlement recommendations to it.

Although the mediation sessions are relatively informal, they are official court proceedings. The court's local rule imposes sanctions against any party who fails to appear or otherwise fully participate.

#### *Number and length of sessions*

The Mediation Center tells attorneys to allow two hours for initial telephone mediation sessions; from four hours to all day for initial in-person mediation sessions; and from thirty minutes to one hour for follow-up mediation sessions. Full pursuit of all opportunities for negotiated settlement might require extensive mediator follow-up activity, such as additional telephone calls, in-person sessions, or caucuses with each side separately.

#### *Fees*

The program does not charge parties or attorneys for the costs of the mediation or for the circuit mediator's time in monitoring appeals in which the parties agree to employ a private mediator. The parties who employ a private mediator are responsible for the private mediator's fees and costs.

#### *Post-conference procedures*

Because settlement is voluntary, circuit mediators take no actions affecting the interests of any party without the consent of all parties. If the parties reach a settlement, the attorneys prepare the settlement agreement, which is binding on all parties.

Once all parties agree on the terms of settlement, the circuit mediator sends a letter to the parties explaining dismissal procedures, which



require the parties to file with the clerk a joint (or agreed) motion to dismiss. Parties who need a post-settlement extension of the briefing schedule must follow the procedures described in the next subsection.

If the appeal does not settle, the circuit mediator declares an impasse. Negotiations can resume at any time until the appeal is terminated.

### ***Other Rules, Policies, or Practices***

#### *Effect on appellate proceedings*

Mediation does not automatically stay appellate proceedings, including the briefing schedule. The circuit mediator may grant an extension of time for an attorney who has a brief due if the extension will facilitate settlement, the deadline for submitting the brief has not passed, and the attorney has not previously filed a motion for an extension of time. The Mediation Center tells the attorney in this situation to call the circuit mediator, and if the circuit mediator grants the extension, to fax the circuit mediator a confirmation letter, copied to all counsel, that states the current and extended submission date.

The circuit mediator then forwards the attorney's letter to the clerk, and the clerk updates the docket to reflect the new due date. If the circuit mediator cannot grant an extension, the attorney may request an extension from the clerk or file a motion with the court. Such a motion must not contain any reference to the Mediation Center or circuit mediation, as required by the confidentiality rules governing the program.

#### *Confidentiality*

The circuit mediator's notes and the attorney's Confidential Mediation Statements do not become part of the court's file. The Mediation Center does not reveal any request by counsel for mediation without the requesting party's permission. Ex parte communications are also confidential except to the extent disclosure is authorized.

Local Rule 33's confidentiality provision applies to all mediated appeals, including appeals that judges refer to mediation. The rule directs all parties and participants in the mediation process to keep confidential all statements and comments made during the mediation and in any subsequent related communications, including not disclosing them (or making any reference to the Mediation Center or circuit mediation) in papers or arguments "to any court or adjudicative body that

might address the appeal's merits." The rule provides limited exceptions:

- release that is necessary to enforce noncompliance sanctions;
- release to those entitled to know about the mediation by reason of a position or relationship with a party; or
- release with the written consent of each mediation participant.

#### *Sanctions*

Local Rule 33 authorizes the clerk, after notice, to dismiss the appeal of a party who does not file a timely Civil Appeal Statement. The rule also authorizes the court, in the case of a party or attorney who fails to comply with the rule or the court's notice of mediation, to (a) assess reasonable expenses caused by the failure, including attorneys' fees or all or a portion of the appellate costs; (b) dismiss the appeal; or (c) take such other action it believes is warranted. As stated above, the court's Local Rule 33 provides for imposing sanctions against any party who fails to appear at or otherwise fully participate in mediation.

#### *Reports and evaluation*

The Mediation Center submits to the judges of the court monthly internal reports on the number of appeals mediated, pending, terminated, and settled. These reports do not include case names or docket numbers. Except for appeals specifically referred to the Mediation Center by a panel of judges, there is no reporting to the court concerning the status of its mediations.

#### ***For More Information***

Contact Lowell L. Garrett, Chief Circuit Mediator, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303, telephone: 404-335-6260.

Website: [www.call.uscourts.gov/offices/mediation.php](http://www.call.uscourts.gov/offices/mediation.php)

### **District of Columbia Circuit: Appellate Mediation Program**

The U.S. Court of Appeals for the District of Columbia Circuit implemented its Appellate Mediation Program in May 1987. The program is an established part of the appellate process in the court. The Legal Division of the Clerk's Office of the court of appeals, working in concert with the director of dispute resolution in the Office of the Circuit Executive, refers cases to the program. The circuit executive serves as the program administrator and is responsible for program evaluation and liaison between the mediators and court personnel.

The program is managed by the director of dispute resolution in the Office of the Circuit Executive. The director helps select and train mediators, assigns mediators to cases referred to mediation, monitors the mediators' work, may mediate or co-mediate cases, and serves as a resource for mediators and the public when questions arise about the program or about particular cases. The director and deputy director also manage a separate dispute resolution program for the district court.

The program's mediators are volunteer attorneys who are selected by the court and trained by professional mediator trainers. They include experienced litigators, senior members of the bar, and law professors. Mediators are encouraged to attend occasional training events sponsored by the court. The extensive use of volunteer mediators distinguishes this program from other regional federal appellate mediation programs. The director of dispute resolution assigns each case in the program to a mediator based on a mediator's experience, expertise in particular subject areas, and other relevant factors.

Although the volunteer mediators are not paid for their services, the court offers to reimburse them for minor out-of-pocket expenses and provides them with administrative support and limited secretarial services if needed. The director of dispute resolution occasionally co-mediate a case with one of the volunteer mediators and sometimes mediates cases without a co-mediator.

The primary role of the mediators is to help parties reach a settlement or, at a minimum, resolve some issues in their case. If settlement is not possible, the mediators will help the parties clarify or eliminate issues to expedite the appellate process. Other objectives of the pro-

gram are reducing the expense of protracted appeals and encouraging the development of creative resolution options.

Another feature of this program, and this court, is that many of the mediated cases are on review from a decision of a federal agency or involve the United States, the District of Columbia, or other government entities. Court personnel report that settlement rates for government cases have consistently kept pace with those for private cases.

The mediation process is governed by the court's per curiam Order Establishing the Appellate Mediation Program, effective Nov. 29, 1988, as amended.

### ***Selecting Cases for Mediation***

#### *Eligible case types*

The program handles a broad range of cases. Eligible cases include civil appeals from the district court, petitions for review of agency action, and original actions. Regulatory matters are the single largest category of referred cases.

In determining whether to accept a case, Clerk's Office attorneys and the director of dispute resolution consider

- the underlying dispute and its relation to the issues on appeal;
- incentives to settle or limit issues on appeal;
- the issues' susceptibility to mediation and their possibility of resolution;
- the number of related pending cases; and
- the number of parties (especially if there are many parties from distant jurisdictions).

Cases in which one or more of the parties require a judicial resolution of the issues on appeal are often inappropriate for mediation.

Attorneys in the Clerk's Office screen most civil and agency cases to determine whether they are appropriate for mediation. The Clerk's Office refers cases it believes might be appropriate for mediation to the director of dispute resolution for a second level of review. Cases are accepted into the program no earlier than forty-five days after the appeal is docketed and usually before the briefing schedule is issued.

Before selecting a case for mediation, the director of dispute resolution usually solicits the views of the lead attorneys about the suitability

ity of referring the case to a mediator. The attorneys' views on this matter are not dispositive, however.

Parties may request mediation by submitting a request form to the clerk. The Appellate Mediation Program encourages them to do so and gives such requests special consideration, but does not automatically grant the requests. Such requests are confidential and are not disclosed to the judges of the court or to opposing counsel.

The order that governs the program provides that “[u]ncounseled cases, while not categorically excluded [from the program], are rarely referred to mediation.” The director of dispute resolution reports that the program has accepted pro se cases for mediation in rare instances in the past. In such cases, the court of appeals appoints an attorney to represent the pro se party for mediation purposes only.

#### *Documents reviewed*

When selecting cases for mediation, the Clerk's Office and the director of dispute resolution have the following documents available for review:

- the docketing statement;
- the judgment or order on appeal;
- any opinion issued;
- the appellant's statement of issues on appeal;
- the certificate of counsel as to parties, rulings, and related cases; and
- all relevant motion papers and court orders.

#### ***Scheduling the Conferences***

##### *Scheduling process*

A letter from the circuit executive to each party's lead attorney initiates the mediation process. The letter notifies the attorneys that the case has been selected for mediation, describes the program, identifies the assigned mediator, and transmits a copy of the court's per curiam order describing the procedures to be followed.

The first mediation session is held within forty-five days of the case's selection for the program.

*Conference sites*

The mediators conduct initial mediation sessions at the E. Barrett Prettyman U.S. Courthouse of the court of appeals or, if mutually agreeable, in the mediator's office. On some occasions, the mediator decides to hold the initial session by telephone, if for example, traveling to Washington, D.C., would be a hardship for a participant. Subsequent conferences are conducted by telephone or in person.

*Mediation submissions (Position papers)*

The order establishing the program directs the attorneys for each party, within fifteen days of selection of the case for mediation, to submit to the mediator a "position paper" no longer than ten pages that states the party's views on the key facts and legal issues in the case and includes a statement of motions filed in the appeal and their status. The order also directs the attorneys to inform the mediator of all motions filed or decided while mediation is under way and to provide them to the mediator on request. The order makes clear that attorneys must not file these mediation statements and other documents with the Clerk's Office and need not serve them on opposing counsel, unless the mediator so directs.

**Mediation Sessions**

*Nature of sessions*

Mediation usually begins at a joint meeting attended by the mediator, attorneys, and, whenever possible, the parties themselves. The mediator explains how the mediation is to be conducted and then asks each party to explain its views on the matter in dispute. The appellant typically will speak first. The mediator usually refrains from asking questions, or allowing participants to ask questions of one another, until all parties have had an opportunity to speak. Then the mediator often meets individually (caucuses) with each side to explore more fully the needs and interests underlying stated positions and to help parties explore settlement options. Additional meetings may be held to explore settlement possibilities or to help the parties finalize an agreement.

*Party participation*

The court requires that attorneys for the parties attend all mediation sessions. The court also strongly urges that all party-clients attend each mediation session. Each party represented must have an attorney or another person present with actual authority to enter into a settlement agreement during the mediation session. The order establishing the program authorizes mediators to communicate directly with a party to request attendance as long as the mediator fully discloses such communication to that party's attorney.

Someone with settlement authority need not attend mediation sessions in cases involving the United States or District of Columbia governments, as long as such a person can be reached by telephone during the sessions. When settlement authority rests with an assistant attorney general (or its equivalent) or an official at a higher rank, with members of an independent agency, or with District of Columbia officials above the rank of corporation counsel, the order waives the requirement to be reachable during the mediation session unless the mediator specifically requires such availability in writing after reviewing the mediation papers.

*Number and length of sessions*

Initial mediation sessions usually last several hours. The mediator may schedule additional meetings or place follow-up telephone calls to attorneys. Follow-up discussions may continue for days or weeks.

The complexity of cases involving the federal government or other government units as parties, including cases on review from a federal agency, frequently requires significant amounts of mediator time. The mediator often must conduct several mediation sessions and multiple follow-up phone calls.

*Fees*

Neither the program nor the mediators charge parties or attorneys for the costs of the mediation, including the mediator's services.

*Post-mediation procedures*

No party is bound by anything said or done at a mediation session unless a settlement is reached.

If mediation results in a settlement, attorneys for the parties file a stipulation of dismissal or other appropriate stipulation within thirty days after settlement, unless the attorneys move for a short extension.

If mediation does not resolve a case, the case remains on the docket and proceeds as if mediation had never occurred. Although the mediator notifies the Office of the Circuit Executive of the result, this information is never provided to the judges.

### ***Other Rules, Policies, or Practices***

#### *Effect on appellate proceedings*

All cases in mediation remain subject to normal scheduling for briefing and oral argument. If the parties agree that a change in the schedule would further the progress of the discussions, they may file a joint motion to defer or postpone briefing or oral argument, representing in the motion that the mediator (not identified by name) concurs in the request. The court has delegated to the clerk of court the authority to decide such motions and normally grants them. Attorneys may not file any other motions that refer to the fact that the case is in mediation.

#### *Confidentiality*

The order establishing the program states that the “content of mediation discussions and proceedings, including any statement made or document prepared by any party, attorney, or other participant, is privileged and shall not be disclosed to the Court or construed for any purpose, in any proceeding in any forum, as an admission against interest.”<sup>17</sup> The order thus bars the parties from filing any motion or other document with the court that would disclose information about the content of the mediation or whether it has been concluded. Parties and mediators may not tell the court about parties’ requests to submit cases to mediation or file their pre-mediation position papers with the court. The order also bars parties from using any information obtained as a result of the mediation process as a basis for any motion other than one about the briefing or argument schedule.

Attorneys in the Circuit Executive’s and Clerk’s Offices do not confer with judges in selecting cases for mediation. The mediators and the

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17. Order Establishing the Appellate Mediation Program, effective Nov. 29, 1988, as amended.



Circuit Executive's Office maintain strict confidentiality about the content of each mediation, do not communicate with the court about what happens during mediation sessions, and do not file in court files the papers generated by the mediation process. However, they may, with the litigants' consent, identify for the public or the court individual cases that have been resolved through mediation as examples of the Appellate Mediation Program's success.

#### *Sanctions*

The order establishing the program states that failure of attorneys to attend sessions "may result in sanctions."

#### *Recusal*

The Appellate Mediation Program requires mediators to recuse themselves from any cases in which they perceive a conflict of interest. The director of dispute resolution asks the mediators to check for conflicts when a case is assigned to them and encourages them to recuse themselves when they or their law firms have a current or prior professional affiliation with any party; when they have a close relationship with one or more of the attorneys in the case; or when there is any other reason that might make their service as a mediator in a particular case inappropriate. The director of dispute resolution has the discretion to substitute a new mediator if any party objects to the mediator initially appointed by the director. The court has no written recusal rules for situations in which the director of dispute resolution serves as a mediator or co-mediator in the program other than the Code of Conduct for Judicial Employees.

#### *Immunity*

The Court of Appeals for the District of Columbia Circuit has held that a volunteer case evaluator in the District of Columbia Superior Court ADR program has absolute quasi-judicial immunity while performing official duties. *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

#### *Reports and evaluation*

The mediators complete an evaluation form for each case mediated, whether or not the case is settled in mediation. In addition, each attor-

## MEDIATION & CONFERENCE PROGRAMS IN THE COURTS OF APPEALS

ney participating in mediation is asked to complete an evaluation form. These forms provide information about the issues in the case, the amount of time spent and number of meetings held during the mediation, the type of assistance provided by the mediator, and the outcome of the talks. From these forms, the Office of the Circuit Executive prepares periodic reports for internal court use about the program, including program settlement rates.

### ***For More Information***

Contact Nancy E. Stanley, Director of Dispute Resolution, U.S. Court of Appeals for the District of Columbia Circuit, 333 Constitution Ave., N.W., Room 4826, Washington, DC 20001-2866, telephone: 202-216-7350.

Website: [www.cadc.uscourts.gov](http://www.cadc.uscourts.gov) (Click on “Mediation Programs”)

### **Federal Circuit: Appellate Mediation Program**

The U.S. Court of Appeals for the Federal Circuit began the Appellate Mediation Program in 2005. The court's Circuit Mediation Office consists of the circuit mediation officer and support staff that the court deems necessary. Organizationally, the office is in the court's Office of the Clerk and Circuit Executive. The circuit mediation officer administers the program under the Appellate Mediation Program Guidelines, which are available from the Clerk's Office and on the court's website at [www.fedcir.gov/#mediation](http://www.fedcir.gov/#mediation).

Court personnel report that the circuit mediation officer has extensive experience as an attorney and as one of two chief deputy clerks in the Clerk's Office of the Federal Circuit. The circuit mediation officer also has had training in mediation. In addition, he has had on-the-job experience and training with respect to the design and implementation of a mediation program.

In 2005 and 2006, the court asked, and intends to ask periodically in subsequent years, the Federal Circuit Bar Association to provide the court with a list of distinguished attorneys and academicians with expertise in the substantive areas of the court's jurisdiction, as well as attorneys with experience mediating. The candidates are encouraged, but not required, to be members of the bar of the court. The court selected a roster of mediators from the list, and the court intends to add to the roster in subsequent years. The goal is to have a roster of mediators who will have expertise in a cross section of the court's jurisdiction. The court accepts, on a rolling basis, applications for mediator positions on the roster.

Court personnel report that the private mediators on the court's roster are distinguished, experienced attorneys and academicians. Most, if not all, of these mediators have expertise in one or more of the subject matters that are within the jurisdiction of the court, as well as experience mediating. The mediators the court selects for its roster must not be in the active practice of law. Mediators are not paid for their services but will be reimbursed by the court for minor out-of-pocket expenses, such as photocopying costs, telephone charges, facsimile charges, and transportation to the courthouse.

The program provides a confidential, risk-free opportunity for parties to resolve their disputes with the help of an experienced neutral, third-party mediator, selected from the court's roster. The purpose of the program is to help the parties achieve settlement. Although party participation in the program is voluntary, the program was established with the expectation that the parties' attorneys will be receptive to exploring mediation.

The court will periodically assess the program, and it may be extended, modified, discontinued, or made permanent. A three-judge committee appointed by the chief judge oversees and monitors the program's operations. The committee will suggest changes to the program's procedures, as the committee deems necessary.

During the program, the committee and the circuit mediation officer will have ongoing discussions about the course of mediation efforts with the view of revising the program as necessary and appropriate. The court established its voluntary Appellate Mediation Program by a per curiam order dated August 1, 2005, under Federal Rule of Appellate Procedure 33.

### ***Selecting Cases for Mediation***

#### *Eligible case types*

All cases in which the parties are represented by counsel are eligible for the program, with the exception of pro se cases, mandamus petitions, ex parte appeals from the Patent and Trademark Office, anti-dumping and countervailing duty cases, International Trade Commission cases, Temporary Emergency Court of Appeals (TECA) legacy cases, and petitions for review of the Secretary of Veterans Affairs' rulemaking.

According to procedures in effect at the time the program began in 2005, the circuit mediation officer determines those cases appropriate for mediation. The circuit mediation officer then contacts attorneys in those cases to determine whether the appeal and, if pertinent, the cross-appeal present any jurisdictional defects. When speaking with attorneys, the circuit mediation officer determines if the case is a good candidate for mediation and if the parties agree to participate in the mediation program. If there are no apparent jurisdictional defects and if all the parties in a case agree that mediation would be useful, the circuit mediation officer usually refers the case and those parties to an

outside mediator. If at the outset it appears to the circuit mediation officer that mediation would not be fruitful, then court mediation efforts will cease.

At any time during a case pending in the Federal Circuit, attorneys for two or more parties may confidentially jointly request that a case be included in the mediation program. A Confidential Joint Request to Enter Mediation Program form is available from the Clerk's Office and on the court's website. That request will not appear on the court's docket sheet and will be directed to the circuit mediation officer. If there are no apparent jurisdictional defects and if all the parties in a case file a joint request form, the circuit mediation officer usually refers the case and those parties to an outside mediator.

For each case mediated under the program, the circuit mediation officer must select a mediator from the court's roster with the following exception. If the attorneys jointly propose a mediator not on the roster, the circuit mediation officer has the option of appointing that mediator, provided the parties agree to pay any out-of-pocket expenses of the mediator and the mediator agrees to serve pro bono.

*Documents reviewed*

The circuit mediation officer may review the notice of appeal, the trial tribunal's docket sheet, the decision of the trial tribunal, the court's docketing statement, and briefs to assist him in selecting cases for mediation.

The docketing statement is a two-page form to be completed by all attorneys. The Clerk's Office includes the form in the docketing packet sent to the attorneys after a case is docketed. The attorneys must complete the form in duplicate and return it to the Clerk's Office within fourteen days of docketing. The docketing statement is not part of the formal mediation process but will assist the circuit mediation officer with the selection process. One copy is retained in the Clerk's Office case file, and the other copy is transmitted to the circuit mediation officer. The form asks for

- name(s) of the party or parties the submitting attorney represents;
- case information and relief awarded in the case below;
- any related cases pending before the Federal Circuit;

- a brief statement of the issues to be raised on appeal in the case at hand;
- whether the attorney believes that the case may be amenable to mediation; and
- information relevant to the inclusion of the case in the court's Appellate Mediation Program.

*Judicial selection*

The court has no policy concerning judges or judicial panels referring cases or matters to the circuit mediation officer for mediation.

***Scheduling the Mediation Sessions***

*Scheduling process*

Cases are selected for mediation as early as possible in the appellate process and in no event after a case has been heard or submitted to a panel of judges on the merits. The circuit mediation officer generally selects cases for mediation before the first brief is filed. The program may later expand to cases in which briefs have been filed.

The circuit mediation officer generally expects the mediator and the parties to complete the mediation in 90 days. At the outside, mediation must be completed within 150 days of the date of the case's referral to the program.

*Mediation sites*

Mediation sessions may be held in the courthouse if the mediator so desires. The court intends that at least one mediation session will be an in-person one with party principals and attorneys present. The court's mediation guidelines do not discuss the site of subsequent follow-up sessions.

*Mediation submissions*

The court's Appellate Mediation Program does not require written mediation statements from the parties, as some other mediation programs do.

### ***Mediation Sessions***

#### *Nature of sessions*

According to project guidelines, the mediator is not bound by a defined formula or approach to mediating a case. The mediator may conduct the mediation as he or she deems appropriate. Mediation will cease at any time the mediator concludes that further efforts will not be fruitful.

The purpose of mediation is settlement of the case. At least for purposes of the program, the mediator will not be asked to narrow the issues on appeal. The extent to which the parties agree to narrow the issues will be reflected in their briefs.

#### *Party participation*

Participation in the program is voluntary. Once the Circuit Mediation Office schedules a case for mediation, the court requires that attorneys attend all sessions and that, at least one time during the process, the attorneys and the parties (or party representatives with actual settlement authority) meet face to face.

If the U.S. government is one of the parties, the mediator may waive this requirement by allowing a senior government attorney without authority to settle to attend if someone with settlement authority can be reached by telephone during the mediation session. If government settlement decisions must be made collectively, then a senior attorney who is authorized to negotiate on behalf of the government and make recommendations concerning settlement must be present. When settlement authority rests with an official at the rank of assistant attorney general, its equivalent, or higher, the requirement that the official be reachable during the mediation session may be waived.

#### *Fees*

The program does not charge parties or attorneys for the costs of the mediation program, the mediation process, or the mediators. The private mediators serve without compensation. The court reimburses mediators for out-of-pocket expenses.

*Post-mediation procedures*

At the conclusion of the mediation process in an individual case, the mediator will notify the circuit mediation officer of the resolution of the mediation.

If, following mediation, settlement is reached, the settlement agreement must be in writing and binding on all parties. In that event, the appellant or the parties jointly must file, with the Clerk's Office, a motion to dismiss the appeal voluntarily or other appropriate motion. If the parties do not settle after mediation, the case proceeds as if mediation had not occurred.

***Other Rules, Policies, or Practices***

*Effect on appellate proceedings*

While cases in mediation remain subject to the normal scheduling for briefs and oral argument by the Clerk's Office, attorneys are free to file a consent motion for an extension of time pursuant to Federal Circuit Rule 27(h)(4) stating that "settlement" is the reason for the extension (without a mention of mediation in the motion). If the mediator and the parties believe that multiple mediation sessions are required, that the filing of a brief or the scheduling of oral argument would interfere with good-faith settlement efforts, and that additional extensions of time are needed, the parties may file a joint motion for additional extensions. A motion for an extension, beyond the time granted under Rule 27(h)(4), will be referred to the circuit mediation officer. The court has given him the authority to grant motions for extensions, upon the showing of good cause, up to a date that is no more than 150 days after the case was referred to the mediator.

To maintain the confidentiality of the mediation process, a joint motion for an extension of time for mediation purposes (beyond a Rule 27(h)(4) motion) must be filed in a public version and a version stamped "Direct to Circuit Mediation Officer." The public version should move for an extension of time on the basis of settlement discussions without reference to mediation. The Clerk's Office places the public version in the public file and enters the joint motion on the docket sheet. The circuit mediation officer's version must state that the parties are in mediation, must state that the mediator agrees with the need for an extension, and must include reasons for the extension. The



circuit mediation officer will rule on the motion under the name of the clerk. The Clerk's Office will enter the ruling on the docket sheet in the Clerk's Office.

*Confidentiality*

The circuit mediation officer will not communicate with the judges about the content or substance of any mediation proceedings. The circuit mediation officer may discuss the overall effectiveness of the Appellate Mediation Program with the court, however. In connection with the court's evaluation of the Appellate Mediation Program, the circuit mediation officer may disclose statistical data and other summary information on the program if they are needed to assess the program. During the program, the committee will from time to time discuss the program with the circuit mediation officer with the aim of revising it as appropriate and necessary. Generally, communications concerning statistical information are not prohibited. Papers generated by the mediation process will not be included in the Clerk's Office files except as noted in connection with motions for extensions of time.

The content of mediation discussions and proceedings is confidential, as explained in the Appellate Mediation Program Guidelines. Mediators in the program are obligated to protect the confidentiality of all mediation proceedings and are prohibited from complying with subpoenas or other requests for information about cases mediated under the program. Mediators must not communicate with any court officials, except the circuit mediation officer, about what transpires in any mediation session. Communications with the court about mediation matters are limited to those between the mediator and the circuit mediation officer.

The court expects participating attorneys to refrain from commenting publicly about the fact that a case is or was in mediation or from disclosing any information about the mediation to anyone who is not or was not directly or indirectly a party to the proceedings. Nevertheless, if all attorneys and parties involved in a particular mediation agree in writing to public disclosure of the mediation by the attorneys or the parties, and the mediator consents, disclosure is not prohibited. Even with such consent, attorneys should not include mention of mediation in their briefs or at oral argument.

*Sanctions*

Any party, attorney, or mediator who fails to materially comply with any of the provisions of the Appellate Mediation Program Guidelines may be subject to appropriate sanction by the court.

*Recusal*

Before final selection of a mediator, the circuit mediation officer will inquire about conflicts of interest. The mediator must not represent either party for any purpose, must disclose any past relationships with attorneys, attorneys' firms, or the parties, and must disclose any potential conflicts. Mediators are required to decline from participating in any cases in which there is a conflict of interest, in which they perceive a conflict, or in which a reasonable person would perceive a conflict. The Code of Conduct for Judicial Employees governs the circuit mediation officer's conduct.

*Reports and evaluation*

During the program, the committee and the circuit mediation officer will have ongoing discussions about the course of mediation efforts with the aim of revising the program as necessary.

At the conclusion of the mediation process in each case under the program, the mediator must notify the circuit mediation officer of the resolution of the mediation. The circuit mediation officer will then send a questionnaire about the effectiveness of the program to the attorneys and the mediator, inviting their candid, confidential responses. The questionnaire responses must not be given to the judges of the court or anyone else other than the senior staff attorney of the Federal Circuit, who will summarize the responses. The senior staff attorney will send the summary to the court for purposes of assessing the program; the summary must not reveal any details about or names of specific cases or persons.

***For More Information***

Contact the Circuit Mediation Officer, U.S. Court of Appeals for the Federal Circuit, Howard T. Markey National Courts Building, Lafayette Square, 717 Madison Place, N.W., Washington DC 20439, telephone: 202-312-5521.

Website: [www.fedcir.gov/#mediation](http://www.fedcir.gov/#mediation)

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