Circuit Mediation Program Website

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

A Message From The Chief Judge

For over twenty years, the Ninth Circuit Court of Appeals has operated a court mediation and settlement program. During that time, experienced and skilled circuit mediators have worked cooperatively with attorneys and their clients to resolve a variety of disputes. The disputes mediated range from the most basic contract and tort actions to the most complex cases involving important issues of public policy. The mediators have even successfully resolved death penalty cases. No case is too big or too small for mediation in the court's program.

The court offers this service, at no cost, because it helps resolve disputes quickly and efficiently and can often provide a more satisfactory result than can be achieved through continued litigation. Each year the mediation program facilitates the resolution of hundreds of appeals.

The judges of the Ninth Circuit are extremely proud of the professional work of the nine circuit mediators, all of whom are full-time employees of the court. They are highly experienced and qualified attorneys from a variety of practices and have extensive training and experience in negotiation, appellate mediation, and Ninth Circuit practice and procedure.

Although the mediators are court employees, they are well shielded from the rest of the court's operations. The court has enacted strict confidentiality rules and practices; all who participate in one of the court's mediations may be assured that what goes on in mediation stays in mediation.

Experience has shown that counsel and litigants will find professional, efficient and effective mediation services from the court's highly regarded Circuit Mediation Office.

Alex Kozinski, Chief Judge

MEDIATION IN THE NINTH CIRCUIT

The court established the Ninth Circuit Mediation Program pursuant to Federal Rule of Appellate Procedure 33 and Circuit Rule 33-1 to facilitate settlement of cases on appeal.

A. How Cases Are Included in the Program

Almost all civil cases in which the parties are represented by counsel are eligible for the Circuit Mediation Program. Cases come to the program in a variety of ways, primarily through a Settlement Assessment Conference initiated by the court. On occasion, cases are referred by panels of judges or by the Appellate Commissioner. Counsel may also request that an appeal be included in the program.

1. The Settlement Assessment Conference

The mediators look to a document called the Mediation Questionnaire to help determine whether a case might be an appropriate candidate for inclusion in the mediation program. Appellants are required to file the Mediation Questionnaire in the Ninth Circuit within 7 days of the docketing of an appeal or a petition for review. Appellees may file a Mediation Questionnaire, but are not required to do so. See Ninth Circuit Rules 3-4 and 15-2 for a description of cases excluded from the program. A fillable version of the Mediation Questionnaire is available on this court's website, www.ca9.uscourts.gov, under *Forms*.

Following the mediator's review of the Mediation Questionnaire, in the majority of cases, the court will order counsel to participate in a telephonic Settlement Assessment Conference with a circuit mediator to exchange information about the case, discuss options the mediation program offers, and look at whether the case might benefit from inclusion in the mediation program. The initial assessment conference typically lasts between 30 minutes and an hour and includes a discussion of the case's litigation and settlement history. At the conclusion of the call, counsel and the mediator will decide whether further discussions would be fruitful. If counsel and the mediator agree that further settlement discussions are not warranted, the mediator can discuss with counsel any procedural or case management issues that may require attention, such as changing the briefing schedule, consolidating cases, or other procedural issues. As long as counsel are in

agreement, the mediator will enter an order memorializing the procedural agreements and indicating that the case will not be included in the Mediation Program. Additional follow up telephone calls may be necessary before a consensus is reached about whether a case will be included in the mediation program.

If there is a consensus to proceed with mediation, the appeal will be selected for inclusion in the Mediation Program. See The Mediation Process, below.

2. Panel Referrals

Approximately ten percent of the mediation program's cases come from referrals from panels of judges and from the Appellate Commissioner. Judges usually refer cases after oral argument, but before they submit the matter for decision. Sometimes the panel will inquire whether counsel believe such a referral would be beneficial; other times the panel will simply refer the case. The Appellate Commissioner typically refers attorneys' fees matters. Once a case has been referred, the assessment process generally follows the same process described above.

3. Requests From Counsel

Counsel may contact the Chief Circuit Mediator if they would like to have an appeal considered for the program. The request will be kept confidential, if counsel so requests. Once a request has been received, the assessment follows the same process described above.

B. What Makes A Case A Good Candidate for Appellate Mediation?

In determining whether a particular case is appropriate for mediation, counsel, the parties, and the mediator will consider many factors, including the following:

- the parties' interest in participation;
- the certainty, or the possibility, that a Ninth Circuit decision will not end the dispute;
- a desire to make or avoid legal precedent;
- the existence of other appeals that raise the same legal issue;

- the desire to preserve a business or personal relationship;
- the existence of non-monetary issues;
- the possibility that a creative resolution might provide better relief than a court could fashion;
- a history of strong feelings that may have prevented effective negotiations;
- the possibility that one or all parties could benefit from a fresh look at the dispute;
- a desire to open and improve communication between the parties.

Settlement discussions through the program are not limited to the case that is on appeal in the Ninth Circuit. As long as all parties are in agreement, the discussions may include additional parties and related cases in other courts, as well as issues that are not part of any litigation.

C. The Mediation Process

In each case selected for inclusion in the mediation program, the mediator will work with counsel to construct an effective, cost-sensitive settlement process. After the initial conference, the mediator may conduct follow-up conferences with counsel and the parties, in separate or joint sessions. These follow-up sessions may be held in-person or on the telephone. In-person mediations may be held at the court or, in appropriate cases, in other locations. See The In-Person Mediation, below for more information regarding in-person mediations.

Working with the mediator, the parties will determine what issues will be discussed in the mediation and how those discussions will proceed. In some cases, the focus of the mediation will be on the legal issues and possible outcomes of the appellate process. In other cases, it may be on rebuilding relationships or joint problem solving. Sometimes the mediator will facilitate direct discussions between the parties; at others he or she will act as an intermediary, shuttling back and forth between them. The mediator will try to resolve these various process issues in a manner that best serves the interests of the mediation participants.
Regardless of the content of the discussions, the mediator will facilitate negotiations among the parties to help them devise a mutually acceptable resolution. The mediator will ask questions, reframe problems, facilitate

communication, assist the parties to understand each other and help identify creative solutions. The mediator will not take sides, render decisions, offer legal advice or reveal confidences.

Settlement occurs when the parties find a resolution that is preferable to continued litigation. Factors that frequently favor settlement over litigation include speed, cost, certainty, control, creativity and flexibility.

D. The In-Person Mediation

When all counsel and the mediator are in agreement, the mediator will schedule an in-person mediation. It may be held at the court or, in appropriate cases, in other locations. In planning the mediation, counsel should expect to address many of the following questions:

- Who is the appropriate decision maker on your side?
- Who might be the appropriate decision maker on the other side(s)?
- If your side is a governmental entity, who is the person most likely to be able to "sell" a negotiated solution to the appropriate decision-making body?
- Are there any non-parties whose presence at the mediation is necessary to reach a resolution? (For example, insurance carriers, lien-holders, spouses, experts, or other stakeholders or advisors.)
- What information do you need to make the mediation productive?
- What information might the other side need to make the mediation productive?
- What does the mediator need to know to prepare? What's the best way to get the mediator prepared?
- Does your client have any particular sensitivities of which the mediator should be aware?
- Is there any related litigation that should be included?
- What location would be most convenient?
- Do you or your client have any calendar limitations? (For example, scheduled vacations, or long trials.)
- Does any participant have health or mobility issues that might need to be accommodated?

E. Preparing for Mediation

The most effective and efficient mediations are those in which counsel and their clients are fully prepared. Full preparation means understanding the case on a number of different levels. First, counsel will want to make sure they know the standard of review on appeal, understand the relevant law and facts, and have a good sense of both how the appeal fits into their client's litigation strategy and how the litigation itself serves the client's larger goals.

In addition, the following questions may be helpful to counsel and their clients in preparing for mediation:

1. Mediation works best when all participants know what really matters to them. What are the key needs and interests of yours that, if satisfied, would allow you to resolve this matter? Key needs or interests could be, for example, certainty, closure, economic security, avoidance of legal precedent, avoidance of future litigation, fairness, respect, understanding or institutional change.
2. What are the key interests of the other parties to the dispute?
3. Assuming anything is possible, what would you like to talk about at the mediation? What do you think the other parties would want to discuss?
4. What choices do you remember making in the events that gave rise to the dispute? How might your actions have been misunderstood by the other parties to the dispute?
5. What could you find out at mediation that might help you understand the actions and choices of the other parties in this matter?
6. What is the emotional tenor of this dispute? How might you best deal with your own emotions? How might the mediator help the parties handle their emotions?
7. Consider what will happen if you win the appeal. Consider what will happen if you lose the appeal. Will the appeal end the litigation? Might you or another party file bankruptcy? How much will it cost to pursue the appeal and subsequent proceedings, if any?
8. What practical concerns inform your thoughts about how to resolve this matter? Practical concerns might include tax consequences, precedential

implications, satisfaction of lienholders, cash flow issues or attorney compensation.

9. What other concerns might be relevant to your thinking about how to resolve this case? For example, are there issues of principle for you or the other parties to the dispute?

10. What would it feel like to have the case proceed without a negotiated resolution? And end favorably to you? Unfavorably?

11. Will ending the litigation resolve the entire dispute? Might you have further contact with other parties to this matter? Do you have common business interests or personal associations?

12. Can you imagine a resolution that would meet the needs and interests of all parties to the dispute? What would it feel like to have the dispute settled in a manner that was satisfactory to all parties? Are there other people to whom you'd want to be able to explain your decision to settle this matter?

CONFIDENTIALITY

Circuit Rule 33-1

(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.

(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.

IMMIGRATION

The court has adopted the selective use of mediation to help process its large number of immigration cases. See Order Setting Assessment Conference in Immigration Case in Relevant Rules, Forms and Orders section, below. Although immigration cases are often seen as all-or-nothing legal disputes, experience has shown that some immigration cases are very good candidates for settlement discussions. Good candidates for mediation include:

- Cases in which it seems likely that more proceedings are needed before the BIA, such as when the BIA did not consider all claims or issues, or where subsequent case law suggests that the Ninth Circuit will remand the case to the BIA for further consideration.
- Cases in which there have been developments in petitioner's life that provide the basis for a motion to reopen proceedings to apply for adjustment of status. The parties may be able to agree to file a joint motion to reopen.
- Cases in which a mediation conference call provides a useful forum for clarifying the procedural posture of the case (e.g., when motions are pending before the administrative agency), or exploring all possible forms of relief (e.g., identifying that petitioner is a member of a class in a class action or that petitioner may be covered by a new statute).
- In rare cases where the equities are such that the parties agree to leave the removal order in place, but the government agrees not to enforce it so long as petitioner does not violate certain conditions.
- Cases where petitioners might be eligible for "Dream Act" or other forms of relief involving deferred action, prosecutorial discretion or administrative closure.

FREQUENTLY ASKED QUESTIONS

1. Are appellees/respondents required to file an MQ?

No.

2. Is there a deadline for appellees to file the MQ?

No, although soon after appellants file their MQ is recommended.

3. Who do I contact if I need help electronically filing the MQ or any other documents? Do I use the same user ID and password that I use in the district court?

If you need help with electronic filing the MQ or any other pleading, email the help desk: CMECF_ca9help@ca9.uscourts.gov.

No. The Ninth Circuit electronic filing system is completely different from that of the district court. New registration is required along with a new user ID and password. Any questions about passwords or user IDs should be directed to the ECF help desk.

4. If counsel is not registered with CM/ECF and the MQ is due soon, can the MQ deadline be extended and, if so, by how many days?

We recommend contacting the Mediation Office to ask for an extension. The length of an extension depends on the circumstances, but generally one to two weeks can be expected.

5. What is a Settlement Assessment Conference?

After reviewing the Mediation Questionnaire, the mediators select cases for a telephonic Settlement Assessment Conference, the purpose of which is to engage counsel in a discussion about whether the case might benefit from settlement efforts. The conference includes a discussion of the case's history, counsel's views on whether mediation would be appropriate, and the mediator's explanation of possible settlement procedures. During the conference (or sometimes during a subsequent follow-up conference),

counsel and the mediator will decide whether to include the case in the mediation program.

6. Who is expected to participate in a Settlement Assessment Conference*?*

The court expects that all counsel intending to file briefs in the case participate in the conference. If more than one attorney is representing a party, then the attorney with the most direct relationship with the client should participate. Co-counsel and other attorneys in the principal counsel's firm may attend if counsel believes their presence would be beneficial. Clients are not expected to participate in the initial assessment conference.

7. Is attendance at the Settlement Assessment Conference mandatory?

Yes. Attendance by counsel at the initial Settlement Assessment Conference is ordered by the court and is mandatory.

8. Do clients participate in the Settlement Assessment Conference and other telephone conferences?

Clients are discouraged from participating in the initial Settlement Assessment Conference call. Depending upon the case, clients may participate in subsequent phone conferences, and will always participate in in-person sessions, but the initial Settlement Assessment Conference is intended for counsel only.

9. What if counsel is not available for the Settlement Assessment Conference as scheduled?

The mediation program will reschedule the initial Settlement Assessment Conference if counsel has a pre-existing obligation. Counsel should contact the mediation office by telephone [415-355-7900], fax [415-355-8566], or email (see Assessment Conference order) to request that the case be rescheduled. Ideally, counsel will have contacted opposing counsel first, and will include with the request a list of alternate dates and times available to all counsel.

10. Who initiates the call?

In most cases, the mediator will initiate the call to all counsel listed in the court's order setting up the conference. On occasion, the call will be scheduled as a dial-in call, the instructions for which will be set forth as a confidential attachment accessible only to counsel of record. If the order contains incorrect information, it is important that counsel correct this information before the call.

11. How long will the conference last?

The initial assessment conference typically lasts from 30 to 60 minutes. Subsequent telephone conferences can vary in length, depending upon the nature and scope of the discussions.

12. Does a mediation statement need to be submitted?

No mediation statement is required for the initial assessment conference. If the case progresses further in the mediation process, the mediator may request that counsel submit mediation statements.

13. What does the mediator know about the appeal and what documents are available to the mediator before the Settlement Assessment Conference takes place?

Prior to holding the Settlement Assessment Conference, the mediator will have reviewed the Mediation Questionnaire filed by the appellant, the Ninth Circuit docket, and the lower court order from which the appeal stems. Sometimes the Mediation Questionnaire and the order appealed from contain a great deal of information, other times they contain very little. In all instances, the mediator will give counsel the opportunity to explain their view of the case.

14. Who are the mediators?

The mediators are all experienced attorneys who come from a variety of backgrounds. All are highly trained in mediation and negotiation. The mediators are employees of the court and have been mediating for the court

for ten to twenty years or more. See The Ninth Circuit Mediators, below.

15. Are mediators assigned a particular appeal according to its subject matter?

No. Appeals and petitions for review are assigned to mediators randomly, regardless of subject matter, with two exceptions. All Washington district court cases and all petitions for review related to the Bonneville Power Administration are assigned to Chris Goelz, and all petitions for review related to certain decisions of the Federal Energy Regulatory Commission are assigned to Lisa Jaye.

16. Can the parties select a particular mediator from the program?

No, with the exceptions/listed particular in the answers to question 15, cases are assigned to the individual mediators in a random fashion. A mediator will, however, handle all related cases. In the event that related matters have been overlooked, requests to send them to the mediator with the earliest appeal are encouraged.

17. What if the parties wish to hire a private mediator?

If parties wish to hire a private mediator, the circuit mediator will manage the appeal (including adjustment of the briefing schedule) to accommodate the private mediation. The Ninth Circuit does not refer cases to private mediators, nor does it use a panel of private volunteer mediators.

18. Can the mediators move or vacate the briefing schedule?

Yes. The mediators can vacate or extend the briefing schedule, but will do so only if all counsel are in agreement. If counsel cannot agree, a motion must be filed.

19. Does involvement of an appeal in the mediation program slow down the disposition of the appeal?

No. Typically if a case is mediated, the mediator (with the agreement of counsel) will vacate the briefing schedule. If the case does not settle, the

mediator will establish a new briefing schedule. Doing so does not delay disposition of the appeal, as the court schedules oral argument or decision without oral argument based on the date the Notice of Appeal is filed, not on the dates the briefs are filed. In most cases, oral argument is scheduled more than 12 months after the filing of a notice of appeal, which usually allows enough time to mediate and brief, without delaying disposition of the case. In the case of an appeal from a preliminary injunction order, which are expedited by statute and court rules, inclusion in the Mediation Program may delay disposition.

20. If an appeal is in the program, will the mediation take place in person? If so, where will it occur?

Each case is unique. One of the mediator's tasks is to make sure that the mediation process meets the needs of all participants, to the greatest extent possible. Thus, in one case, the mediator will schedule multiple conferences over the telephone, while in another he or she will hold an in-person mediation. When an in-person mediation is scheduled, the mediator will make every effort to hold the session in a location that is as convenient as possible for the greatest number of participants. Mediators will travel to locations throughout the Ninth Circuit when warranted.

21. Is there a cost to my client of participating in the mediation program?

No. The mediation program is a service of the court and is provided free of charge.

22. Does the mediation office take pro se cases, i.e. cases where at least one party is not represented by counsel?

No. The Ninth Circuit General Orders exempt pro se cases from participation in the program.

23. Can I request that my case be included in the mediation program?

Yes. In any counseled case, counsel may send a request to be included in the program to the Chief Circuit Mediator. Such requests will be held confidential if requested.

24. How does appellate mediation differ from mediation at the District Court level?

Mediation at the appellate level is not particularly different from mediation at the District Court level. In both instances mediators help parties to explore their interests, think creatively, and develop solutions. The difference is that on appeal, a judge, jury or administrative agency has rendered an appealable decision. Sometimes that decision resolves all of the substantive issues in the case, and sometimes it resolves only some of them (e.g., appeals from preliminary injunctions or decisions about qualified immunity). Either way, the decision and what is likely to happen to it on appeal, become part of the parties' risk analysis. Some cases lend themselves to appellate mediation better than others. See What Makes a Case a Good Candidate for Appellate Mediation?, above.

25. Now that the court is using electronic filing, how is the confidentiality of mediation materials maintained?

Any document electronically filed with the court's clerk's office is not confidential and will appear on the court's electronic docket. The mediators can cause the clerk to remove mistakenly filed confidential documents after the fact, but counsel should exercise care in the first instance to avoid the filing of confidential documents with the court. All messages, correspondence, mediation statements or other documents sent by fax or email to the Mediation Program the individual mediators' are maintained separately from the court's electronic filing and are confidential.

THE NINTH CIRCUIT MEDIATORS

The Ninth Circuit Mediation Program is staffed by a chief circuit mediator and eight circuit mediators who all work exclusively for the court of appeals. Eight are resident in the court's San Francisco headquarters; one is resident in the court's Seattle office. The mediators are all licensed attorneys who have an average of twenty-five years of combined private-law and mediation practice. They are all experienced and highly trained in appellate mediation, negotiation, and Ninth Circuit practice and procedure. The mediators are listed below:

Claudia L. Bernard
Chief Circuit Mediator
415-355-7908
Claudia_Bernard@ca9.uscourts.gov

Roxane G. Ashe
Circuit Mediator
415-355-7911
Roxane_Ashe@ca9.uscourts.gov

Ann Julius
Circuit Mediator
415-355-7906
Ann_Julius@ca9.uscourts.gov

Margaret A. Corrigan
Circuit Mediator
415-355-7905
Margaret_Corrigan@ca9.uscourts.gov

Stephen Liacouras
Circuit Mediator
415-355-7915
Stephen_Liacouras@ca9.uscourts.gov

Lisa Jaye
Circuit Mediator
415-355-7910
Lisa_Jaye@ca9.uscourts.gov

C. Lewis Ross
Circuit Mediator
415-355-7901
Lew_Ross@ca9.uscourts.gov

Christopher A. Goelz
Circuit Mediator (Seattle, WA)
206-224-2323
Chris_Goelz@ca9.uscourts.gov

Peter Sherwood
Circuit Mediator
415-355-7909
Peter_Sherwood@ca9.uscourts.gov

FOR MORE INFORMATION

If you would like more information regarding the Circuit Mediation Program please contact us via email, telephone or letter:

E-mail Address:
ca09_mediation@ca9.uscourts.gov

San Francisco Office:
Circuit Mediation Office
U.S. Court of Appeals
for the Ninth Circuit
James R. Browning Courthouse
95 Seventh Street
P.O. Box 193939
San Francisco, California
94119-3939

(415) 355-7900 (main line)
(415) 355-8566 (fax)

Seattle Office:
Circuit Mediation Office – Northwest Branch
U.S. Court of Appeals
for the Ninth Circuit
730 William Kenzo Nakamura Courthouse
1010 Fifth Avenue
P.O. Box 193939
Seattle, Washington
98104-1130

(206) 224-2320 (main line)
(206) 224-2321 (fax)

Hours:
Office hours are 8:30 a.m. to 5:00 p.m.
Monday through Friday, excluding federal holidays.

RELEVANT RULES, FORMS AND ORDERS

The following are available on the Ninth Circuit Mediation Office website, www.ca9.uscourts.gov/mediation:

- Circuit Rule 3-4: Mediation Questionnaire
- Circuit Rule 15-2: Mediation Questionnaire in Agency Cases
- Federal Rule of Appellate Procedure 33: Appeal Conferences
- Circuit Rule 33-1: Settlement Programs – Appeal Conferences
- Mediation Questionnaire
- Sample Motion to Dismiss
- Sample Stipulated Motion to Dismiss Voluntarily *(F.R.A.P. 42.(b)*
- Sample Stipulated Motion to Dismiss Without Prejudice to Reinstatement
- Sample Order to Dismiss Without Prejudice to Reinstatement
- Sample Order Setting Assessment Conference in Civil Case (including attachment, Information About Assessment Conferences)
- Sample Order Setting Assessment Conference in Immigration Case (including attachment, Information About Assessment Conferences in Immigration Cases)