



**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**NOTICE AND OPPORTUNITY FOR COMMENT ON PROPOSED  
AMENDMENTS TO THE CIRCUIT RULES**

Pursuant to 28 U.S.C. § 2071(b), comments are invited on the proposed changes to Ninth Circuit Rule 33-1 and the Committee Advisory Note to Rule 33-1.<sup>1</sup> The revisions are intended to emphasize the confidential nature of the settlement process.

Please direct comments to Molly C. Dwyer, Clerk of Court at [Molly\\_Dwyer@ca9.uscourts.gov](mailto:Molly_Dwyer@ca9.uscourts.gov) and Cole Benson, Supervising Deputy Clerk at [Cole\\_Benson@ca9.uscourts.gov](mailto:Cole_Benson@ca9.uscourts.gov). Comments must be submitted no later than August 20, 2012.

**Proposed Amended Ninth Circuit Rule 33-1 Circuit Mediation Office**

- (a) **Purpose.** The function of the Circuit Mediation Office is to facilitate the voluntary resolution of cases.
- (b) **Attendance at Mediation Conferences.** A judge or circuit mediator may require the attendance of parties, and counsel at a conference or conferences to explore settlement-related issues.
- (c) **Confidentiality.** To encourage efficient and frank settlement discussions, the Court establishes the following rules to achieve strict confidentiality of the mediation process.

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<sup>1</sup> The text of the existing rule follows the proposed revised rule.

- (1) The Circuit Mediators will not disclose mediation related communications to the judges or court staff outside the mediation unit.
- (2) Documents, e-mail and other correspondence sent only to the Circuit Mediators or to the mediation unit are maintained separately from the court's electronic filing and case management system and are not made part of the public docket.
- (3) Should a Circuit Mediator confer separately with any participant in a mediation, those discussions will be maintained in confidence from the other participants in the settlement discussions to the extent that that participant so requests.
- (4) Any person, including a Circuit Mediator, who participates in the Circuit Mediation Program must maintain the confidentiality of the settlement process. The confidentiality provisions that follow apply to any communication made at any time in the Ninth Circuit mediation process, including all telephone conferences. Any written or oral communication made by a Circuit Mediator, any party, attorney, or other participant in the settlement discussions:
  - (A) except as provided in (B), may not be used for any purpose except with the agreement of all parties and the Circuit Mediator; and
  - (B) may not be disclosed to anyone who is not a participant in the mediation except
    - (i) disclosure may be made to a client or client representative, an attorney or co-counsel, an insurance representative, or an accountant or other agent of a participant on a need-to-know basis, but only upon receiving assurance from the recipient that the information will be kept confidential;
    - (ii) disclosure may be made in the context of a subsequent confidential mediation or settlement conference with the agreement of all parties. Consent of the Circuit Mediator is not required.
- (5) Written settlement agreements are not confidential except as agreed by the parties.

(6) This rule does not prohibit disclosures that are otherwise required by law.

(d) **Binding Determinations by Appellate Commissioner.** In the context of a settlement or mediation in a civil appeal, the parties who have otherwise settled the case may stipulate to have one or more issues in the appeal submitted to an appellate commissioner for a binding determination. (*current language*)

***CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 33-1***

***(a) Mediation Conferences.*** *The Circuit Mediation Office is staffed with experienced attorney mediators and is an independent unit in the Court. In any case, the Court may direct that a conference be held, in-person or over the telephone, with counsel, or with counsel and the parties or key personnel, including insurance representatives. A judge who conducts a settlement conference pursuant to this rule will not participate in the decision on any aspect of the case, except that he or she may vote on whether to take a case en banc. (Rev. 12/1/09)*

*Requests by counsel for a conference will be accommodated whenever possible. Parties may request conferences confidentially, either by telephone or by letter directed to the Chief Circuit Mediator. (Rev. 12/1/09)*

*The briefing schedule established by the Clerk's office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's office pursuant to Circuit Rule 31-2.2.*

*Counsel should discuss settlement with their principals prior to a conference scheduled under this rule. (Rev. 12/1/09)*

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***(c) Binding Determinations by Appellate Commissioner.*** ~~*In the context of a settlement or mediation in a civil appeal, the parties may stipulate to having one or more issues in their appeal referred for a binding determination by an Appellate Commissioner. Where the parties enter into such a stipulation as set forth at (d) above, the matter may be handled with abbreviated and accelerated briefing and a guaranteed opportunity for in-person or telephonic oral argument before the Appellate Commissioner. The Appellate Commissioner will issue a determination and, if requested, a written statement of reasons. The determination will have no precedential effect and will be final and nonreviewable. Cases will ordinarily be*~~

*referred to the Appellate Commissioner through the Court's mediation program. In some instances, the Court's pro se unit may also alert parties to the availability of this program. For further information, please contact the Circuit Mediation Office at (415) 355-7900. (New 7/01)*

**Circuit Rule 33-1. Mediation Office -- Appeal Conferences**

*(Rev. 12/1/09)*

The primary purpose of a prehearing conference shall be to explore settlement of the dispute that gave rise to the appeal. The judge or court mediator may require the attendance of parties and counsel. Information disclosed to the judge or court mediator in settlement discussions shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the settlement program participants. *(Rev. 7/94)*

In the context of a settlement or mediation in a civil appeal, the parties who have otherwise settled the case may stipulate to have one or more issues in the appeal submitted to an appellate commissioner for a binding determination.  
*(New 7/01)*