

Mediation & Conference Programs in the Federal Courts of Appeals

a sourcebook for judges and lawyers

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Introduction

This sourcebook is a reference guide on mediation and conference programs in the federal courts of appeals, programs that offer a way for courts to deal with increasing filings without increased demand for circuit judgeships.¹ The sourcebook responds to requests from the appellate courts for a detailed description of other circuits' mediation and conference programs as well as more general information about what happens in other circuits. In addition, it provides a means for attorneys to learn more about these programs; providing this information to attorneys helps the courts work more efficiently.

Terminology

Although the fundamental nature of the conference is similar in nearly all these programs, courts refer to the conference sessions as mediations, conferences, settlement conferences, and as Rule 33 conferences. Mediators are also referred to in different ways. In describing each court's program, the sourcebook adopts the terminology used by that court.

For simplicity and ease of presentation, the sourcebook uses certain words in their vernacular rather than technical sense. For example, as used in the sourcebook, the word *appeal* generally refers to any civil proceeding before the court of appeals, including appeals of a district court order, appeals from the U.S. Tax Court, petitions for review of agency or administrative actions, and applications for enforcement of agency or administrative orders.² Where appropriate, the detailed description for each court includes a list of case types not included under this definition.

Sources for the information

The information in the sourcebook was derived primarily from a review of court rules, orders, and related program documents. This was

1. Similar information for alternative dispute resolution programs in the district courts can be found in an earlier Center publication: 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).

2. References to the "filing of a notice of appeal" generally also include the filing of a petition for review of an agency or administrative order and the filing of an application for enforcement of an agency or administrative order. The word *appellants* generally refers to both appellants and petitioners. The programs described herein do not cover criminal cases.

supplemented by in-depth interviews with the senior conference attorney or other designated person in each court about program procedures, including how operating procedures or common practices might vary from written procedures and how programs differ from one another. Personnel in each court also had an opportunity to review and update draft descriptions of their program.

The sourcebook reflects revisions through the end of 1996. Keep in mind that the program in a particular court may already be slightly different from the one described here. This sourcebook is only an introduction to the programs. Local rules, internal operating procedures, and other court documents provide complete information about the programs.

Background on Appellate ADR

Pursuant to Fed. R. App. P. 33, all thirteen federal courts of appeals have implemented programs that help parties resolve issues on appeal.³ The focus of most of the programs is to encourage or require counsel for the parties to discuss settlement at a conference facilitated by a nonjudicial court employee or other third-party neutral. Although these attorney-neutrals have different titles depending on the court, their role is primarily that of a mediator. The conferences are usually held before the filing of appellate briefs and, in nearly all cases, before oral argument. Local court rules or procedures identify the criteria each court uses to determine whether a case is eligible for the program and whether a conference should be scheduled.

The first of these programs began in the 1970s, but much of the expansion of the concept in other federal appellate courts has occurred in the past several years.⁴ In 1990, six of the thirteen federal courts of

3. Fed. R. App. P. 33 provides:

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.

We use the term *program* to identify the courts' settlement processes, but some courts do not refer to their process as a program.

4. As of November 1995, mediation programs were active in about twenty-five state appeals courts. *The ABC's of ADR: A Dispute Resolution Glossary*, 13 *Alternatives to High Cost of Litig.* 147 (Nov. 1995). A study by the Institute of Judicial Administration showed that, as of 1989, "twenty-nine state appellate courts (21 intermediate and 8 final courts of appeal) had imple-

OVERVIEW OF CIRCUIT PROGRAMS

appeals had conference programs, and since 1990, the other seven have added programs. A chronology of program implementation is as follows:

Second Circuit	1974	First Circuit	1992
Sixth Circuit	1981	Eleventh Circuit	1992
Eighth Circuit	1981	Fourth Circuit	1994
Ninth Circuit	1984 ⁵	Seventh Circuit	1994 ⁷
D.C. Circuit	1987 ⁶	Third Circuit	1995
Federal Circuit	1989	Fifth Circuit	1996
Tenth Circuit	1991		

Program objectives

Several objectives are common to the majority of the programs. These include the following:

Settling cases through facilitated negotiations

The primary focus of the programs is settlement of cases. Conference sessions are generally structured to help parties communicate, 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. Without Fed. R. App. P. 33 conferences, the appellate process, unlike many trial proceedings, presents few opportunities for the parties to meet to discuss settlement.

mented and were actively utilizing prehearing conferences. Another fifteen state appellate courts had adopted and then abandoned this procedure.” Margaret L. Shaw, *Dispute Resolution and the Appellate Courts: A Project of the Institute of Judicial Administration* funded by the State Justice Institute, at 4 (undated report). Program goals most often included settlement of cases and narrowing of the issues. There was variety in such program features as who conducted the prehearing conferences, the types of cases included, and the skills and techniques used. *Id.* at 4–5.

5. An early version of the current Ninth Circuit program was fully implemented in 1984. The original emphasis was not on settlement but on improving presentation of issues before the court. The program evolved toward more emphasis on settlement, and it was officially modified to a settlement orientation in 1992.

6. The initial procedures implemented in 1987 were superseded in 1988 by the per curiam order that, as amended, now governs the program.

7. In 1972, the Seventh Circuit launched a preargument conference program that continued into the 1980s. The focus of the program was to reduce the quantity and size of submissions to the court and reduce the time from docketing to disposition. It was not directed toward settlement, other than by providing a neutral ground for the attorneys and parties to meet. The court’s new program, launched in 1994, is a settlement program.

Helping litigants obtain outcomes not otherwise available

Conferences can be a forum to stimulate the development of creative solutions that could not be achieved through traditional appellate processes or by the parties acting on their own. The conferences can help parties expand settlement discussions, often by going beyond the legal issues in controversy. They sometimes result in resolution of other litigation involving the same parties.

Conserving judicial resources

Most programs are staffed entirely by nonjudges. Settling a case early without judicial action helps reduce appellate docket pressures and can save judge-time that would be devoted to briefs, oral argument, and opinion writing had the case not settled.⁸ This objective is important at a time when appellate filings are increasing while many judges and others are reluctant to increase the number of appellate judgeships.⁹

Improving case management

Most programs focus mainly on settlement but also address procedural issues and case management. They often help parties simplify or clarify issues and, frequently without motions, resolve procedural matters. These steps have the potential to streamline the appellate process, even when cases do not settle. For example, steps toward case management at the conclusion of a conference can improve the quality of briefs and oral arguments, which in turn can expedite decisions.¹⁰

8. The Federal Judicial Center has reported on certain conference programs in federal appellate courts, including analyses of benefits derived from the programs. For example, an evaluation of the Sixth Circuit program in effect in the mid-1980s concluded that the program resulted in savings in court and litigant resources. See James B. Eaglin, *The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals* 41–42 (Federal Judicial Center 1990). The evaluation found that the program was doing the work of 1.06 appellate judges and related staff. *Id.* at 30–31. See also Anthony Partridge & Allan Lind, *A Reevaluation of the Civil Appeals Management Plan* (Federal Judicial Center 1983); J. Goldman, *An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration* (Federal Judicial Center 1977).

9. See generally Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the U.S. Congress and the Judicial Conference of the United States* 37–53 (Federal Judicial Center 1993); Carol Krafka et al., *Stalking the Increase in the Rate of Federal Civil Appeals* (Federal Judicial Center 1995).

10. Conference programs often complement other case-management techniques. For example, one appellate court, just before launching its mediation program, implemented a new case-management plan designed to dispose of more cases up front by encouraging dispositive motions to dismiss or summarily affirm or reverse. Patricia M. Wald, . . . *Doctor, Lawyer, Mer-*

Comparing program features

In the 1980s there was more disparity in the structure and operation of the programs than there is today, but some differences remain. When designing and operating conference programs, courts consider many factors, including regional practices and the geographic size of a circuit. The purpose of the discussion below is to describe some similarities and differences, not to assess the merits of any approach.

Program names

The widely recognized progenitor of Fed. R. App. P. 33 programs is the Civil Appeals Management Plan (CAMP) adopted in the Second Circuit in 1974.¹¹ Although one other court adopted a similar name in 1992, most federal appellate courts initially used the title *preargument conference program*.¹² More recently, courts have begun to use the names *conference program*, *settlement program*, or *settlement conference program*, and four courts use some variation of the name *appellate mediation program*. Although the programs go by various names, most are essentially mediation programs.

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) to those that consider only specified categories of cases as generally eligible for the program. For example, some programs do not include cases in which a public agency is a party because government attorneys often cannot secure sufficient authority to negotiate and settle a case. A few of these courts make exceptions if a party requests a conference or other circumstances warrant one. Recent changes in federal and state government policies concerning alterna-

chant, Chief, 60 Geo. Wash. L. Rev. 1127, 1138 (1992) (describing implementation of D.C. Cir. R. App. II). See also Thomas E. Baker, *Intramural Reforms: How The U.S. Courts Of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913 (Spring 1995); McKenna, *supra* note 9, at 37-53; Arthur D. Hellman, *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Arthur D. Hellman, ed. 1990); Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (Federal Judicial Center 1987).

11. *But see supra* note 7 describing a different type of preargument program launched in the Seventh Circuit in 1972.

12. In 1994, a completely rewritten Fed. R. App. P. 33 became effective. The revision 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." Fed. R. App. P. 33 advisory committee's notes.

tive dispute resolution may or may not have an impact on these findings and perceptions.¹³

Pro se cases are generally not scheduled for a conference because of concerns that a pro se party might view the mediator as an advisor or representative or as imposing a settlement. Also generally not included in the programs are original proceedings (such as petitions for writs of mandamus) and prisoner petitions. However, some programs will schedule a conference in certain otherwise noneligible civil appeals if one or more parties request one. None of the programs covers criminal cases.

Case-selection processes

Some conference program managers believe it is difficult to predict from case documents alone which cases are likely to settle. This view has led some programs to schedule nearly all civil cases for a conference but has led others to 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.

In the First and Second Circuits, nearly all civil cases (including administrative agency cases) docketed in the court of appeals are eligible for the program and scheduled for a conference. In the Sixth and Federal Circuits, certain case types, such as cases involving government agencies, generally are not eligible for the program, but settlement discussions are held in nearly all civil cases that meet program eligibility requirements. A substantial portion of docketed cases in all four of these courts go through the conference process.

The Third, Fourth, Fifth, Eighth, Ninth, and District of Columbia Circuits schedule a conference only in cases that appear likely to achieve settlement on some or all of the issues on appeal. For instance, cases involving an agency that has a cumbersome procedure for obtaining settlement authority or cases in which one or more of the parties require a judicial resolution of the issues on appeal might not be deemed likely to settle. Other factors that might be considered include the parties' expressed interest in participating in the program,

13. See, e.g., Exec. Order No. 12988, 61 Fed. Reg. 4729 (1996) (establishing guidelines for federal agencies to "make reasonable attempts to resolve [disputes] expeditiously and properly before trial," stating that ADR is "appropriate" if it will "materially contribute to the prompt, fair, and efficient resolution of the claims"). In the District of Columbia Circuit, where government entities are litigants in a substantial percentage of docketed cases, the appellate mediation program has been regularly settling cases involving government litigants. See Patricia M. Wald, . . . *Doctor, Lawyer, Merchant, Chief*, 60 Geo. Wash. L. Rev. 1127, 1134-36 (1992).

the complexity of the case, and the amount of monetary relief requested. Docketing statements (or, as some courts call them, appeal information statements) filed by the parties generally provide information about the nature of the action, the result below, and the issues on appeal. Screening might also include a review of the judgment or order 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, conference program staff not only review case documents but also contact appellate counsel by telephone to evaluate the likelihood of settlement and suitability for the program.

The programs in the Seventh, Tenth, and Eleventh Circuits randomly select from a pool of civil cases that meet basic eligibility requirements.

Timing of the conferences

Most conferences occur at an early stage in the appeal, usually before parties file their briefs. An underlying assumption by some program designers is that parties' incentives for settlement often decrease as their briefing and oral argument preparation progresses. Early scheduling is intended to give parties the opportunity to settle before they incur the major expense of filing briefs and appendices. Furthermore, even if a conference does not result in settlement, any narrowing or clarifying of issues achieved could be of benefit to counsel in the briefing process and may yield more effective presentations at oral argument.

Generally, the court's 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 scheduling order may be adjusted if progress toward settlement warrants.

In those courts that do not schedule or require conferences in all program-eligible cases, procedures generally allow parties to request a conference at any time during the case. Such requests are often granted in any nonprisoner civil case where all parties are represented by counsel. Occasionally, appellate panels refer cases for conferences just before or after oral argument.

Effect on appellate proceedings

The scheduling of a conference generally does not automatically toll the running of time periods for filing briefs or ordering transcripts or otherwise automatically stay appellate proceedings. If the need arises, the mediator, or the parties by motion, may arrange for enlargement of the time for filing briefs, transcripts, or other matters. In some programs, the conference office is authorized to dispose of a wide variety of procedural motions that arise in a case.

In-person and telephone conferences

Generally, mediators work with counsel to schedule a conference location and format convenient for participants.

Where the circuit boundaries encompass large states, as in the Fifth, Sixth, Ninth, and Tenth Circuits, a large proportion of the conferences take place over the telephone. Proponents of teleconferences note their convenience, efficiency, and cost-effectiveness.

Proponents of in-person conferences maintain that face-to-face interactions between the parties may contribute to the settlement efforts. In the four most geographically compact circuits (First, Second, Third, and District of Columbia), most conferences are held in person. However, even in those programs, distant locations of participants or other factors may preclude in-person conferences, and teleconferences are scheduled as appropriate.

Mediation techniques

Programs use facilitative mediation techniques to help parties find solutions to underlying problems giving rise to the litigation. In the conference process, the mediator usually discusses settlement jointly with all parties in the case and often also meets separately, in *caucuses*, with each party to facilitate settlement. Counsel for each party is always included in these sessions.

In the First and Second Circuits, in addition to using this facilitative approach, the mediator also may make predictions about the outcome or, when appropriate, recommend a specific negotiated settlement. Any such predictions or recommendations on the merits are nonbinding advisory opinions of the mediator and not those of the court; the mediator does not compel the parties to accept the recommendations or to settle.

Mandatory versus voluntary participation

In nearly all programs, once a conference is scheduled, parties—or at least their counsel—are required to participate, and there is no formal provision for removing a case from the program. Although this participation is mandatory, the conference process is nonbinding, so that no settlement is reached unless all parties fully consent. 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, as mentioned above, some conference offices consider the willingness of the parties to mediate as a factor in selecting cases to be mediated.

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

Settlement authority

Pursuant to Fed. R. App. P. 33, attorneys attending an appeal conference must obtain from their clients “as much authority as feasible to settle the case.” In many programs, the clients—not just their counsel—are strongly encouraged to attend. When the client is a corporation or other entity, the client often sends a company representative in addition to legal counsel. Some programs have guidelines governing settlement authority in these situations. For example, a company representative who attends the conference should have authority to settle or, if circumstances do not provide for delegation of full settlement authority, the company representative should have readily available the means to obtain approval of a settlement from company officials. Some mediators ask that the person with full settlement authority be reachable during the conference by telephone (for example, this is done in the First, Third, Seventh, Ninth, and District of Columbia Circuits).

Confidentiality

The conference 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, attorneys, and parties from disclosing the substance of a conference to any judge or nonparty. Generally not considered confidential, however,

are the fact that the conference took place, the bare results of the conference (for example, settled, not settled, or continued), and any resulting post-conference filing entered on the docket.

Third-party neutrals

In nearly all of the programs, attorneys employed by the court conduct the conferences. These attorneys have different titles in the various programs, including conference attorney, circuit mediator, settlement counsel, settlement attorney, settlement conference attorney, and staff counsel. Courts report that most had prior 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 judges of the court of appeals and district courts conduct mediations in about half the cases, with the program director mediating the rest. The First and Fourth Circuits each hired a former state supreme court associate justice to conduct conferences. Also conducting conferences in these two programs are a senior federal judge (First Circuit) and two conference attorneys (Fourth Circuit). 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 Circuit, the director of the mediation program routinely assigns cases to volunteer attorney-neutrals who meet the court's qualifications. The volunteers are experienced members of the local bar approved by the court for participation in the program and trained in mediation skills. Occasionally, the program director, a court staff member, mediates or co-mediates a case. Although the use of volunteer mediators is quite common in trial courts, this program is the only one of its kind among the federal courts of appeals.

In the Federal Circuit, settlement discussions are scheduled and conducted by parties' counsel in certain types of cases. The local rule does not require involvement of a third-party neutral. Court staffs' involvement is limited to issuing notices of the local rule's requirement to parties in eligible cases. This design is unique among the federal courts of appeals.

Costs to parties

For the most part, the assistance of conference programs is 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 teleconferences are typically borne by the party initiating the call, usually the appellant. For in-person conferences, parties bear their own travel costs.

In the District of Columbia Circuit, the mediators, who are not court employees, are not paid for their services. The court does reimburse them for out-of-pocket expenses.

Evaluating Program Success

This sourcebook does not evaluate the success of any program design or compare the effectiveness or efficiency of different approaches. Given the recent inauguration of some programs and substantial changes to others, future studies might profitably evaluate different program designs. Programs should be measured primarily by the criteria set by the court for their success. Settlement rates will naturally be one important measure, but some programs have objectives in addition to settlement. Regardless of the criteria used, any comparison of program types would require full consideration of the differences among the programs, including variations in case mix among the courts. Any comparison should also take into consideration definitional problems, such as the difficulty of defining a successful settlement.

Future studies also might address whether it is necessary or feasible to develop additional criteria for case selection, with an evaluation of whether certain case characteristics can reliably predict settlement potential.

Mediation and Conference Programs in the Federal Courts of Appeals

Circuit	What case types eligible for conferences?	Which cases selected for conferences?	What ADR method used?	Who participates in conferences?	Who conducts conferences? ^a	Third-party neutrals involved in procedural motions? ^b
First	Fully counseled civil cases ^c (but not, e.g., prisoner and certain government agency cases)	Every program-eligible case Any matter referred by a circuit judge	Both facilitative and evaluative mediation	Attorneys with appropriate settlement authority; clients not required, but permitted to attend	Two settlement counsel: a former state supreme court justice now employed by circuit and a senior federal judge	As necessary, settlement counsel may recommend procedural motions to the court
Second	Fully counseled civil cases ^c (but not, e.g., certain prisoner cases)	Nearly all program-eligible cases Any case referred by a hearing panel	Both facilitative and evaluative mediation	Attorneys with appropriate settlement authority; usually without clients; staff counsel may permit or require clients to attend	Three staff counsel employed by court	Staff counsel issues and revises scheduling orders, as necessary, and may dispose of certain procedural motions
Third	Fully counseled civil cases ^c (but not, e.g., prisoner cases)	Cases with settlement potential selected by program director from those eligible for program Cases referred by hearing panels Most cases where a party requests a conference	Facilitative mediation	Attorneys with settlement authority; clients usually required to attend	Several senior judges in the circuit; one program director employed by the court	Not usually, because clerks' office generally issues briefing orders after cases leave program

continued

COMPARATIVE TABLE OF PROGRAM FEATURES

Mediation and Conference Programs in the Federal Courts of Appeals, continued

Circuit	What case types eligible for conferences?	Which cases selected for conferences?	What ADR method used?	Who participates in conferences?	Who conducts conferences? ^a	Third-party neutrals involved in procedural motions? ^b
Fourth	Fully counseled civil cases ^c (but not, e.g., tax appeals, prisoner cases, and most government agency cases)	Cases selected by program director from those eligible for program with consideration of settlement potential Cases referred by hearing panels Most cases where a party requests a conference	Facilitative mediation	Attorneys with authority to initiate and respond to settlement proposals; clients generally permitted but not required to attend	Three conference attorneys employed by court (including one retired state supreme court justice)	Conference attorney, with consent of all parties, may recommend procedural orders to clerk's office
Fifth	Fully counseled civil cases ^c (but not prisoner cases)	Cases selected by conference attorney based on settlement potential Cases referred by hearing panels Most cases where a party requests a conference	Facilitative mediation	Lead counsel; conference attorney may require attendance by parties	One conference attorney employed by court	Conference attorney may recommend resetting briefing schedule or entry of other orders controlling course of proceedings
Sixth	Fully counseled civil cases ^c (but not, e.g., agency cases, tax appeals, and prisoner cases)	Cases selected after conference attorneys review files for cases eligible for program Cases referred by hearing panels Most cases where party requests conference	Facilitative mediation	Attorneys with authority to make and respond to settlement proposals; clients generally not required to attend	Five conference attorneys (four full-time equivalents) employed by court	Conference attorney may extend briefing deadlines as necessary to complete negotiations

continued

Mediation and Conference Programs in the Federal Courts of Appeals, continued

Circuit	What case types eligible for conferences?	Which cases selected for conferences?	What ADR method used?	Who participates in conferences?	Who conducts conferences? ^a	Third-party neutrals involved in procedural motions? ^b
Seventh	Fully counseled civil cases ^c (but not, e.g., certain agency cases and certain prisoner cases); cases with unresolved jurisdictional problems not automatically excluded	One program-eligible case in five, selected at random Most cases where a party requests a conference	Facilitative mediation	Attorneys; clients generally not required to attend but clients with full settlement authority must be available by telephone for duration of conference	Two settlement conference attorneys employed by court	Conference attorney may extend briefing deadlines or stay appeal if that would facilitate negotiation and settlement (court order is issued if procedural schedule is modified)
Eighth	Fully counseled civil cases ^c (but not, e.g., certain prisoner and agency cases and certain interlocutory appeals) ^d	Cases selected by program director from those eligible for program with consideration of settlement potential Cases referred by hearing panels Certain cases where party requests conference	Facilitative mediation	Attorneys with discretionary settlement authority, usually accompanied by clients	One mediator—the program director—employed by court	No; program director refers procedural matters to clerks' office
Ninth	Fully counseled civil cases ^c (but not, e.g., most prisoner cases); cases with unresolved jurisdictional problems not automatically excluded	Cases selected after circuit mediators review files for cases eligible for program with consideration of settlement potential Cases referred by hearing panels Most cases where party requests conference (In some cases, an "initial assessment conference" is held before mediation conference to gain more information)	Facilitative mediation	Attorneys, usually with clients who have full settlement authority	Six circuit mediators employed by court	Circuit mediator may rule on certain procedural motions (e.g., vacating or resetting appeal schedule)

continued

COMPARATIVE TABLE OF PROGRAM FEATURES

Mediation and Conference Programs in the Federal Courts of Appeals, continued

Circuit	What case types eligible for conferences?	Which cases selected for conferences?	What ADR method used?	Who participates in conferences?	Who conducts conferences? ^a	Third-party neutrals involved in procedural motions? ^b
Tenth	Fully counseled civil cases ^c (but not, e.g., certain prisoner cases)	Cases randomly selected by circuit mediators from eligible cases Cases referred by hearing panels Most cases where party requests conference	Facilitative mediation	Attorneys with broadest feasible authority to settle; clients generally not required to attend	Three circuit mediators employed by court	Circuit mediator may request certain orders from clerk's office (e.g., order extending time for briefing or order consolidating cases) to carry out purposes of the conference procedure
Eleventh	Fully counseled civil cases ^c (but not, e.g., prisoner cases)	Cross-section of cases selected by Circuit Mediation Office after reviewing files for cases eligible for program Cases referred by circuit judges Most cases where party requests conference	Facilitative mediation	Attorneys with appropriate settlement authority; clients generally encouraged to attend but not required to do so	Four circuit mediators employed by court	Circuit mediator may recommend to clerk's office extension of briefing deadlines, as necessary to complete negotiations
D.C.	Broad range of civil cases (many mediated cases are on review from decision of federal agency or involve the U.S., D.C., or other governmental entities); eligible cases include original proceedings	Cases selected by clerk's office and program director after reviewing files for cases eligible for program with consideration of settlement potential Certain cases where party requests conference	Facilitative mediation	Attorneys with settlement authority; clients generally encouraged to attend but not required to do so	Panel of court-trained volunteer attorney-mediators; experienced litigators, senior members of bar, and law professors; program director employed by court	Parties file procedural motions with clerk's office, but parties may when appropriate represent in their motions that the mediator (not identified by name) concurs in request

continued

Mediation and Conference Programs in the Federal Courts of Appeals, continued

Circuit	What case types eligible for conferences?	Which cases selected for conferences?	What ADR method used?	Who participates in conferences?	Who conducts conferences? ^a	Third-party neutrals involved in procedural motions? ^b
Federal	Fully counseled civil cases brought pursuant to certain sections of 28 U.S.C. (cases covered include patent infringement appeals from the district court and certain appeals from the U.S. Patent & Trademark Office)	For all cases covered by Fed. Cir. R. 33, clerk's office notifies parties that they are required to conduct prehearing settlement discussions	Settlement discussions (no requirement for mediation)	Counsel for parties, who are required to schedule and conduct settlement discussions; after discussions, parties must file either a joint statement of compliance with settlement discussion rule or agreement of dismissal of case	No special court staffing; parties conduct their own settlement discussions	Not applicable

Note: In all but two circuits, conferences are usually scheduled for a date before appellant's brief is due. In the Third Circuit, generally conferences are held before issuance of the briefing order—usually soon after the mediator receives each party's confidential position paper. In the Federal Circuit, after the last brief is filed, the clerk's office sends the parties a notice of the settlement discussion requirement (Fed. Cir. R. 33 requires settlement discussions within seven days after the filing of the last principal brief).

- a. The titles used in this table for third-party neutrals are those used by the courts.
- b. Examples include motions to amend scheduling order; motions to enlarge time to file brief; motions to file oversize brief, and motions concerning supplemental appendix.
- c. Generally, in all courts, cases in which a party appears pro se are not considered program-eligible. Also, in most courts, original proceedings and cases with identified jurisdictional problems generally are not program-eligible.
- d. Program participation is voluntary—upon the consent of the parties.

Description of Programs, Circuit by Circuit

First Circuit: Civil Appeals Management Program (CAMP)

The First Circuit's conference program is called the Civil Appeals Management Program, or CAMP. Under CAMP, in most civil cases docketed in the court, a preargument conference is conducted by one of the court's settlement counsel. Once a case is scheduled for conferencing, participation in the conference process is mandatory; attorneys attending conferences are required to have full settlement authority.

The primary goal of CAMP is to encourage the resolution of appellate cases without court action, so the court can make optimum use of its limited resources and litigants can minimize costs. The program serves as a mechanism to encourage and facilitate settlement and to seek withdrawal of meritless appeals. Another goal is to accelerate the disposition of appeals that go forward to argument or submission, by simplifying issues that are not settled at the conference and by resolving any open procedural matters that may aid in the handling or disposition of the case.

The court established CAMP in 1992. The process is governed by Fed. R. App. P. 33 and 1st Cir. R. 47.5. In the year ending Jan. 31, 1994, 369 cases were referred to the program; in the year ending Jan. 31, 1995, 320 cases were referred.

About 80% of CAMP conferences are held in person, because the court has observed that in-person conferences are more effective than teleconferences in producing settlements.

At conferences, settlement counsel may make outcome-based predictions on the merits and may recommend a specific negotiated settlement. Parties are not required to accept the recommendation.

Selecting Cases for Conferences

Eligible case types

All civil cases docketed in the court are included in CAMP except original proceedings (such as petitions for writs of mandamus), prisoner cases (including habeas corpus petitions), INS cases, summary enforcement actions of the NLRB, cases where a party appears pro se, 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.

Selection process

Upon receipt of the case documents, the clerk's office refers all eligible cases to the Office of Settlement Counsel, where they are scheduled for a conference.

Documents reviewed

Case documents sent to the Office of Settlement Counsel include the notice of appeal, district court docket entries, and, if requested, the record on appeal. Also included is a completed preargument statement form and accompanying documents, which the appellant is required to file within ten days after receiving the clerk's notice that the case has been docketed in the court of appeals. (For each eligible case, when the court of appeals receives the notice of appeal or otherwise docketed the case, the clerk's office sends appellant's attorney a notice that the notice of appeal has been received, the preargument statement form, the transcript information form, and information on CAMP.)

The preargument statement provides information about the basis of 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. Copies of any judgments and all judicial opinions relevant to the issues on appeal accompany the statement.

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

For each case referred to CAMP, the program administrator in the Office of Settlement Counsel schedules a conference with one of the court's two settlement counsel and sends lead attorneys notice of the date and time of the conference. Consolidated and companion cases are scheduled for combined conferences.

Timing of conferences

The conference is normally scheduled for a date ten to thirty days after the filing of the preargument statement and at least fourteen days before appellant's brief is due. The objective is to hold the conference before the parties have made substantial investments in the appeal.

In-person conferences

For in-person conferences, attorneys for each party and, where appropriate, their clients travel to the site of the settlement counsel's offices. For New England-based appeals, in-person conferences are held at the J.W. McCormack Post Office & Courthouse in Boston, Mass.; for Puerto Rico-based appeals, conferences are held at the federal courthouse in Hato Rey, P.R.

Teleconferences

Teleconferences are held in cases where factors like distance or cost prevent in-person conferences.

Conference Sessions

Nature of sessions

During the conference, the settlement counsel attempts to mediate a resolution. At the beginning of the conference, settlement counsel instructs participants on the confidentiality rules and discusses procedural concerns and any motions the parties may wish to file. Attorneys for the appellant and appellee then present their respective positions on the issues raised on appeal, with settlement counsel commenting and questioning as appropriate. Attorneys must be fully prepared to discuss and evaluate the legal merits of each issue and to narrow, eliminate, or clarify issues when appropriate. Settlement counsel can make outcome-based predictions on the merits and, in appropriate situations, recommend a specific negotiated settlement, which the parties are not required to accept.

After the joint session, the settlement counsel usually caucuses separately with attorneys for each side; caucuses include candid appraisal of likely outcomes on appeal, exploration of clients' interests, and solicitation of settlement proposals, ideas, and offers. Conferences conclude with joint discussions on case status, next steps, follow-up conference scheduling, or briefing extensions.

Any other matters, including pertinent matters raised by the parties, may be discussed if the settlement counsel determines they may

aid the proceedings. 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

Once a case is scheduled for conferencing, participation is mandatory. Generally, the attorneys in charge of the appeal are required to attend the conference and must have appropriate authority to settle or otherwise dispose of the appeal. Clients who will not delegate such authority must be available by telephone during the conference if reasonably possible. Otherwise, clients, while generally not required, are permitted to attend conferences.

Length of sessions

Conferences are scheduled to last up to 1.5 hours unless there is a specific reason to plan a longer or shorter time period. Initial in-person conferences last an average of 1.0 to 1.5 hours. Initial teleconferences last an average of 20 minutes. Settlement counsel may schedule follow-up telephone or in-person conferences, with or without clients, as necessary to pursue negotiated settlements fully. Follow-up discussions may continue over days, weeks, or longer. For most cases, one or two joint conferences per case are sufficient.

Post-conference procedures

If a settlement is achieved, the settlement counsel asks the parties to execute a dismissal stipulation to close the case.

If a case cannot be resolved through CAMP, the program administrator sends a memorandum of nonsettlement to the clerk's office for filing in the appellate case file and, if appropriate, to the referring panel. The case will remain on the docket and proceed as if the conference process had not been initiated. Even though the case does not settle fully in CAMP, the conference may result in issuance of an amended scheduling order or a post-conference order, such as a stipulated order to narrow the issues to be briefed and argued.

Settlement counsel keep records concerning agreements made during the conference process, including the parties' agreement to file a dismissal stipulation, and the program administrator monitors the filing of papers related to those agreements. Generally, parties send those papers to the program administrator, who follows up on any items

not received within the time set at the conference. Follow-up may include telephone calls or letters to attorneys or an amended scheduling order.

Other Rules or Policies

Effect on appellate proceedings

The briefing schedule set by the clerk's office runs concurrently with the conference process. The scheduling of a preargument conference does not automatically stay any aspect of the appellate proceedings.

If the need arises, the settlement counsel recommends that parties file a motion to enlarge the time for filing briefs, transcripts, or other documents. The court generally approves motions recommended by settlement counsel and, if necessary, the clerk issues an amended scheduling order. The filing of a procedural or substantive motion may cause settlement counsel to reschedule the conference.

Confidentiality

Settlement counsel must not disclose the substance of the conference to any judge or other person. Attorneys for the parties are likewise prohibited from disclosure to anyone other than their clients or cocounsel and then only upon receiving assurance that the recipients will honor the confidentiality of the information. 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 are not considered confidential.

Sanctions

If the court's rules are violated, settlement counsel may send the clerk a recommendation for sanctions, which may include dismissal of the appeal. The court decides what sanctions, if any, are to be imposed. The clerk may dismiss the case for failure to take each of the actions set forth in the conference notice.

Grievances

Any grievances as to the handling of a case under the program are sent to the circuit executive to be addressed by the court of appeals. The circuit executive is to hold all such grievances confidential on behalf of the court of appeals unless release is authorized by the complainant.

Settlement Counsel Staffing

Assignment of cases

All cases are assigned to one of two settlement counsel: one in Boston, Mass., for New England-based cases and one in Hato Rey, P.R., for Puerto Rico-based cases.

Qualifications and training

The settlement counsel in Boston previously served as an associate justice of the Supreme Judicial Court of Massachusetts. The settlement counsel in Puerto Rico is a senior judge of the U.S. Court of International Trade.

Recusal

Settlement counsel recuse themselves from cases in which they believe they have a conflict of interest. A new settlement counsel may be substituted in the event of recusal.

Program Administration

Organization and management

Organizationally, the Office of Settlement Counsel is located in the Office of the Circuit Executive. An active circuit judge, with the assistance of the circuit executive, oversees the program. The settlement counsel in Boston manages the program, with operational assistance from a program administrator.

Reports and evaluation

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

For More Information

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Second Circuit: Civil Appeals Management Plan (CAMP)

Under the Second Circuit's Civil Appeals Management Plan (CAMP), the clerk's office refers, with few exceptions, all docketed civil cases to the Office of Staff Counsel. The Office of Staff Counsel, which administers the program, issues a scheduling order for all cases referred and a notice of preargument conference in nearly every case referred. Once a conference is scheduled, participation in the conference process is mandatory. The court employs three staff counsel who conduct all CAMP conferences.

CAMP is intended to provide a forum for resolution of disputes without court action and to expedite the processing of civil cases docketed in the court. The focus of the program is on settling cases, but CAMP conferences also are intended to narrow issues, eliminate patently meritless arguments, weed out meritless appeals, and resolve procedural problems.

The court inaugurated CAMP in 1974. It is conducted pursuant to Fed. R. App. P. 33 and 2d Cir. R. app. C. and D.

In fiscal 1994, 1,065 cases were referred to the program by the clerk's office; in fiscal 1995, 1,012 cases were referred. Staff counsel conducted a CAMP conference in 1,075 cases in fiscal 1994 and in 948 cases in fiscal 1995.

A CAMP conference is scheduled in nearly all civil cases docketed in the court. Ordinarily, after attorneys for all parties make their presentations at a conference, staff counsel are expected to give views on the merits or other aspects of the appeal.

Most conferences are conducted in person; the parties' attorneys usually attend without their clients. Staff counsel has the authority to dispose of certain procedural motions and to issue and revise scheduling orders.

Selecting Cases for Conferences

CAMP-eligible case types

CAMP-eligible cases are those in which the Office of Staff Counsel issues a scheduling order. This is done for each counseled civil case docketed in the court. Examples of such cases are:

- appeals from final decisions of the district court; certain appeals of interlocutory decisions as authorized by law

- U.S. Tax Court appeals
- bankruptcy appeals
- review of administrative orders (including Social Security cases and enforcement actions of the NLRB)
- prisoner civil rights cases
- pro se cases where the unrepresented party has a law degree.

“Counseled cases” are cases in which all parties are represented by counsel, including cases in which a pro se party has a law degree. The scheduling order lists the dates on which the record on appeal, briefs, and joint appendix are to be filed as well as the date on which the parties are to be ready for argument. The schedules differ from case to case, depending on the needs of the particular appeal and the argument schedule of the court. On proper request of the parties, staff counsel may issue a revised scheduling order at or after the CAMP conference.

Selection process

All CAMP-eligible cases are scheduled for conferencing except for original proceedings (such as mandamus petitions), habeas corpus petitions, and 28 U.S.C. § 2255 cases (involving challenges to convictions). Cases scheduled for a conference are referred to herein as “conference-eligible cases.”

Documents reviewed

For all CAMP-eligible cases, the clerk’s office forwards to the Office of Staff Counsel certain case documents upon their receipt. These documents include the notice of appeal, the district court docket entries, and the completed preargument statement form that the appellant is to file with the clerk within ten calendar days after docketing of the appeal. The court-provided preargument statement form requires information about the basis of jurisdiction, the nature of the action, the result appealed from, the issues proposed to be raised on appeal, and a copy of the relevant judgment, order, or opinions in the case.

Judicial selection

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

Scheduling the Conferences

Scheduling process

For all conference-eligible cases, within a few days after receiving a case, the Office of Staff Counsel issues a conference notice/order that sets the time and place for the CAMP conference and states requirements for attorney attendance, preparation, and settlement authority. In scheduling conferences, the Office of Staff Counsel groups together consolidated and companion cases.

Timing of conferences

Staff counsel generally schedule the conference for a date well in advance of the due date of the appellant's brief, often before the date for filing the record. The objective is to hold the conference before the parties have made a substantial investment in the appeal. The average time between docketing the appeal and the conference has been approximately thirty to forty-five days over the past several years.

In-person conferences

Approximately two-thirds of the conferences are held in person at the court of appeals, Foley Square, New York City. Where a sufficient number of cases can be accumulated and efficiency and economy permit, staff counsel may also hold conferences at locations other than Foley Square but within the geographic boundaries of the circuit. The three staff counsel combined spend less than one day per month in travel status.

Teleconferences

Where considerable distance or other substantial reasons warrant (approximately one-third of the cases), staff counsel may conduct prearranged teleconferences.

Conference Sessions

Party preparation

The conference notice/order instructs the attorneys to be fully prepared at the conference to discuss and evaluate in depth the legal merits of each issue and, where appropriate, to narrow, eliminate, or clarify issues. The staff counsel also asks attorneys to be prepared to cite cases in support of their positions and may ask them to bring to the CAMP conference copies of the most important decisions upon which they will rely on appeal.

Nature of sessions

The purposes of the preargument conference are to consider the possibility of settlement, to simplify issues, and to address any other matters that may aid in the handling or disposition of the proceeding. The function of staff counsel is to act as an impartial mediator seeking agreement acceptable to all parties, educate parties on law and practice in the Second Circuit, meet privately with each side when appropriate, and resolve procedural problems informally and expeditiously.

Staff counsel generally begins the conference by explaining conferencing procedures and discussing the confidentiality rules. Typically, staff counsel also seeks to establish whether the court has jurisdiction. The parties' attorneys then present their respective positions on the issues raised on appeal, with staff counsel asking pointed questions and commenting substantively when appropriate.

After listening to the attorneys for each party, staff counsel gives a nonbinding advisory opinion on the merits or on other aspects of the appeal when appropriate. In some cases, this may include a recommendation that the appeal be withdrawn. The views expressed are those of staff counsel and not those of the court. If, after completion of the conference procedure, the attorneys believe in good conscience that they cannot reach an agreement, they are not under any compulsion to do so.

If settlement or withdrawal has not been tentatively agreed to at the initial conference, staff counsel may issue a revised scheduling order. If appropriate, staff counsel is also likely to ask for follow-up discussion among the parties' attorneys or to instruct the lawyers for one or both sides to consult with their clients and report back to staff counsel by a certain date. Based on these reports, staff counsel decides how to proceed further.

Staff counsel also may help resolve procedural matters, including, for example, a consensual stay of the district court judgment, stipulation on an expedited argument schedule, or agreement on the contents of a joint appendix. This often obviates the need for written motions.

Party participation

Once the conference is scheduled, participation in the conference process is mandatory. Ordinarily, attorneys in charge of the appeal are expected to attend the conference in person without their clients. Attorneys are to participate in good faith, with a view to resolving differ-

ences, and are to obtain advance authority from their clients to make such commitments as reasonably may be anticipated.

With the permission of staff counsel, clients may attend with their attorneys. In the limited number of cases where staff counsel reasonably believes that the presence of a client might be helpful, staff counsel may request—or, in exceptional circumstances, require—an attorney to have the client attend the conference with the attorney. (Proposals for revision with respect to client participation requirements are pending.) Staff counsel does not talk 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 1.0 to 1.5 hours but sometimes last several hours. Initial teleconferences usually are shorter. Based on input from the parties' attorneys, staff counsel decides whether follow-up calls, an additional conference, or no further action is appropriate. Follow-up discussions may continue over days, weeks, or longer. Approximately 15% to 20% of cases require at least one conference beyond the initial joint conference. Most initial conferences require several additional follow-up calls.

Post-conference procedures

If a settlement is achieved, staff counsel asks the parties to execute a dismissal stipulation to close the case.

In certain 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 without prejudice to reinstatement. For example, the parties may enter into such a stipulation pending some action, such as a Supreme Court decision in a controlling case, a decision of an administrative agency or court on a dispositive issue in the subject appeal, or action at the trial level on the parties' motion for amendment of the judgment. In other instances, the stipulation may require the parties to reinstate the appeal by a fixed date; this commonly is done when staff counsel and the parties believe that ongoing settlement negotiations are likely to be successful if given more time.

If a case cannot be resolved through the conference process, it remains on the docket.

Other Rules or Policies

Effect on appellate proceedings

During referral to conferencing, the program does not automatically stay other activities in a case. The Office of Staff Counsel is authorized to dispose of a wide variety of procedural motions that arise in a case, for example, motions to file oversized briefs or motions concerning supplemental appendices. Staff counsel may grant extensions of time for filing briefs for good cause shown, but the court's policy is to grant such motions sparingly. See *United States v. Delia*, 925 F.2d 574 (2d Cir. 1991) (Newman, J.); *United States v. Raimondi*, 760 F.2d 460 (2d Cir. 1985) (Kaufman, C.J.).

The court uses careful scheduling controls to pursue a policy of speedy yet deliberate justice, while permitting oral argument in every case. The dates and scheduling orders issued by staff counsel typically provide for faster briefing and argument than provided for in the Federal Rules of Appellate Procedure. Delays caused by settlement efforts in CAMP are rare and minimal.

Confidentiality

All matters discussed at a conference, including the views of staff counsel as to the merits, are confidential. Staff counsel, the attorneys, and the parties are prohibited from communicating to any unauthorized third parties the discussions or actions taken at the conference. Likewise, staff counsel do not communicate or report to the court what has been said in the conference, and the lawyers for the parties are instructed not to do so. *In re Lake Utopia Paper Ltd.*, 608 F.2d 928, 930 (2d Cir. 1979) (panel “deplore[d] any compromising of the confidentiality of [staff counsel’s] comments by counsel for a party to the appeal”).

Sanctions

Appendix C of the court's local rules provides:

In the event of default in any action required by a preargument conference order not the subject of the scheduling order, the Clerk shall issue a notice to the appellant that the appeal will be dismissed unless, within ten days thereafter, the appellant shall file an affidavit showing good cause for the default and indicating when the required action will be taken. The staff counsel shall thereupon prepare a recommendation on the basis of which the Chief Judge or any other judge of this Court designated by the Chief Judge shall take appropriate action.

2d Cir. R. App. C. 6(c).

Grievances

Any grievance as to the handling of a case under CAMP is to be addressed to the circuit executive, who will hold it confidential on behalf of the court of appeals unless release is authorized by the complainant.

Staff Counsel

Assignment of cases

The court employs three full-time staff counsel, who conduct all conferences. If a new case is related to a matter previously handled in the program, the new case is assigned to the staff counsel who is familiar with the matter.

Qualifications and training

Court personnel report that, in hiring staff counsel, the court sought experienced attorneys who have creative problem-solving skills. New staff counsel are trained by observing, and being observed by, the senior staff counsel. Periodically, staff counsel attend workshops with conference attorneys from other courts.

Recusal

Other than the code of conduct for federal judicial employees, the court has no written recusal rules for CAMP. Staff counsel recuse themselves from cases in which they believe they would have a potential conflict of interest or for any other reason that might make their service in a particular case inappropriate.

Fees

The court of appeals funds the administration of the program. However, long distance telephone conferences generally are set up by the parties, usually the appellants, with costs typically borne by the party initiating the call.

Program Administration

Organization and management

In addition to conducting conferences, the senior staff counsel is the administrative head of the office and administers the program collaboratively with the other staff counsel. Each of the office's three

staff counsel is provided a full-time legal assistant who provides administrative and secretarial support.

Reports and evaluation

The number of conferences held and whether they resulted in disposition are reported monthly to the chief judge.

Comprehensive evaluations of CAMP have been conducted. In a 1974–1975 pilot study, a senior attorney and staff were hired to conduct preargument conferences. During a twelve-month period beginning in October 1974, cases were randomly assigned to experimental and control groups. Federal Judicial Center staff evaluated program results, after reviewing case files and responses to questionnaires completed by judges and attorneys. See Jerry Goldman, *An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration* (Federal Judicial Center 1977); Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 Colum. L. Rev. 1209 (1978).

In 1978, the court began a second experiment with an expanded CAMP program, and the Federal Judicial Center evaluated the expanded program. See Anthony Partridge & Allan Lind, *A Reevaluation of the Civil Appeals Management Plan* (Federal Judicial Center 1983). See also Comment, I. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 Yale L.J. 755 (1986).

For More Information

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Third Circuit: Appellate Mediation Program

Under the Third Circuit's Appellate Mediation Program, the program director selects from the pool of eligible cases those that have nonfrivolous issues of the kind that are capable of being mediated and settled. Senior judges in the circuit serve as mediators for about half the cases selected; the program director mediates the rest. Generally, once a mediation is scheduled under the program, participation is mandatory. Usually parties attend the mediation with their counsel.

The purpose of the program is to facilitate settlement and otherwise assist the expeditious handling of the appellate caseload. The program was designed to maximize both judicial economy and cost savings to the parties. The program is governed by Fed. R. App. P. 33 and the court's June 8, 1994 per curiam order (effective Aug. 1, 1994). The program currently applies to cases on appeal from all districts in the circuit except the District of the Virgin Islands. Full implementation began on March 1, 1995. (From August 1994 to March 1995, the court tested the program's procedures on cases appealed from the Eastern District of Pennsylvania.)

In the period from May 1 to Oct. 31, 1995, 422 new filings were referred by the clerk's office as eligible for the program. From those filings, the program director selected 107 for mediation and a mediation session was held in nearly all cases selected. The program has been scheduling mediations in about 25% of all new filings referred by the clerk's office.

Senior judges of the court of appeals, senior judges of the district courts, and the program director serve as mediators. Most initial mediation sessions are in person. Generally, the clerk's office does not issue a briefing order until after a case leaves the program. Although agency cases are eligible for the program, the director does not schedule mediation if agency settlement authority cannot be readily obtained.

Selecting Cases for Conferences

Eligible case types

Nearly all civil cases in which all parties are represented by counsel are eligible for the program. The only case types not eligible are original proceedings, prisoner cases (including habeas corpus petitions and prisoner civil rights cases), cases with unresolved jurisdictional

problems, cases otherwise expedited by the court, and cases in which a party appears pro se.

Selection process

The clerk's office forwards eligible cases to the program director, usually within four weeks of the filing of the notice of appeal. Approximately 95% of cases selected for conferences come from this pool of eligible cases.

Within one week and usually within two days after receipt of an eligible case, the program director reviews the case file and decides whether the case should be placed in mediation. The director selects cases with legitimate issues of the kind that are capable of being mediated and settled. If uncertain whether a case is appropriate for mediation, the director may talk to counsel to get their views on the likelihood of settlement. To explore further whether settlement is possible, the director might also talk to the trial judge and, if prior serious attempts at settlement have failed, may decide not to select the case. The director does not select a case for mediation if the appeal appears to be frivolous.

Documents reviewed

The program director 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 program director also receives forms completed by the appellant, including the civil appeal information statement and the concise statement of facts and issues to be presented on appeal. (For cases eligible for the program, after receipt of the notice of appeal, the clerk's office sends counsel a copy of the court's order establishing the program and copies of court forms including the civil appeal information statement and the concise statement of facts and issues to be presented on appeal. Within ten days after receipt, the appellant must file completed forms with the clerk.)

Requests by parties

About 5% of the program cases enter at the request of one or more parties. A party may request mediation at any time during a case. The program director generally grants these requests in any nonprisoner civil case where all parties are represented by counsel; however, if a request is made after briefing and designation of a hearing panel, it is granted only with approval of the court.

Judicial selection

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

Scheduling the Conferences

Scheduling process

The director assigns a mediator to each case selected for mediation and sends the parties and the clerk a notice of the assignment. When the director is not serving as mediator, the notice is also sent to the judge who will serve as mediator. The notice identifies the mediator and instructs the parties on their preparation of confidential position papers (described below).

Timing of conferences

The initial mediation session is held as soon as practicable after the mediator receives each party's confidential position paper. The initial session is always held before issuance of the briefing order, except for cases that enter the program later at the request of a party or panel.

In-person conferences

The director encourages in-person mediations and most initial sessions are in-person. In assigning cases, particularly those assigned to senior judges, the director considers the geographic proximity of the parties' counsel and the mediator. Only under unusual circumstances would a mediator travel to conduct an in-person mediation. Generally, if the director is conducting a session, it is held in the Appellate Mediation Program's offices in Philadelphia. If a senior judge is conducting a session, it is held in that judge's chambers.

Teleconferences

In some cases, distance or other factors preclude in-person conferences; 20% or less of initial mediations are conducted by telephone, with the mediator initiating the calls.

Conference Sessions

Position papers

Within fifteen days of notice of the assignment to mediation, counsel for each party must prepare and submit to the mediator a confidential position paper of no more than ten pages. The position paper must

state counsel's views on settlement, describe prior settlement discussions, and identify other issues or lawsuits that must be resolved to settle the case. Neither the appellate panel nor opposing counsel see the position papers.

Nature of sessions

The purpose of the mediation session is to consider the possibility of settlement and any other matters that the mediator determines may aid in 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 and to create an amicable solution. The conduct of the session follows the classic mediation model, including the mediator caucusing with parties and facilitating efforts to settle the case. The mediator may also mediate related issues or lawsuits that are not on appeal.

Party participation

Generally, once a mediation is scheduled under the program, participation is mandatory. The mediator directs the attorneys and, almost always, the parties to attend the mediation session. Mediation sessions must be attended by the senior lawyer responsible for each side of the appeal or another person with actual authority to negotiate a settlement.

In cases involving the U.S. government, senior attorneys on either side of the case may attend the mediation sessions as long as someone with settlement authority can be reached during each session. Department of Justice attorneys in mediation sessions must give the mediator the name and title of the government official authorized to effectuate settlement (under 28 C.F.R., Part O, Subpart Y) and the person the mediator and attorney can contact by telephone during the mediation session. When settlement authority for the government rests with an official of the rank of assistant attorney general (or its equivalent) or higher, or with the members of an independent agency, the requirement that the official or members be reachable during the mediation session does not apply, unless the mediator for good reason requires it.

Number and length of sessions

Initial in-person mediation sessions last an average of two hours; initial telephone mediation sessions last an average of one hour. Typi-

cally, one in-person mediation session is held per case. At the conclusion of the initial mediation session, the mediator determines whether additional sessions are necessary and notifies the parties of any future sessions. For the majority of cases in the program, after the initial session the mediator conducts follow-up telephone negotiations, with or without clients, as necessary to pursue settlement fully.

Post-conference procedures

Parties are not bound by anything said or done at a mediation session unless a settlement is reached.

If a tentative settlement is reached, the director reports it to the clerk and sends all counsel a letter outlining its fundamental terms. The letter also offers help in finalizing the written settlement agreement and fixes a due date for filing a stipulation of dismissal of the appeal. Counsel must file the stipulation, with a copy to the director, within thirty days after settlement is reached. The director's assistant monitors due dates for dismissal stipulations. Counsel may ask the director for an extension, which is granted if good cause is shown.

If no settlement is reached, the director sends the clerk a notice that the mediation was unsuccessful and that the mediation file has been destroyed. The clerk's office then issues a briefing order.

Other Rules or Policies

Effect on appellate proceedings

All cases in the program remain subject to normal clerk's office scheduling for briefing and oral argument. Generally, however, the clerk's office does not issue a briefing order until after a case leaves the program. If the scheduling of additional mediation sessions will affect the briefing schedule in a case, the clerk, upon the mediator's recommendation, postpones issuance of the briefing order.

The program was designed to minimize delay by requiring a swift screening process and conferencing schedule. Most cases referred from the clerk's office are quickly excluded from the program through the director's screening process described above. Once a case is selected, the mediator asks the parties to stop litigating and start focusing on mediating. Mediated cases that do not settle return to a full briefing schedule, usually within sixty days after entering the program.

Confidentiality

The mediator must not disclose the substance of the mediation sessions to any person. The attorneys are likewise prohibited from disclosing any substantive information from the sessions to anyone, with the exception of their clients or cocounsel but only upon receiving due assurances that the recipients will honor the confidentiality rules. No information provided in the mediation sessions is to be construed as an admission against interest. The parties' confidential position papers sent to the mediator are not served on opposing counsel.

The appellate panel is never told whether a case has been in the mediation program. The parties must not file any motion or other document that would disclose information about the content of a mediation, whether or not it has been concluded. Parties are prohibited from using any information obtained as a result of the mediation process as a basis for any motion, other than a motion affecting the briefing or argument schedule. Documents prepared for mediation sessions are not to be filed with the clerk's office except as noted above. If a case does not settle, the director destroys all mediation files for that case.

Sanctions

Failure of counsel to comply with the requirements of the court's order establishing the program could result in sanctions, but sanctions with respect to conferencing have not been necessary to date.

Mediator Staffing

Assignment of cases

The director assigns each case in the program to a mediator, with the assignment often based on the geographic locations of counsel in the case and available mediators. Senior judges conduct about half the mediations, with the rest conducted by the program director.

Qualifications and training

Court personnel report that in selecting the program director, the court sought an attorney with extensive federal court litigation and ADR experience. The director has nearly thirty years' experience as a lawyer.

Recusal

In selecting cases for mediation, the director does not see files for cases in which the director's former law firm is involved. Screening for those cases is done by the clerk of the court of appeals; the clerk administers mediation for those cases if they are selected for mediation. For cases for which there is any potential for conflict of interest, the program director has no contact with the case or those involved in mediating it.

A judge who participates in a mediation under the program will not sit on a judicial panel that considers any aspect of the case.

Program Administration

Organization and management

The director, in cooperation with the clerk of court, manages the program. 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 has one administrative assistant.

Reports and evaluation

The director maintains data, by type of case, on the number of cases referred to the program, the number of cases mediated, whether those mediations resulted in settlement, and how long cases have been in the program.

For More Information

Jacob P. Hart, Esq., Director, Appellate Mediation Program, U.S. Court of Appeals for the Third Circuit, 601 Market St Rm 20716, Philadelphia PA 19106, tel. 215-597-6238

Fourth Circuit: Pre-Argument Conference Program

The Fourth Circuit's Pre-Argument Conference Program's senior conference attorney reviews all eligible cases shortly after docketing to determine whether a preargument conference might assist the court or the parties. Counsel for the litigants also are encouraged to request a conference if they believe mediation will be helpful. If a conference is scheduled under the program, the court requires lead counsel for each party to participate. For most initial conferences, clients are not required to attend. Each conference is conducted by an attorney in the court's Office of the Conference Attorney.

The objectives of the program are to reduce the caseload of the judges of the circuit and thereby to save taxpayers money, as well as save time and money for litigants and their counsel.

The program, which accepted its first case on Aug. 1, 1994, is governed by Fed. R. App. P. 33 and 4th Cir. R. 33. In fiscal 1995, the clerk's office referred 867 cases to the program. In that year, the Office of the Conference Attorney accepted 625 cases into the program, including cases where a party requested a conference. Conferences were scheduled in nearly all 625 cases.

Most conferences are conducted by telephone but they may be held in person at the discretion of the conference attorney. Conference attorneys have found that granting extensions of briefing schedules can in certain cases facilitate settlement.

The program does not include agency cases unless a party requests a conference or other circumstances warrant one, because government attorneys often have insufficient authority to negotiate and settle a case.

Selecting Cases for Conferences

Eligible case types

All docketed civil cases are eligible for the program except for prisoner cases, habeas corpus petitions, cases in which a party is appearing pro se, tax appeals, and most agency cases. Original proceedings such as mandamus petitions are not mediated unless an appellate panel requests mediation.

Selection process

Shortly after receiving the docketing statement from the clerk's office, the senior conference attorney screens each eligible case and determines whether mediation will help the court or the parties. In selecting cases, the senior conference attorney gives weight to indications of receptiveness to settlement, including whether a party requested mediation. Other factors considered include the complexity of the case, the amount of monetary relief requested, and the nature of the issues (for example, constitutional issues might not be appropriate for mediation, whereas cases alleging only monetary damages might be). Occasionally, the senior conference attorney may talk to counsel of record about prospects for settlement before selecting a case.

Documents reviewed

For each eligible case, the clerk's office sends the Office of the Conference Attorney a copy of the docketing statement and related papers filed by the parties. The docketing statement identifies the issues to be raised on appeal, lists relevant citations to governing statutes or dispositive cases, and includes a copy of any order or judgment that is the subject of the appeal. (Upon filing of the notice of appeal, the clerk's office of the court of appeals sends parties a package that includes a docketing statement form, information concerning the conference program, and procedures for requesting a conference. The appellant must file a completed docketing statement form with the clerk.)

The clerk's office also identifies cases that have unresolved jurisdictional problems and notifies the senior conference attorney when jurisdictional problems are resolved.

Requests by parties

A small but increasing percentage of cases in the program are scheduled for mediation at the request of a party. If a party requests mediation, the senior conference attorney screens the case to determine if it should be accepted into the program. Such requests are granted at the senior conference attorney's discretion and are usually allowed in civil cases in which no party appears pro se. A party may request a conference at any time during an appellate case.

Judicial selection

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

Removal from the program

The court has no established procedure for a party to remove a case from the program. However, at any time after the beginning of the first conference, the conference attorney may terminate conference proceedings if he or she concludes that participation in the program would not be beneficial.

Scheduling the Conferences

Scheduling process

For cases selected for mediation, the Office of the Conference Attorney gives written notice of the scheduling of a conference, usually within seven days after the office receives a case. Cases are assigned either to a conference attorney in Durham, N.C., or one in Richmond, Va. To maximize the reach of the program and provide the earliest possible intervention point, the office reschedules conferences only in the event of exceptional circumstances or a conflict with a court hearing or trial. Consolidated appeals and appeals in companion cases are generally consolidated for mediation.

Timing of conferences

Nearly all conferences are scheduled for a date before briefs are due.

Teleconferences

More than 95% of the conferences are teleconferences, with the conference attorney initiating the calls.

In-person conferences

In-person conferences are scheduled at the direction of an appellate panel, by request of the parties, or in other appropriate cases as determined by the conference attorney. For example, when a case involves attorneys at locations not too far from Durham or Richmond, in-person conferences may be scheduled at court facilities in either of those cities. Conference attorneys travel to mediation sites at other locations only on rare occasions—if, for example, the conference attorney determines that an in-person conference is essential but a party does not have the ability to travel.

Conference Sessions

Nature of sessions

Conference objectives include the following:

- to prevent unnecessary motions or delay by attempting to resolve any procedural problems in the case
- to identify and clarify the main issues raised in the appeal
- to consider any other matter relating to the management and disposition of the appeal
- to explore possibilities for settlement.

Although significant attention may be given to procedural questions and problems raised by counsel, the primary purpose of the conference is to offer participants a confidential, risk-free opportunity to evaluate their case candidly with an informed neutral and explore possibilities for voluntary disposition of the appeal.

Before a conference, the conference attorney usually reads the district court opinion as well as cases cited in the docketing statement. The extent of conference attorney preparation varies with the amount of information available at the time of the conference. Most conferences begin with an inquiry as to any procedural questions or problems counsel might have that could be resolved by agreement. These might include questions about the joint appendix or the need for a specially tailored briefing schedule. The conference attorney often then presents a short overview of the appeal and asks for comments on its accuracy. This is sometimes followed by parties' counsel discussing the issues on appeal.

The conference attorney then inquires about settlement and probes for each party's interests if these are not immediately evident. Lead counsel are asked to come prepared to articulate their views of the merits of the case as well as their clients' interests and needs. Generally, the conference attorney facilitates or leads an exploration of settlement. This is often done in private caucuses with each party. The conference attorney works toward generating offers and counteroffers until the parties either settle or, if the case cannot be settled at the conference, know how far apart they are. The conference attorney does not predict how the court will rule on any issue or on the appeal as a whole.

Party participation

If a conference is scheduled, the court requires participation of all

lead counsel of record. Clients generally are not required to attend most initial conferences, but they may.

Counsel are expected to attend with authority to initiate and respond to settlement proposals, but conference attorneys do not necessarily expect counsel to have absolute settlement authority. Sometimes, the purposes of the conference cannot be achieved without the involvement of individuals or groups who are not parties to the appeal, and the conference attorney may invite such parties to participate.

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; however, it is rare for a case to be settled at the first telephone conference. Typically, three joint conferences, with or without clients, are held. This does not include the many separate follow-up telephone calls between the conference attorney and each counsel that are usually necessary before agreement is finally obtained. Follow-up discussions may continue for days, weeks, or longer.

Post-conference procedures

The 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 a case is settled, the conference attorney gives appellant's counsel a motion for entry of dismissal. Once the litigants sign the motion, the conference attorney forwards it to the clerk, who enters the dismissal and closes the case.

If the conference process does not result in dismissal, the Office of the Conference Attorney returns the case to the clerk for further appellate proceedings.

Other rules or policies

Effect on appellate proceedings

Although the time allowed for filing briefs is not automatically tolled by the conference process, parties who wish to pursue settlement or are engaged in settlement discussions may move to suspend or extend the briefing schedule for a reasonable time. Extensions to the briefing schedule are not favored, but the conference attorney may

recommend extensions if all parties consent, if the conference attorney determines that significant progress toward settlement has occurred, and if an extension will likely contribute to a settlement. The clerk routinely adopts the conference attorney's recommendation on briefing schedules.

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

Confidentiality

The appellate docket sheet contains no record of the conference process. Statements and comments made during conferences and information about what happens in the conference process must not, at any time, be made known to the judges of the court or disclosed by the conference attorney or parties' counsel. The files and computer database maintained by the Office of the Conference Attorney are confidential and are not accessible by other units of the court. Papers generated specifically for the conference process and filed with the conference attorney are not included in other court files, except to the extent provided by consent orders entered pursuant to court rules.

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

Sanctions

The conference attorney has no authority to impose sanctions. However, if a party refuses to participate in a conference, unreasonably delays the scheduling of a conference, or otherwise unreasonably impedes the conduct of the program, the conference attorney may recommend that the clerk of court initiate disciplinary action.

Conference Attorney Staffing

Assignment of cases

Each mediation is conducted by one of three conference attorneys employed by the court. The senior conference attorney determines how cases are assigned. Although the assignment process is generally random, the senior conference attorney may assign cases on the basis

of the geographic location of the conference attorney and lead counsel.

Qualifications and training

Court personnel report that in searching for the senior conference attorney, the court sought an attorney who had long and prominent experience in the legal field. The court selected a former North Carolina Supreme Court justice who had formal mediation training. For the other conference attorneys, court personnel report that the court looked for persons who have a strong interest in mediation, experience in the practice of law, and familiarity with the internal operations of the court of appeals.

Recusal

The court has no written recusal rules for conference attorneys other than the code of conduct for federal judicial employees. The conference attorneys observe ethical rules generally applicable to mediators.

Program Administration

Organization and management

Program staffing includes the senior conference attorney in Durham, two additional conference attorneys, and two support persons. The Office of the Conference Attorney is located in Durham, rather than at the seat of the court of appeals in Richmond, because separating the judges of the court from conference program management furthers the goal of confidentiality.

Reports and evaluation

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

For More Information

Hon. Harry C. Martin, Senior Conference Attorney, U.S. Court of Appeals for the Fourth Circuit, 323 E Chapel Hill St Rm 202, Durham NC 27701, tel. 919-541-7848

Fifth Circuit: Appellate Conference Program

The Fifth Circuit launched an appellate conference program in November 1996. The program is currently governed, on an interim basis, by a general order dated November 16, 1996. It is expected that the general order will be replaced by a local rule that provides more detailed procedures. The court employs one appellate conference attorney to conduct all conferences. Under the program, the conference attorney schedules settlement conferences for about 10% of the court's cases. In addition, if a party requests a conference, the Office of the Appellate Conference Attorney generally will schedule one in any eligible case. Lead counsel's participation is required at any scheduled conference. The conference attorney may also require attendance by the parties. The purposes of the conferences include simplification, clarification, and reduction of issues; discussion of settlement; and consideration of any other matter relating to the efficient management and disposition of the appeal. Most conferences are conducted by telephone, but they may be conducted in person at the option of the conference attorney or upon request of the parties. If the parties are engaged in settlement discussions, the conference attorney may recommend a resetting of the briefing schedule. The conference attorney may also recommend the entry of other orders controlling the course of proceedings.

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.

Selection process

The conference attorney reviews cases that are eligible for the program after they clear the court's jurisdictional review. The conference attorney then schedules a conference in cases that appear to have settlement potential, or where a conference might be helpful in narrowing issues. Cases that appear likely to continue to put demands on judicial resources get particular attention. The conference attorney schedules a conference in as many eligible cases as resources allow. One of the immediate objectives of the program is to develop criteria for the conference attorney to use in selecting cases in the future.

Documents reviewed

Currently, selection is based on information contained in the district court's docket sheet, the opinion below, and other pleadings that may be requested by the conference attorney from the district court.

The conference attorney may also request the parties to provide written, case-specific information in the course of the conference proceedings. Papers and briefs filed with the clerk of the court of appeals are reviewed by the conference attorney as a matter of course.

Requests by parties

A party may request inclusion in the program at any time. The conference attorney generally grants the request in any eligible case.

Judicial selection

Occasionally, panels of the court refer cases to the program.

Scheduling the Conferences

Scheduling process

In cases selected for the program, an order is entered assigning each case to the program for proceedings in accordance with the general order. The conference attorney sends lead counsel 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 after the notice of appeal is filed and ten days to two weeks before the conference date. Conferences may be rescheduled when necessary at the request of a party.

Timing of conferences

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

Teleconferences

Most conferences are scheduled as telephone conferences, with the conference attorney initiating the calls.

In-person conferences

Conferences may be conducted in person at the option of the conference attorney or upon request of the parties.

Conference Sessions

Preconference submissions

The conference attorney may require counsel to provide pertinent written information or materials, including position statements, lists of issues, outlines of arguments, or other documents that the conference attorney believes may be helpful in accomplishing the purposes of the conferences. In addition, counsel are requested to copy the conference attorney with all filings and correspondence sent to the clerk. However, counsel are asked not to copy the clerk with materials or documents requested by the conference attorney or otherwise prepared specifically for the program.

Nature of sessions

At the 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, with the conference attorney commenting and questioning as appropriate. The conference attorney facilitates each side's understanding of the issues on appeal and usually caucuses with each side separately, exploring each party's interests and soliciting settlement ideas, offers, and counteroffers.

The conference attorney may also help the parties resolve procedural issues before the initial conference ends. Since cases ordinarily continue beyond the initial conference, the conferences conclude with discussion of next steps in the negotiations, which might include follow-up conferences, submission or exchange of position papers, or discussion between attorneys and their clients as appropriate.

In some cases, the conference attorney's role is concentrated 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 less structured.

Party participation

Lead counsel for all parties are required to participate in any scheduled conference. The conference attorney may also require attendance by the parties or their appropriate corporate representatives.

Number and length of sessions

Initial telephone conferences last an average of one to two hours; initial in-person conferences can last as long as necessary. After the initial conference, the conference attorney conducts follow-up negotiations, with or without clients, as necessary.

Post-conference procedures

Absent consent of all parties, the conference process is not to result in any actions that affect the interest of any party or the case on its merits.

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 are monitored by the conference attorney to assess the results of efforts to narrow the issues and to take advantage of any later opportunity to reopen negotiations.

Other Rules or Policies

Effect on appellate proceedings

The time allowed for filing briefs is not tolled automatically by the conference process. If the parties are engaged in settlement discussions, the conference attorney may recommend a resetting of the briefing schedule. The conference attorney may also recommend the entry of other orders controlling the course of proceedings, including orders altering the page limits for briefs and record excerpts.

Any extensions of the briefing schedule or other procedural adjustments are accomplished through orders like those used in nonconference cases. Consequently, conference program cases can be handled by the clerk's office without any special procedures, and the work of the clerk's office in processing a case is not suspended by assignment to the program.

Confidentiality

All statements made by the parties or their counsel in the course of proceedings pursuant to the general order, and all documents specifically prepared for use in such proceedings, shall be without prejudice, and shall not be binding on the parties unless a settlement agreement is reached. Such statements and documents shall not be quoted, cited, referred to, or otherwise used in the course of the appeal, or in

any other proceeding, except as they may be admissible in a proceeding arising out of a settlement agreement, and they shall be privileged from discovery except in such a proceeding. Documents created for the program and furnished to the conference attorney will not be included in the court's file.

Confidentiality is required with respect to all proceedings pursuant to the general order. Information concerning conferences or settlement discussions shall neither be made known to the court nor disclosed to anyone not involved therein, by either the conference attorney, the parties, or their counsel, except insofar as the information may be admissible in a proceeding arising out of a settlement agreement. The conference attorney may report to the court, when requested, whether active settlement discussions are under way, thus warranting a rescheduling of briefing or disposition. The confidentiality of any settlement agreement will be governed by the terms of that agreement and applicable law.

Sanctions

If a party or attorney fails to comply with conference procedures, the court may assess sanctions for violation of the court's order assigning the case to the program.

Conference Attorney Staffing

Assignment of cases

The appellate conference attorney, who is employed by the court, conducts all conferences in the program.

Qualifications and training

Court personnel report that in selecting the appellate conference attorney, the court sought an attorney who has experience with settlements of the kind of private litigation at which the program is directed and in the identification and assessment of issues in the appellate context.

Recusal

The program has no written recusal rules for the conference attorney other than the code of conduct for federal judicial employees.

Program Administration

Organization and management

The court's Office of the Appellate Conference Attorney includes the conference attorney and an administrative assistant. The administrative assistant's duties include managing the clerical operations of the office and scheduling the conferences. Organizationally, the office is a separate unit of the court, physically and administratively separate from other court offices. The conference attorney manages the program under the direction of the court. One of the judges resident in New Orleans has been appointed proctor for the conference program, but has no access to confidential information about conference proceedings.

For More Information

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Sixth Circuit: Pre-Argument Conference Program

In the Sixth Circuit, the Office of Conference Attorneys schedules preargument conferences to facilitate settlement for most appellate cases that meet program eligibility requirements. In addition, if a party requests a conference, the Office of Conference Attorneys generally will schedule one in any nonprisoner case in which all parties are represented by counsel. Usually, once the office schedules a conference, participation in the process is mandatory; parties usually participate through counsel. Five attorneys employed in the Office of Conference Attorneys conduct all conferences.

The primary purpose of the program is to facilitate settlement in as many cases as possible. 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 established a Pre-Argument Conference Program on a trial basis in 1981 and implemented the permanent program in 1983. The process is governed by Fed. R. App. P. 33, 6th Cir. R. 18, and 6th Cir. I.O.P. 10.1. In recent years, the Office of Conference Attorneys has scheduled about 1,000 cases per year for conferencing: 1,015 cases in fiscal 1995, 1,077 in fiscal 1994, and 853 in fiscal 1993. Conferences were held in nearly all eligible cases scheduled for conferencing. Each conference attorney handles four to eight new cases per week.

About 90-95% of all conferences in the Sixth Circuit's program are conducted by telephone. In the first year of the program, active and senior circuit judges conducted conferences. Under the current program design, the court's conference attorneys conduct all conferences.

Selecting Cases for Conferences

Eligible case types

By local rule, all civil cases docketed in the court are eligible for the program. In practice, conferences generally are not scheduled 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 and NLRB, cases in which at least one party appears pro se, and cases with unresolved jurisdictional problems. If a party requests a conference, the Office of Conference Attorneys generally grants the request in any nonprisoner civil appeal where all

parties are represented by counsel. (Upon docketing of the case, the clerk's office sends all parties a package of case opening materials that includes, for eligible cases, a preargument statement form and a separate form by which parties may request a preargument conference.)

Selection process

For each eligible case, the conference attorneys review the preargument statement and jurisdictional screening form (described below). The Office of Conference Attorneys schedules a preargument conference in as many eligible cases as the resources of the office will allow.

Documents reviewed

For all eligible cases, the clerk's office sends the Office of Conference Attorneys the preargument statements filed by the parties. (In all eligible cases, the appellant must file a preargument statement with the clerk within fourteen days after receipt of case opening materials from the clerk's office.) The statement provides information about the parties, the disposition of the case at the trial level, the issues to be raised on appeal, and appropriate citations to governing statutes or dispositive cases.

The clerk's office also forwards to the conference attorneys a jurisdictional screening form that indicates any immediately apparent jurisdictional defects.

Requests by parties

A party may request a conference any time before the case is calendared for oral argument. The Office of Conference Attorneys generally grants the request in any nonprisoner civil appeal where all parties are represented by counsel.

Judicial selection

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

Scheduling the Conferences

Scheduling process

For cases selected for conferencing, the Office of Conference Attorneys sends lead counsel a notice setting the date and time for the conference and explaining the purposes of the program. The notice is

usually sent within two weeks after the notice of appeal is filed and two to three weeks before the conference date. Conferences may be rescheduled when necessary at the request of a party.

Timing of conferences

Most conferences are set for a date before briefs are due.

Teleconferences

Initial conferences are generally scheduled as telephone conferences with counsel. About 90% to 95% of all conferences are conducted by telephone, with the court initiating the calls.

In-person conferences

If all counsel are in the Cincinnati area, the initial conference is in-person, usually at the courthouse of the court of appeals in Cincinnati. A few times a year, conference attorneys conduct in-person conferences outside Cincinnati. This occurs only under unusual circumstances if such travel would greatly facilitate settlement, such as when large numbers of people must participate in the negotiations and all of them are in the same city. Limited time and travel funds prohibit routine travel to conference sites.

Conference Sessions

Nature of sessions

At the conference, the conference attorney sets out the ground rules, emphasizes the confidentiality rules, and answers questions about court rules and procedures. Counsel for the parties explain their views on the issues raised on appeal, with the conference attorney commenting and questioning as appropriate. The conference attorney facilitates each side's understanding of the issues on appeal and usually caucuses with each side 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 conference attorney may help the parties resolve procedural issues before the conference ends. In cases that continue beyond the initial conference, the conferences conclude with discussion of next steps in the negotiations, which might include follow-up conferences or briefing extensions as appropriate.

Party participation

If a conference is scheduled, lead counsel for all parties are required to participate. Counsel are expected to come with authority to make and respond to settlement proposals. Generally, clients are not required to be present at initial conferences.

Number and length of sessions

Initial telephone conferences last an average of 1 hour; initial in-person conferences last an average of 1.5 hours. Approximately 25% of scheduled cases do not go beyond the initial conference. In the balance of cases, after the initial conference, the conference attorney conducts follow-up telephone or in-person negotiations, with or without clients, as necessary.

Post-conference procedures

Absent consent of all parties, the conference process is not to result in any actions that affect the interests of any party or the case on its merits.

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

For cases that do not settle, if the parties agree on resolution of a procedural issue, such as a revised briefing schedule, the conference attorney confirms the agreed-on due dates in writing and notifies the clerk's office of the revised schedule. If a case cannot be resolved fully through the conference process, the Office of Conference Attorneys notifies the clerk's office that the office is finished with the case, and the case proceeds normally on the court's docket.

Other Rules or Policies

Effect on appellate proceedings

The conference process does not automatically stay other events in a case. However, the conference attorney may extend deadlines for briefing as necessary so that the first brief is due no earlier than two weeks after the date scheduled for the conference. If negotiations continue productively and all parties and the conference attorney agree, briefing may be postponed for a reasonable time until negotiations

are completed. The administrator in the Office of Conference Attorneys 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 during the conference process, the clerk's office refers them to the Office of Conference Attorneys. Conference attorneys often facilitate party agreement on such motions, but if the motion cannot be resolved by party agreement, the clerk's office handles it as any other contested motion.

Confidentiality

The statements and comments made during the conference by the parties and the conference attorney are confidential. Statements and comments otherwise made by the parties to the Office of Conference Attorneys are confidential. The parties are not permitted to disclose these communications in briefs or argument unless all parties agree to the disclosure.

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 was held, what happened at the conference, the results of the conference, and other events in the 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. If a party requests a conference, the court keeps that request confidential, but the requesting party need not do so.

Sanctions

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

Conference Attorney Staffing

Assignment of cases

Cases are randomly assigned to conference attorneys employed by the court.

Qualifications and training

Court personnel report that in selecting conference attorneys, the court seeks attorneys who have a working knowledge of law, demonstrated

legal analytical and problem-solving skills, maturity, and good judgment. All conference attorneys 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 Office of Conference Attorneys 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.

Recusal

The program has no written recusal rules for conference attorneys other than the code of conduct for federal judicial employees.

Program Administration

Organization and management

The court's Office of Conference Attorneys includes the senior conference attorney, four conference attorneys (three full-time equivalents), the conference administrator, and two secretaries. Organizationally, the office is a separate unit of the court, physically and administratively separate from other court offices. The senior conference attorney manages the program under the 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.

Reports and evaluation

The Federal Judicial Center published an evaluation of the court's 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 generally Robert W. Rack, Jr., *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 Toledo L. Rev. 921 (1984) (description of settlement negotiation at the appellate level and of the court's program in 1984).

For More Information

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Seventh Circuit: Settlement Conference Program

In the Seventh Circuit's Settlement Conference Program, about one eligible appeal in five is selected at random to participate in the program. If a party to any eligible case requests a settlement conference, the Settlement Conference Office will schedule one, time permitting. Participation in any conference scheduled under the program, including any follow-up conferences, is mandatory. The court's settlement conference attorneys conduct all conferences in the program, unless potential conflicts result in recusal.

The purpose of the program is to encourage and facilitate the settlement of civil cases docketed in the court. The court implemented the program in November 1994, pursuant to Fed. R. App. P. 33 and 7th Cir. R. 33. (A previous preargument conference program, initiated in 1972, continued into the 1980s.) The program became fully operational in January 1995. For 1996, the random selection process was designed to refer about 230 cases to the program.

The senior conference attorney has set broadly inclusive criteria for program eligibility in the early years of the program, but the criteria may be narrowed as the program matures. The settlement conference attorneys have the authority not only to explore the possibility of settlement, but also to address procedural issues with the parties and to modify briefing schedules. About 40% of initial conferences are held in person.

Selecting Cases for Conferences

Eligible case types

Eligible cases include all docketed civil cases except pro se, prisoner civil rights, habeas corpus, collateral review of convictions and sentencing pursuant to 28 U.S.C. § 2255, Social Security disability, immigration, and original proceedings. Commercial and employment cases are two of the most common types scheduled for conferences. Cases with unresolved jurisdictional problems are not automatically excluded from the program.

Selection process

The clerk's office sends the Settlement Conference Office approximately one-fifth of the court's eligible cases shortly after the cases are docketed. The cases sent are selected at random. The Settlement Confer-

ence Office schedules a conference in all cases it receives from the clerk's office.

Documents reviewed

Before an initial conference, the settlement 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 for the basis of jurisdiction, which the appellant must file with the clerk within seven calendar days after filing a notice of appeal), the district court docket sheet, and the decision appealed from. Sometimes the conference attorney does preliminary legal research.

Requests by parties

Approximately 10% of the cases are in the program at the request of one or more parties. Generally, requests by parties are accepted in any eligible appeal if the Settlement Conference Office calendar permits. Requests may be made by telephone or letter directly to the Settlement Conference Office; a written motion is not necessary.

Judicial selection

Cases are not ordinarily referred by judicial panels.

Scheduling the Conferences

Scheduling process

The Settlement Conference Office sends counsel for each party a Notice of Rule 33 Conference advising 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.

Timing of conferences

When possible, conferences are scheduled well in advance of the due date for appellant's brief.

Teleconferences

For the majority of cases in the program, conferences are conducted by telephone.

In-person conferences

Conferences are held in person at the Settlement Conference Office in Chicago when all attorney participants practice in the Chicago area, which is the situation in about 40% of conference cases. The settlement conference attorneys do not regularly conduct in-person conferences at other locations but can do so in appropriate cases.

Conference Sessions

Preconference submissions

The Settlement Conference Office does not ordinarily require counsel to submit a preargument statement other than the docketing statement described above. However, counsel are frequently asked to furnish copies of designated pleadings or opinions from the district court in advance of the initial conference.

Nature of sessions

At the conference, the settlement conference attorney gives some attention to procedural matters, but the primary purpose is to explore the possibility 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 settlement conference attorney ordinarily meets with counsel first in joint session and then separately in caucuses. Although they discuss settlement proposals at the initial conference, settlement may not be reached at that conference. Often, the settlement conference attorney schedules follow-up conferences or conducts “shuttle” negotiations. By the conclusion of the process, the parties have either reached an agreement to settle or have learned how far apart they are and what the remaining obstacles are to settlement.

Party participation

Participation in any conference scheduled under the program, including any follow-up conferences, is mandatory. Whether to settle is the parties’ decision, but good-faith participation in the settlement process is required. Generally, clients are not required to attend the initial conference; however, parties or party representatives with full settle-

ment authority must be available by telephone for the duration of the conference. Parties are often required to participate in a follow-up joint conference or in caucuses with their counsel and the settlement conference attorney.

It is essential 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.

Number and length of sessions

Initial conferences, whether in-person or on the telephone, usually are scheduled for at least two hours. On average, initial conferences last less than two hours but may take three hours or more. Most initial conferences are followed by additional conversations. A second or third conference with all counsel may be required.

Post-conference procedures

If a settlement is achieved, the settlement conference attorney provides counsel with a form of agreed motion to dismiss the appeal, but counsel are free to document the settlement in any form mutually acceptable to them. Although the settlement conference attorney may assist counsel 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 settlement conference attorney may renew contacts with counsel to explore again the possibility of settlement.

Other Rules or Policies

Effect on appellate proceedings

The court's preliminary consideration of its jurisdiction and counsel's filing of jurisdictional memoranda, when ordered, are not ordinarily stayed pending the outcome of Rule 33 proceedings. Nor is briefing on the merits automatically suspended. (By circuit rule, the standard briefing schedule begins to run on the date the appeal is docketed in the court of appeals. Except in agency cases, there is no initial briefing schedule order.) Nevertheless, the settlement conference attorney may extend the time for briefing or stay the appeal if that would facilitate

negotiation and settlement. A court order is issued if a procedural schedule is modified.

Confidentiality

Although an appeal's having been scheduled for a Rule 33 conference is a matter of record, the substance of all discussions held under Rule 33 is off the record. 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 Rule 33 proceedings in the strictest confidence. As part of this agreement, all participants, including the settlement conference attorney, are forbidden to disclose to any judge or other court personnel what takes place in the conferences. The court looks severely upon any breach of this rule, no matter how well intentioned.

If a party requesting a conference prefers to keep its request confidential, the Settlement Conference Office does not disclose it to other parties, the judges, or other units of the court.

Sanctions

The court has not had occasion to impose sanctions for misconduct in connection with Rule 33 proceedings. Specific rules governing such sanctions have not been promulgated.

Settlement Conference Attorney Staffing

Assignment of cases

The court currently has two settlement conference attorneys who, barring recusal in a case, conduct all Rule 33 conferences.

Qualifications and training

Court personnel report that in selecting the settlement conference attorneys, the court sought experienced lawyers with skills and temperament to help litigants overcome obstacles to settlement.

Recusal

It is the practice of the settlement conference attorneys to recuse themselves from cases in which they believe they would have a conflict of interest. For guidance regarding the appropriateness of recusal, the settlement conference attorneys look to the ABA's Model Code of Judicial Conduct and the code of conduct for federal judicial employ-

ees. In those cases where an actual or colorable conflict of interest precludes a settlement conference attorney from conducting a conference, the court's senior staff attorney may conduct the conference.

Program Administration

Organization and management

Two full-time settlement conference attorneys conduct the conferences. The senior conference attorney administers the program. The settlement conference program operates under the general supervision of the chief judge and the circuit executive. In keeping with the confidentiality of the program, the settlement conference attorneys do not discuss the substance of Rule 33 proceedings with court personnel.

Reports and evaluation

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

For cases referred to the program between January 1995 and December 1996, the senior conference attorney is examining differences in the outcomes between randomly selected conference cases and control cases. One purpose of this effort is to learn empirically whether it would be more effective to focus the program's resources on particular types of cases. The Federal Judicial Center is assisting in the evaluation effort.

For More Information

Joel N. Shapiro, Esq., Senior Conference Attorney, U.S. Court of Appeals for the Seventh Circuit, 219 South Dearborn St Rm 1352, Chicago IL 60604, tel. 312-435-6883

Eighth Circuit: Settlement Program

The director of the Eighth Circuit's Settlement Program reviews all eligible cases for settlement potential. For most cases, this includes discussing settlement possibilities with parties' counsel. If it appears that a joint settlement conference is warranted and if the parties consent, the director schedules a conference and functions as a mediator. Participation in the program is completely voluntary.

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

The program was established in 1981 and is governed by Fed. R. App. P. 33, 8th Cir. R. 3B and 33A, and 8th Cir. I.O.P. § I.C.2. In fiscal 1994, 424 cases were referred to the program; in fiscal 1995, 459 cases were referred. Contact was made with counsel for the parties in approximately 60% of the cases referred, and a joint conference was conducted in approximately 20% of cases referred.

Settlement conferences under the program are held only if the parties consent. Conferences are conducted in person with parties and their attorneys whenever possible. Because the circuit is spread over a large geographic area, 50% of the joint conferences are by telephone. From its inception, the program has concentrated on money judgment cases. The clerk's office handles briefing schedules, requests for extensions, and other case-management functions for all cases, including cases referred to the program for settlement.

Selecting Cases for the Program

Eligible case types

Nearly all civil cases docketed in the court are eligible for the Settlement Program, with these exceptions:

- cases in which a party appears pro se
- cases dismissed for lack of jurisdiction
- cases with unresolved appellate jurisdictional problems
- Social Security Administration and disability cases
- federal income tax cases
- original proceedings such as petitions for mandamus
- interlocutory appeals certified under 28 U.S.C. § 1292(b)

- appeals of injunctions under 28 U.S.C. § 1292(a) (1)
- prisoner cases, including petitions for writ of habeas corpus and other post-conviction relief under 28 U.S.C. §§ 2241, 2254, and 2255.

Prisoner civil rights cases are occasionally candidates for the program if there was a money judgment at the trial level.

Selection process

The director selects eligible cases that appear appropriate for settlement discussions after reviewing documents (described below) referred by the clerk's office. Special importance is placed on reading the opinion at the trial level, if any, and reviewing any interest in settlement indicated on the appeal information form. If a party indicates a lack of interest on the appeal information form, a conference is not scheduled, except by subsequent consent of the parties. In most eligible cases, counsel are contacted by telephone to determine interest in settlement or to arrange joint conferences, particularly when the appeal information form has not been filed.

In large cases that offer some potential for settlement, joint conferences (in-person or by telephone) are scheduled by agreement of the parties. In cases that appear to involve a dollar value under \$100,000 and that do not appear unusually complicated, a joint telephone conference may be scheduled by letter without prior contact. The parties are advised that participation is voluntary and that a party has the right to cancel a conference. Typically, one or more parties in these cases have indicated a willingness to participate on the appeal information forms.

When contacted by the director, counsel sometimes indicate that direct settlement negotiations are under way and that they would like to defer participation in the program until their own efforts are concluded. In these situations, absent a joint request by the parties, the program will not schedule a conference for these three reasons:

First, the court views settlement discussions primarily as the parties' responsibility.

Second, the court views settlement discussions as most likely to be successful immediately before or after filing the appeal, before the parties incur attorneys' fees for briefing and other expenses on appeal. Because of the court's preset briefing schedule, there normally is not enough time to allow both for direct negotiations and a program-scheduled conference before the parties become substantially involved in

the briefing and argument preparation process.

Third, if the parties are offered a program conference as a second forum for bargaining, a party may “save” part of its settlement offer for that process and fail to present its best offer at the direct settlement negotiations, when the timing, momentum, and circumstances are more conducive to settlement.

The settlement director does not generally contact counsel in cases involving state or federal government agencies, because government attorneys often lack sufficient authority for settlement. The director also sometimes screens out cases in which policy or precedential considerations appear adverse to a settlement effort (for example, insurance declaratory judgment actions). If both parties consent, however, these cases may be selected for settlement discussion.

Documents reviewed

The settlement director receives the following documents from the clerk’s office of the court of appeals: the notice of appeal, district court docket entries, any trial court opinion, appellate docket entries, any appeal information form filed by appellant, and any supplemental statement filed by appellee. The appeal information form calls for identification of the issues raised on appeal. The form also includes a section where the parties indicate interest (or lack of interest) in participating in the Settlement Program. A local rule directs the appellant to file the form with the district court; however, the form is not jurisdictional in nature and failure to file it does not result in any penalties. The appellee may file a supplemental statement within three days after receiving service of appellant’s form.

Requests by parties

Parties may ask to participate at any time during a program-eligible case. A conference is scheduled if possible and appropriate. For example, attorneys occasionally request a conference during or after briefing and on rare occasion before an appeal is docketed.

Judicial selection

Hearing panels occasionally refer cases to the program during or immediately before argument.

Scheduling the Conferences

Scheduling process

Once a joint conference is agreed on, the settlement director sends counsel a confirmation letter setting the date and time of the conference and specifying the persons with settlement authority who will attend. Cancellations are infrequent.

Consent to participate

The majority of the conferences are scheduled by advance consent. In telephone conferences scheduled by letter without prior contact, counsel are advised that participation in the program is voluntary and that a party has the right to cancel a conference.

Timing of conferences

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

In-person conferences

In-person conferences are usually conducted in St. Louis for Missouri cases as well as for cases with \$200,000 or higher value from other parts of the circuit. Settlement director travel to conferences outside St. Louis can be arranged occasionally, depending on the time required for travel, the cost of travel, and the number or complexity of cases scheduled for conference in a given location within the pre-briefing period. These in-person conferences usually are held in St. Paul or Little Rock, or in other cities when circumstances warrant.

Teleconferences

Given the geographic size of the circuit, approximately 50% of joint conferences are conducted by telephone. Most of these cases involve amounts less than \$100,000 and appear not to be unusually complicated when initially scheduled.

Conference Sessions

Preconference submissions

For a better understanding of a case, the director usually requests additional materials, such as trial court briefs, before the conference. Normally, however, he does not receive copies of appellate briefs.

Nature of sessions

The primary goal of the joint 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 settlement director explains that confidentiality is the only rule that governs the session. He usually initiates discussion on the case by requesting the appellant to list the issues on appeal and to assess the likelihood of success on each issue. Sometimes, prior settlement discussions form the basis for starting the discussions. The parties are at liberty to deviate from any standard format.

After the introductory joint session, the settlement director functions in an intermediary role, usually separating the parties, assisting them in the development of offers, and conveying offers and counter-offers to each side. He considers this separate caucusing essential to the mediation process. He does not render judgment, attempt to pressure the parties, or impose a settlement. However, he does question unrealistic assessments when they prevent meaningful bargaining and tries to suggest meaningful offers and alternatives whenever possible. There is no effort to encourage nuisance value settlements or unilateral dismissals of appeals.

The director tries to develop options that may not have been considered previously. For example, he sometimes asks the parties to consider whether they should consider any matter or dispute other than the appeal. Examples of other matters include settlement of related litigation, the purchase of property related to the litigation, or forming altered or new business or personal relationships.

Party participation

The parties must consent to participation in the program. Counsel and 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 teleconferences. In teleconferences, counsel are asked to have

their clients present with them or patched in on counsel's telephone line.

Number and length of sessions

In-person conferences last between one hour and all day depending on the progress being made. On average, an in-person conference lasts five to six hours and a teleconference lasts one to three hours. To enhance effectiveness in settlement, every attempt is made to settle a case in one conference, and consistent with that overall objective, continuation of court-assisted settlement efforts beyond the initial conference is discouraged. However, if settlement appears within reach after a conference, the director occasionally continues settlement efforts and makes follow-up telephone calls as necessary to obtain settlement or exhaust settlement possibilities. Occasionally, parties continue bargaining privately and directly without further participation in the program.

Post-conference procedures

When a settlement is achieved, the director asks counsel to execute a dismissal stipulation to close the case but does not usually get involved in drafting settlement agreements. The director informs the clerk's office by memorandum when the conference is concluded and the case settled. The clerk's office sends counsel 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 or Policies

Effect on appellate proceedings

No aspect of the appeals process is stayed automatically while a case is in the settlement program. According to court policy, participation in the program normally does not delay the briefing schedule. If the scheduled conference is near a briefing date and the parties need a briefing extension, the director refers them to the clerk of the court, whose office is responsible for all case-management functions. This separation insulates the Settlement Program from any aspect of the decisional process or enforcement mechanisms of the court.

Confidentiality

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

Mediator Staffing

Assignment of cases

The director of the program serves as the sole mediator at all conferences.

Qualifications and training

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.

Recusal

The court has no written recusal rules for the program other than the code of conduct for federal judicial employees. The director either recuses himself from cases in which he believes he would have a conflict of interest or notifies the parties of any prior personal or professional relationship with any party.

Program Administration

Organization and management

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.

Reports and evaluation

The director keeps internal records on the program for use in preparing statistical reports, which are sent monthly to the judges of the court.

For More Information

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Ninth Circuit: Settlement Program

Under the Ninth Circuit's Settlement Program, circuit mediators review all eligible cases and select those with settlement potential. In addition, counsel for a party may ask that a case be mediated, and occasionally an appellate panel refers a case to the program. Once a conference is scheduled, participation is mandatory. The mediator directs counsel to attend the conference and, where appropriate, directs parties to attend.

The purpose of the program is to facilitate settlement of civil cases docketed in the court. It was implemented in 1984 and is governed by Fed. R. App. P. 33 and 9th Cir. R. 3-4, 15-2, and 33-1.

In fiscal 1994 and fiscal 1995, approximately 40% of the cases referred to the program were selected for conferences. In fiscal 1995, circuit mediators reviewed approximately 2,500 program-eligible cases and scheduled conferences in approximately 1,000 cases. In fiscal 1994, the program reviewed 2,016 program-eligible cases and scheduled 773 for conferencing.

If the court's mediators do not have sufficient information to determine whether a case should be scheduled for mediation, they first conduct an initial assessment conference. This occurs in about 25% of the cases reviewed by the court's mediators. Most assessment conferences and approximately 70% to 75% of mediation conferences are conducted over the telephone. The geography of the circuit and funding limitations restrict the use of in-person mediations. The circuit mediators are authorized to rule on certain procedural matters while cases are in the program.

Selecting Cases for Conferences

Eligible case types

Most nonprisoner civil cases filed in the court are eligible for the program except for the following:

- cases in which a party is appearing pro se
- most cases in which the appellant is incarcerated
- cases involving writs of habeas corpus or motions to vacate, set aside, or correct sentence (28 U.S.C. §§ 2241, 2254, 2255)
- other petitions for a writ (28 U.S.C. § 1651)
- all other original proceedings.

Among the many types of civil 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 NLRB decisions under 29 U.S.C. § 160(e).

Selection process

Soon after each eligible case is docketed, the clerk's office sends the Civil Appeals Docketing Statement (described below) to the Settlement Program Office. The circuit mediators review these statements to help them determine which eligible cases are appropriate candidates for the program and to facilitate case management. Following this review, and in some cases after telephone calls to counsel of record, the mediators select cases to be conferenced under the program.

The mediators do not select cases that are not eligible (as described above) or that do not appear likely to settle. In addition, case selection is based upon a number of other factors, including the parties' interest in participating in settlement negotiations and the mediators' consideration of whether the program could be of benefit to the parties. If the mediator finds a jurisdictional defect or jurisdictional dispute that the mediator cannot resolve with counsel by agreement, the mediator refers the case to the civil motions unit in the clerk's office for processing.

A case is presumed to be not selected for the program unless an order scheduling an assessment or mediation conference has been entered.

Documents reviewed

The Settlement Program Office receives a copy of the Civil Appeals Docketing Statement (CADS) filed for each 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 where a notice of appeal is not required.) The CADS provides information on jurisdiction, the nature of the action, the result at the trial level, and the issues on appeal. The CADS also identifies any related cases known to be pending in the Ninth Circuit and any pending case arising out of the same controversy or involving an issue that is substantially the same or related to an issue in the subject appeal. 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.

Requests by parties

At any time during a case, counsel may request a settlement conference, either by letter or telephone call to the chief circuit mediator. The request is kept confidential if counsel so specifies. Circuit mediators may ask for specific information from counsel before determining whether to include a case in the program. Party requests are accommodated whenever possible; about 5% of cases enter the program this way.

Judicial selection

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

Removal from the program

The circuit mediator may determine that further participation in the program would not be beneficial and may release a case from the program.

Scheduling the Conferences

Scheduling process

If a case is selected for an assessment or mediation conference, the Settlement Program Office normally sends the parties notice of the conference within thirty-five days of the docketing of the appeal.

Assessment conferences. If the court's mediators do not have sufficient information to determine whether a case should be scheduled for mediation, the Settlement Program Office schedules an assessment conference. The office sends counsel an order, which is entered in the case, that sets the date and time of the assessment conference, provides some basic information about the program, identifies who should participate, and instructs counsel on how to prepare.

Mediation conferences. Upon selection of a case for mediation, the conference secretary sends counsel an order setting the date and time of the conference. The order, which is entered in the case, identifies who should participate at the conference, provides some basic information about the program, states whether the conference will be in person or by telephone, and advises parties how to prepare.

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

Timing of conferences

Conferences typically occur in the prebriefing stage of an appeal.

Teleconferences

Nearly all assessment conferences, and approximately 70% to 75% of the mediation conferences, are conducted by telephone. The geography of the circuit, staffing limitations, and limited travel funds restrict the use of in-person mediations.

In-person conferences

Generally, the mediator will not schedule an in-person conference unless groundwork for settlement has been laid. 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 mediator may conduct a conference at any appropriate location in the Ninth Circuit. Each mediator spends two to five days per month in travel status.

Conference Sessions

Mediation statements

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

Nature of sessions

There are two types of conferences:

Assessment conferences. The primary purpose of an assessment conference is to determine whether a mediation conference should be scheduled in the case. Usually, all counsel 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, counsel must discuss settlement with their clients.

Mediation conferences. The primary purpose of the mediation conference is to explore settlement of the dispute that gave rise to the appellate case. The basic process used is mediation, but each case presents unique circumstances and personalities that the mediator considers in determining an appropriate settlement procedure.

Counsel are required to attend mediation conferences with authority to discuss the feasibility of various settlement processes, to make and respond to settlement proposals, and to settle. The mediator may conduct follow-up conferences, either in separate or joint sessions, in person or by telephone. In exceptional circumstances, the mediator may refer a case to a judge or another mediator for mediation.

In addition to mediating issues on appeal, the program may also mediate related disputes. If settlement is not reached, the mediator addresses any jurisdictional issues and works with counsel to develop the most efficient and expeditious plan for disposition of the case. This 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.

Party participation

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

If all counsel agree that clients are to attend the assessment or mediation conference, they notify the Settlement Program Office. Although clients generally do not participate in assessment conferences, clients usually do attend and participate in mediation conferences with their counsel. The mediator may require that clients attend mediation conferences. Conferences after the initial conference may also include representatives of third parties upon whom settlement depends (such as insurance carriers), as requested by counsel or the mediator.

For in-person mediations, parties must have present at the mediation an individual who is fully informed and vested with full settlement authority. For teleconferenced mediation, if the person representing a party 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. In appropriate cases, to pursue fully all opportunities for negotiated settlement, there is extensive follow-up activity such as additional telephone conferences, caucuses with each side separately, and, where appropriate, follow-up in-person conferences. These activities may continue for days, weeks, or longer.

Post-conference procedures

If the parties reach settlement, the mediator occasionally helps them draft a preliminary settlement agreement; the parties prepare the final settlement agreement. If a case is settled in the program, the parties send a request (or stipulation) for dismissal to the mediator; if the mediator approves the dismissal, the mediator sends an appropriate order to the clerk's office for entry in the case. The Settlement Program Office monitors cases in the program to see that parties submit dismissal papers as agreed.

If no settlement is reached, the mediator and other participants determine whether and how to continue negotiations. At the last conference, the mediator usually works with counsel 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, counsel direct all subsequent procedural issues and all inquires and filings to the clerk's office.

Other Rules or Policies

Effect on appellate proceedings

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

Procedural motions. The court requires that program participants consult with the mediator before filing any procedural motion. The mediator is authorized to rule on certain procedural matters while cases are in the program, including vacating or resetting the appeal

schedule. Usually, the mediator resolves procedural matters over the telephone and counsel 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, counsel may ask the mediator by telephone, in advance of the conference, that the schedule be vacated. At the conference, the mediator also will consider requests to alter the briefing schedule. In addition, appellant may make a telephone request to the mediator to suspend preparation of the record if it appears there is a reasonable possibility of settlement and preparation of the record would be expensive.

If during a conference the mediator is unable to resolve a procedural issue with counsel by consensus, the mediator may direct counsel to file a motion with the clerk. Such motion will be decided either by the circuit mediator or the clerk.

Case-management conferences. The purpose of a case-management conference, which is to be held only in exceptional circumstances, is to develop the most efficient procedural plan for complex cases. For a case in the program, the mediator may conduct a case-management conference either as part of an assessment or mediation conference or as a separate telephone conference. If the mediator selects a case for a case-management conference, counsel are notified by order. If a case is not in the settlement program and a case-management conference is warranted, it is conducted by telephone by a civil motions attorney from the clerk's office.

Confidentiality

In order 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 outside the settlement program participants. Counsel 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. The files are never made part of the main case file.

If the mediator confers separately (caucuses) with the participants, those discussions are also confidential to the extent the participants

request them to be. Requests by counsel to include a case in the program also are kept confidential at counsel'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) (appeal dismissed for failure to prosecute after counsel repeatedly failed to appear at scheduled conferences). Generally, the court may take other action it deems appropriate, including imposition of disciplinary and monetary sanctions pursuant to local rule.

Mediator Staffing

Assignment of cases

Each mediation is conducted by a circuit mediator employed by the court. Cases are randomly assigned to circuit mediators. In exceptional circumstances, the mediator may refer a case to a circuit, district, or magistrate judge or to another mediator for mediation.

Qualifications and training

Court personnel report that the circuit mediators are experienced litigation attorneys who have extensive training and expertise in negotiation, mediation, and settlement.

Recusal

The court has no written recusal rules for circuit mediators other than the code of conduct for federal judicial employees.

Program Administration

Organization and management

The Settlement Program is an independent unit in the court of appeals. Program staff consists of five circuit mediators and three support positions in San Francisco, Cal., and one circuit mediator and one support position in Seattle, Wash. The chief circuit mediator man-

ages the program and reports to the chief circuit judge.

Reports and evaluation

The Settlement Program Office reports periodically on the number of cases conferenced 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 commentary 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 (1995).

For More Information

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Tenth Circuit: Circuit Mediation Office

The Tenth Circuit's Circuit Mediation Office may schedule a mandatory settlement conference, with certain exceptions, in any civil case docketed in the court. If counsel for any party requests a conference, the Circuit Mediation Office ordinarily will schedule one if all parties in the case are represented by counsel. Hearing panels occasionally refer cases to the office. Otherwise, the Circuit Mediation Office randomly selects cases for conferencing. Each conference is conducted by one of the court's circuit mediators.

The primary purpose of the conference 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: lawyers are frequently reticent about initiating settlement negotiations; the appellate process, unlike trial proceedings, presents few opportunities for the parties to meet to discuss settlement; a mediator can help parties accomplish what they cannot accomplish alone; and 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 began operations on April 1, 1991. The mediation program is governed by Fed. R. App. P. 33 and 10th Cir. R. 33.1. In calendar year 1994, the office scheduled at least one conference in 413 cases; in calendar year 1995, at least one conference in 412 cases. A few cases scheduled for conference settled before the date set for the conference.

Most conferences are by telephone. The circuit mediator may permit or require clients to attend the conference. The Circuit Mediation Office randomly selects cases for conferencing because limited staffing prevents conferencing every case, and the office finds it difficult to predict from case documents alone which cases are more likely to settle.

Selecting Cases for Conferences

Eligible case types

Most civil cases docketed in the court are eligible for selection except the following types: pro se cases, habeas corpus cases, and cases with unresolved jurisdictional problems. 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 such as petitions for review of NLRB decisions.

Selection process

The Circuit Mediation Office randomly selects cases from the pool of all newly docketed eligible cases. The conference administrator schedules as many cases for conferencing as staffing will allow.

Documents reviewed

For civil cases docketed in the court, the clerk's office sends docketing statements, upon receipt, 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.

Requests by parties

If the Circuit Mediation Office does not schedule a particular case for a conference, counsel for any party may call the office and request a conference at any time during a case. Such requests are almost always granted and are held confidential.

Judicial selection

Hearing panels, on occasion, refer cases to the mediation office just before or after oral argument.

Scheduling the Conferences

Scheduling process

For each case selected for conferencing, the Circuit Mediation Office schedules the conference and sends conference notices to lead counsel. This is ordinarily done within two weeks after receiving the docketing statement from the clerk's office. The conference notice informs counsel of the time and date of the conference and whether it will be in person or by telephone. Anyone with an unavoidable scheduling conflict may ask that the conference be rescheduled; the Circuit Mediation Office then provides one or more alternate dates and asks the

attorney with the conflict to get the other parties to agree on a conference date.

Timing of conferences

Conferences are usually held about two weeks after notices are sent.

Teleconferences

About 95% of the conferences are conducted by telephone.

In-person conferences

In some cases, the circuit mediator may require an in-person conference. On occasion, circuit mediators travel to conference sites.

Conference Sessions

Nature of sessions

Each conference is conducted by a circuit mediator. The goals include discussion of the possibility of settlement and consideration of any other matter relating to the efficient management and disposition of the appeal.

Conferences frequently involve discussion of the legal merits of the case for the purpose of understanding the key issues on appeal and evaluating the risks of continuing with the case. Counsel are expected to be fully prepared to discuss these matters. Frequently the circuit mediator has candid, private discussions with counsel, aimed at determining the client's reasons for pursuing the case, learning the client's underlying interests, exploring common ground, and examining bases for settlement.

Procedural matters are also discussed in order to streamline the appeal process and avoid unnecessary paperwork. For example, transcript difficulties may be resolved, briefing schedules modified, or appeals consolidated. If further negotiations beyond the initial conference are warranted, follow-up conversations or additional conferences may be conducted.

Before the conference, the circuit mediator reviews the order or opinion from the trial court and in some cases other materials; the circuit mediator also may try to anticipate settlement options. During the conference, the circuit mediator maintains fairness in the negotiating process, acts as a catalyst to bring parties together, acts as a buffer when parties or counsel clash, helps parties objectively assess the

strengths and weaknesses of the case, and proposes settlement alternatives.

Party participation

Once a case is scheduled for conferencing, participation in the conference process is mandatory. The court requires lead counsel to participate at the conference. In addition, the circuit mediator may permit or require clients to attend, but generally clients do not attend the first conference session. Before the conference, lead counsel must obtain the broadest feasible authority to settle the appeal.

Number and length of sessions

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

Post-conference procedures

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

If agreement is reached 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 applies to the clerk for an appropriate order reflecting such agreement.

Some settlements are global in nature and result in the resolution of cases in other district, bankruptcy, or state courts. Other settlements forestall the filing of additional lawsuits.

Other Rules or Policies

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. After a case is scheduled for conferencing, however, the circuit mediator may apply to the clerk for an order to extend time for briefing or otherwise to control the subsequent course of the proceedings (for

example, consolidation of cases) in order to carry out the purposes of the conference procedure. For example, if briefs are due to be filed soon after the initial conference and the parties and the circuit mediator agree that it would be worth deferring briefing until negotiations are completed, the circuit mediator may apply to the clerk for an order extending briefing dates.

Confidentiality

To encourage full and frank discussion, all communications, statements, offers, and comments made in the course of a conference and in subsequent discussions are confidential, are not placed in the record, and are not otherwise to be disclosed to the court by the circuit mediator, counsel, or the parties. Counsel may not refer to or quote any such communications in briefs or at oral argument. *Clark v. Stapleton Corp.*, 957 F.2d 745 (10th Cir. 1992). If a party requests a conference, the Circuit Mediation Office keeps that request confidential.

Sanctions

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

Staffing

Assignment of cases

Each conference is conducted by a circuit mediator employed by the court. Cases are randomly assigned to circuit mediators.

Qualifications and training

Court personnel report that the circuit mediators are experienced attorneys with mediation skills.

Recusal

The court has no written recusal rules for the mediation office other than those contained in the code of conduct for federal judicial employees.

Program Administration

Organization and management

The court's Circuit Mediation Office includes 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.

Reports and evaluation

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

For More Information

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

Eleventh Circuit: Circuit Mediation Office

With certain exceptions, all civil cases docketed in the court are eligible for mediation in the Eleventh Circuit's program. The Circuit Mediation Office (CMO) selects a cross-section of eligible cases and schedules conferences in all cases selected. In addition, if a judge of the court of appeals or any party requests a conference in an eligible case, the CMO automatically schedules a conference. Once the CMO schedules a conference, participation is generally mandatory; however, a party may request the CMO to remove a case from mediation. The court's circuit mediators conduct the conferences.

The objectives of the court's program are threefold:

- to offer the parties and their counsel a confidential, risk-free opportunity to evaluate their case with an informed, neutral mediator and to explore possibilities for voluntary settlement
- to narrow and refine the issues on appeal as much as possible and assist in the resolution of any procedural issues
- to bring participants together through a dispute resolution process that is convenient, economical, and flexible.

The CMO was created in 1992 and conducts conferences pursuant to Fed. R. App. P. 33 and 11th Cir. R. 33-1. The CMO schedules a Rule 33 conference in about 800 new cases per year, which represents more than half of the cases eligible for the program.

Most initial conferences are conducted by telephone. Participation at a conference is usually through lead counsel; however, the circuit mediator permits and may require parties to attend. The parties and their counsel may communicate *ex parte* with the CMO at any time. Even if a case does not settle in the conference process, it may continue in mediation until the court decides the issues on appeal.

Selecting Cases for Conferences

Eligible case types

All nonprisoner civil cases are eligible for mediation, if all parties are represented by counsel. Prisoner cases (including those involving habeas corpus) and cases with at least one party appearing *pro se* are not scheduled for Rule 33 conferences, even if a party requests mediation.

Selection process

The clerk's office sends all eligible cases to the CMO after the cases clear the court's jurisdictional review. The CMO reviews the cases and selects a cross-section for mediation.

Documents reviewed

For all eligible cases, the clerk's office sends the CMO completed civil appeal statements filed by the parties. (A completed Eleventh Circuit civil appeal statement form is required in all civil cases, except pro se and habeas corpus cases and cases where the appellant/petitioner is incarcerated. The appellant files the form with the clerk of the court of appeals within twenty-one days after filing the notice of appeal in the district court, or in agency cases within twenty-one days from the date the form was mailed to the petitioner.) The statement sets forth a description of the facts and issues on appeal, citations of relevant authority, the judgment or order appealed from, and any supporting opinion or findings. The appellee may file a response within seven days of receipt.

Requests by parties

Attorneys are encouraged to request a conference if they believe a conference would be helpful. At any time during a case, a request by one or more parties in an eligible case is always accepted if all parties are represented by counsel. If an attorney makes an ex parte request for a conference and desires that the request be kept confidential, the CMO honors that confidentiality.

Judicial selection

Cases may also be referred to mediation by an active or senior judge of the court of appeals.

Removal from the program

Cases may be removed from mediation on a case-by-case basis, but only after the mediator and counsel consult on the issue of removal.

Scheduling the Conferences

Scheduling process

Two to three weeks before the conference date, the CMO sends lead counsel written notice of the initial conference.

Timing of conferences

The CMO selects most cases for mediation soon after court of appeals docketing and before briefing.

Teleconferences

Most initial conferences are conducted by telephone with the court initiating the calls.

In-person conferences

If all counsel are located in the Atlanta area, the initial conference generally is held in person. At the circuit mediator's discretion, conferences for cases outside the Atlanta area also may be conducted in person. If all parties agree that an in-person conference would be beneficial, counsel are encouraged to contact the CMO to discuss the possibility of scheduling a conference at a mutually agreeable location. Occasionally, at no expense to the parties, the circuit mediator travels to other locations in the circuit to conduct in-person conferences. The CMO travel budget is limited, however.

Conference Sessions

Mediation statements

After a case is scheduled for a conference, counsel may submit to the circuit mediator a short confidential mediation statement assessing the case. The circuit mediator does not share the statement with opposing counsel, and it does not become part of the court's case file. If a party files a brief before the conference date, that party is to send the CMO a copy.

Nature of sessions

The topics addressed at conferences include the possibility of settlement, simplification of the issues, and any other matters the circuit mediator determines may aid in the disposition of the appeal. In cases in which oral argument is to be heard, additional topics might include the issues to be argued and the time permitted for oral argument. The conferences are designed to reduce the time and expense of appellate cases. Lead counsel must be prepared to negotiate in good faith, express their views on the merits of the case, and articulate their clients' interests.

The circuit mediator conducts the conferences in a series of joint

and separate sessions, talking with both sides together and then with each side separately. Initial conferences generally begin with an inquiry about any procedural issues that can be resolved by agreement, such as questions about record excerpts or the need for a specially tailored briefing schedule. Discussion then moves to an explanation by each party of the issues on appeal. The purpose of this discussion is not to decide the case or reach a conclusion about the issues, but to understand the issues and evaluate risks to both sides. In many cases, a candid examination of these issues is helpful in reaching a consensus on the settlement value of the case.

The circuit mediator inquires about settlement and probes for each party's interests, often in private discussion with each side. Every effort is made to generate offers, counteroffers, and alternative settlement options until the parties either settle or know the case cannot be settled. The circuit mediator may also mediate related trial court cases, frequently in an attempt to achieve a global settlement of various lawsuits or proceedings.

Party participation

Once a case is scheduled for conferencing, participation in the conference process is generally mandatory, but a case may be removed as described above. Participation is usually through lead counsel. The CMO attempts to identify lead counsel when scheduling the conference and requires lead counsel to obtain advance authority from their clients to make such commitments at the conference as reasonably may be anticipated.

Although clients are not required to be present at most initial conferences, they may wish to participate in their conferences and are encouraged to be actively involved in the mediation process. The court suggests that counsel may wish to have clients attend the conference or be available by phone at the time of the conference. The circuit mediator also may require clients to attend. When settlement cannot be achieved without the involvement of individuals or groups who are not parties to the appeal, such parties may be invited to participate.

Number and length of sessions

The initial teleconference may last up to two hours. The initial in-person conference may last up to four hours. Typically, three joint conferences are scheduled per case, not including ex parte follow-up

telephone calls. In almost all cases, to pursue fully all opportunities for negotiated settlement, there is extensive follow-up activity such as additional telephone calls, in-person conferences, or caucuses with each side separately.

Post-conference procedures

Because settlement is voluntary, no actions affecting the interests of any party are taken without the consent of all parties. If a settlement is reached, counsel for the parties prepare the settlement agreement, which is binding upon all parties to the agreement.

Once all parties agree on the terms of settlement, the circuit mediator sends a letter to parties explaining dismissal procedures, which require the parties to file with the clerk's office a joint (or agreed) motion to dismiss. If parties need a post-settlement extension or stay of the briefing schedule, they send a letter request directly to the circuit mediator.

If the case does not settle, the circuit mediator declares an impasse. Negotiations can resume at any time until the case is terminated by the clerk of the court.

Other Rules or Policies

Effect on appellate proceedings

The scheduling of a conference does not automatically toll the running of time periods for filing briefs or ordering transcripts or otherwise automatically stay appellate proceedings. However, the circuit mediator may grant counsel's request for enlargement of the briefing period if negotiations are productive and all parties and the circuit mediator agree. Such requests may be made by letter to the circuit mediator. Under this procedure no motion is necessary; the circuit mediator forwards the letter request to the clerk's office with a memorandum recommending the enlargement of the briefing period.

Cases that do not settle in the conference process may continue in mediation until the court decides the issues on appeal.

Confidentiality

Statements and comments made during a conference and subsequent discussions related to the conference are kept strictly confidential by the CMO. Parties and their counsel also agree to maintain this confidentiality, which extends to nondisclosure in briefs or arguments to

the court. The court strictly enforces the confidentiality rule in all cases in the program. The CMO does not report case-identifiable information to the court, and the court's docket contains no record of the scheduling of a conference.

Parties and their counsel may communicate *ex parte* with the CMO at any time. These *ex parte* communications are also confidential, except to the extent disclosure is authorized. Any request for a conference by a party is not revealed by the court or the circuit mediator to opposing counsel without permission of the requesting party.

Sanctions

Upon failure of a party or attorney to comply with the provisions of the conference program rules, the court may assess reasonable expenses (including attorneys' fees) caused by the failure, assess all or a portion of appellate costs, dismiss the appeal, or take such other appropriate action as the circumstances warrant.

Mediator Staffing

Assignment of cases

Each conference is conducted by a circuit mediator employed by the court.

Qualifications and training

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

Recusal

The code of conduct for federal judicial employees applies.

Program Administration

Organization and management

The CMO consists of four circuit mediators (three in Atlanta, Ga., and one in Tampa, Fla.), a mediation office administrator, and two administrative assistants. The chief circuit mediator manages the program and reports to the circuit executive on administrative matters and to the chief judge on policy matters. For operational purposes, the office is a separate unit of the court and is independent of the court in the following respects: the office is solely responsible for selecting cases

for the program, does not report to the court concerning any particular case, and keeps confidential all communications in program cases.

Reports and evaluation

The CMO submits to the judges of the court monthly internal reports on the number of cases pending, conferenced, terminated, and settled. These reports do not identify case names or docket numbers.

For More Information

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District of Columbia Circuit: Appellate Mediation Program

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. Cases are referred to the program by 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. Parties may request mediation by submitting a form to the clerk's office; these requests are confidential and are given special consideration in selecting cases to be mediated under the program. Once a case is selected for mediation, participation in the program is mandatory. The mediators are volunteer attorneys, selected by the court and trained by professional mediator trainers.

The process is governed by the court's per curiam Order Establishing the Appellate Mediation Program, effective Nov. 29, 1988, as amended. The primary role of the mediators is to help parties reach a settlement or, at a minimum, to help parties resolve some issues in their case. If settlement is not possible, the mediators will help parties clarify or eliminate issues to expedite the appellate process. Other objectives of the program are to assist parties by curtailing the expense of protracted appeals and to encourage the development of creative resolution options.

The program's mediators are typically experienced litigators, senior members of the bar, or members of law school faculties. Initial mediation sessions, and follow-up sessions, are usually conducted in person.

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. Settlement rates for government cases have consistently outpaced those for private cases.

The director of the program also manages the mediation program of the U.S. District Court for the District of Columbia.

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. Although the single largest category of referred cases involves contract claims, no particular case type can be

said to predominate. Pro se cases generally are not considered appropriate for mediation.

Selection process

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 to the director of dispute resolution for a second level of review.

The factors considered by the clerk's office and the director in determining whether a particular case is appropriate for mediation include

- the nature of the underlying dispute
- the relationship of the issues on appeal to the underlying dispute
- the availability of incentives to reach settlement or limit the issues on appeal
- the susceptibility of the issues to mediation
- the possibility of effectuating a resolution
- the number of parties
- the number of related pending cases.

Cases which might not be deemed appropriate for mediation include those involving many parties from distant parts of the country or those in which one or more of the parties require a judicial resolution of the issues on appeal. Before selecting a case for mediation, the director usually solicits the views of lead counsel about the suitability of referring the case to a mediator. Counsel's views on this matter, however, are not dispositive.

Documents reviewed

When selecting cases for mediation, the clerk's office and director 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
- all relevant motion papers and court orders.

Requests by parties

Parties are encouraged to request mediation by submitting a request form to the clerk. Such requests are confidential and are not disclosed to the judges of the court or to opposing counsel. Although requests for mediation are not automatically granted, the clerk's office and the director give them special consideration in deciding whether a case should be referred to the program.

Scheduling the Conferences

Scheduling process

The mediation process is initiated by a letter from the circuit executive to each party's lead counsel. The letter notifies counsel 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.

Timing of conferences

Cases are screened for mediation no earlier than forty-five days after the appeal is docketed and in most cases before the briefing schedule is issued. The first mediation session is held within forty-five days after the case is selected for the program.

Documents provided to mediators

When the circuit executive notifies counsel of case selection for mediation, the circuit executive sends the mediator

- a copy of 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
- all relevant motion papers and court orders.

In-person conferences

Initial mediation sessions are conducted in person at the courthouse of the court of appeals or, if mutually agreeable, in the mediator's office. Subsequent conferences may be by telephone or in person.

Teleconferences

On rare occasions, and at the mediator's discretion, the initial mediation session may be held over the telephone. For example, this might occur if traveling to Washington, D.C., would be a hardship on a participant.

Conference Sessions

Position papers

Within fifteen days of the court's selection of a case for mediation, counsel for each party must submit to the mediator a position paper of no more than ten pages, stating the party's views on the key facts and legal issues in the case and including a statement of motions filed and their status. In addition, motions filed or decided during the mediation process are to be submitted to the mediator upon request. Documents submitted to the mediator are not filed with the clerk's office and need not be served on opposing counsel unless the mediator so directs.

Nature of sessions

The objective of the mediation is to facilitate settlement, simplify issues, or otherwise assist in the expeditious handling of the appeal. Mediation begins at a joint meeting attended by the mediator, counsel for the parties, and, whenever possible, the parties themselves. After the mediator explains how the mediation is to be conducted, each party is asked to explain its views on the matter in dispute. Appellant typically will speak first. The mediator is likely to refrain from asking questions, or allowing participants to ask questions of one another, until all parties have had an opportunity to speak. After this, the mediator often caucuses individually 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

Once a case is scheduled for mediation, participation in the process is mandatory. The court requires attendance at mediation sessions by each party's counsel or another person with actual settlement authority. The court also strongly encourages all parties to attend and gives

mediators the authority to communicate directly with a party to request attendance as long as the mediator fully discloses such communication to that party's counsel.

In cases involving the United States or the District of Columbia government, senior attorneys on either side of the case generally may attend mediation sessions, as long as someone with settlement authority can be reached by telephone during the sessions. When settlement authority for these governments rests with an official at the rank of assistant attorney general (or its equivalent) or higher, with members of an independent agency, or with District of Columbia officials above the rank of corporation counsel, the requirement that the official or members be reachable during the mediation session is waived unless the mediator for good reason specifically requires such availability in writing after reviewing the mediation papers.

Number and length of sessions

Initial mediation sessions usually last several hours. In addition to the initial session, the mediator may schedule other meetings or place follow-up telephone calls to counsel. Follow-up discussions may continue over days or weeks or longer.

Many of the cases referred to the program involve the federal government or other government units as parties or are cases on review from a decision of a federal agency. Because these cases are often more complex or difficult to resolve than cases between private parties, they frequently require significant amounts of mediator time, often with several mediation sessions per case.

Post-conference procedures

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

If mediation results in settlement, counsel file a stipulation of dismissal or other appropriate stipulation within thirty days after settlement, unless a short extension is requested by the attorneys by motion.

If a case cannot be resolved through mediation, it remains on the docket and proceeds as if mediation had not been initiated. No notification to the court is necessary.

Other Rules or Policies

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. Such motions are decided by the clerk of court on delegated authority and are normally granted. Counsel may not file any other motions that refer to the fact that the case is in mediation.

Confidentiality

The content of mediation discussions and proceedings (including any statement made or document prepared by any party, attorney, or other participant) is privileged and may not be disclosed to the court or construed for any purpose as an admission against interest. To that end, the parties may not file any motion or other document that would disclose any information about the content of a mediation or whether it has been concluded. Parties are prohibited from using any information obtained as a result of the mediation process as a basis for any motion other than a motion affecting 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 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, individual cases that have been resolved through mediation may be publicly identified or brought to the court's attention as program successes if the litigants consent to such disclosure.

Sanctions

Failure of counsel to attend sessions may result in sanctions.

Mediator Staffing

Selection of mediators

The court has selected about thirty members of the bar to serve as pro bono mediators in the program.

Qualifications and training

Court personnel report that the volunteer mediators are typically experienced litigators, senior members of the bar, or distinguished members of law school faculties in the Washington, D.C., area. Before being assigned any cases, they must complete a one- to two-day training course taught by professional trainers selected by the court. Throughout their tenure with the program, mediators are encouraged to attend occasional court-sponsored training events.

Assignment of cases

The dispute resolution director assigns each case in the program to a mediator based on a mediator's experience, expertise in certain subject areas, or other relevant factors. The director occasionally mediates or, more often, co-mediates a case with one of the volunteers.

Recusal

Mediators are required to recuse themselves from handling any cases in which they perceive a conflict of interest. The director asks the mediators to check for conflicts when the case is assigned and encourages the mediators to recuse themselves when they or their law firm 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. A new mediator may be substituted if any party objects to the mediator initially appointed by the director.

Immunity

The U.S. 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 F3d 1249 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

Fees

Mediation is offered at no cost to the parties. Mediators are not paid for their services but are reimbursed by the court for minor out-of-pocket expenses such as trips to the courthouse. The court also provides parking, administrative support, and limited secretarial services to the mediators, if needed.

Program Administration

Organization and management

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, occasionally 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 also manages a separate dispute resolution program for the district court.

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 attorney participating in a 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 quarterly reports about the program, including program settlement rates.

For More Information

Nancy E. Stanley, Esq., Director of Dispute Resolution, U.S. Court of Appeals for the District of Columbia Circuit, 333 Constitution Ave NW Rm 4826, Washington DC 20001-2866, tel. 202-273-0657

Federal Circuit: Settlement Discussion Rule

The Federal Circuit's settlement discussion rule, Fed. Cir. R. 33, applies in certain types of cases. For those cases specified in the rule (see below), the rule requires parties, through counsel, to discuss settlement within seven days after filing of the principal briefs. This requirement applies only if all parties are represented by counsel and the federal government is not a party. Counsel for the parties arrange for and conduct the settlement discussions. Settlement discussions are mandatory in cases of the type identified in the court's rule.

The process is governed by Fed. R. App. P. 33 and Fed. Cir. R. 33. The primary purpose of Fed. Cir. R. 33 is to generate discussions regarding settlement or voluntary dismissal.

The court's process differs from other federal appellate conference programs in that court staff is not involved in scheduling or conducting conferences. The court's rule requires settlement discussions; there is no requirement for the involvement of a third-party neutral.

Settlement Discussion Process

Case types covered

If all parties are represented by counsel, Fed. Cir. R. 33 requires prehearing settlement discussions in any case brought pursuant to one of the following code provisions:

28 U.S.C. §§ 1292(c)(1), (2); 1295(a)(1);

28 U.S.C. § 1295(a)(4)(A) (with respect to patent interferences only);

28 U.S.C. § 1295(a)(4)(B) (with respect to inter partes proceedings only);

28 U.S.C. § 1295(a)(4)(C) (with respect to civil actions under 35 U.S.C. § 146 only); and

28 U.S.C. § 1295(a)(6).

Cases covered by the rule include patent infringement appeals from the district court, certain appeals from the U.S. Patent and Trademark Office, and review of certain final determinations of the U.S. International Trade Commission.

Scheduling process

After the last brief is filed in a case to which Fed. Cir. R. 33 applies, the clerk's office mails parties notice of prehearing settlement discus-

sion requirements. Counsel for the parties are required to schedule and conduct the settlement discussions.

Post-discussion procedures

After the discussions, but no later than the time for filing a separate appendix under the court's rules, the parties must file either a joint statement of compliance with Fed. Cir. R. 33—indicating that settlement discussions have been conducted—or an agreement that the appeal be dismissed under Fed. R. App. P. 42(b).

Effect on appellate proceedings

Discussions regarding settlement or voluntary dismissal may occur at times other than those identified in Fed. Cir. R. 33. The rule does not preclude the parties from agreeing to dismiss the appeal at other times, including the period subsequent to oral argument but before decision.

Staffing

The clerk's office mails notices of Fed. Cir. R. 33 requirements and docketed joint statements of compliance or agreements to dismiss as they are filed. There is no separate staffing for the process.

For More Information

Jan Horbaly, Clerk of the Court, U.S. Court of Appeals for the Federal Circuit, National Courts Building, 717 Madison Pl NW, Washington DC 20439, tel. 202-633-6550

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