United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPELLATE MEDIATION PROGRAM

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT APPELLATE MEDIATION PROGRAM

The Appellate Mediation Program was created in 1987. Originally conceived as a one-year experiment, it has become an integral part of the Court's case management system. Mediation was originally intended to supplement the Court's 1986 Case Management Plan, which was undertaken to accommodate a sixty percent increase in filings and pending cases over a two-year period. It was also intended to help parties by curtailing the expense involved in protracted appeals and by providing a forum to stimulate the development of creative resolution options that are not likely to be achieved through Court order or through the independent action of the parties.

The Appellate Mediation Program uses mediation to achieve settlement of cases. It also encourages the settlement of some issues in a case and the procedural streamlining of cases to simplify briefing and to reduce motions activity. Mediation efforts that are unsuccessful initially may result, weeks or even months later, in settlement.

Mediation differs considerably from arbitration and negotiation. In arbitration, an outcome is imposed upon the parties. In negotiation, discussion takes place between the parties, usually with no assistance from a neutral. In mediation, a neutral helps parties reach a resolution that is acceptable to them. Cases are settled only if the parties agree to a course of action that will terminate their case so that no further Court involvement is required.

The Appellate Mediation Program has had a significant impact on the Court's workload. Cases that are settled do not proceed to oral argument, thus saving the time of judges and law clerks who would otherwise prepare for argument. Issues and positions are clarified in the mediation process so that, even if settlement is not achieved, the Court benefits from more efficient briefing. Finally, mediation frequently saves time and money for the litigants themselves. It can also produce agreements that meet their needs more effectively than the relief that could be provided through judicial disposition. Mediation is offered at no cost to the parties.

CASE SELECTION

Cases filed with the Court of Appeals are selected for mediation by attorneys in the Legal Division of the Clerk's Office. Screening occurs after dispositive motions have been decided and, in any event, no sooner than 45 days after a case has been docketed in the Court of Appeals.

No criminal cases enter the program. Civil cases are reviewed on an individual basis, with a number of factors considered in making the eligibility determination. These factors 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 these issues to mediation, the possibility of effectuating a resolution, the number of parties and the number of related pending cases. Uncounseled cases, while not categorically excluded, are rarely referred to mediation.

Parties are encouraged to request mediation by completing a "Request to Enter Appellate Mediation Program" form and sending it to the Clerk *in duplicate*. The Court treats such requests as confidential. Although requests to enter mediation

are not automatically granted, the Legal Division staff give them special consideration.

PROGRAM MEDIATORS

The Court has selected distinguished senior members of the bar, academicians from local law schools, and attorneys with broad experience mediating complex civil cases to serve as mediators. The mediators are experienced attorneys who enjoy the Court's full confidence.

The mediators protect the confidentiality of all proceedings and do not communicate with the Court about what transpires during mediation sessions. Mediators are required to recuse themselves from handling any cases in which they perceive a conflict of interest.

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 if needed.

The primary role of program mediators is to make every effort to help parties reach a settlement or, at a minimum, to help parties resolve some issues in the case. If settlement is not possible, the mediators will help parties clarify or eliminate issues to expedite the litigation process.

CONFIDENTIALITY

Confidentiality is ensured throughout the mediation process. Attorneys in the Legal Division do not confer with judges in selecting cases for mediation. Mediators protect the confidentiality of all proceedings and are prohibited from complying with

subpoenas or other requests for information about mediated cases. Papers generated by the mediation process are not included in Court files, and information about what transpires in the mediation process is not at any time made known to the Court. The Circuit Executive's Office, which is responsible for program administration and evaluation and liaison between the mediators and Court personnel, maintains strict confidentiality about the content of the mediation in particular cases. The Court expects participating counsel to refrain from commenting publicly about the fact that a case is in mediation or from disclosing any information about the parties' discussions or the status of the talks to anyone who is not, directly or indirectly, a party to the negotiations.

The above is not intended to guarantee absolute secrecy about the identity of the cases that are chosen for mediation. Nor is it meant to preclude dissemination of information about the types of cases going through the mediation process and about overall program results. Generic information about the program and cases entering it is available, and reports are generated for analysis and evaluation. 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 a disclosure.

MEDIATION PROCEDURES

The Director of the Legal Division of the Clerk's Office identifies cases for mediation no earlier than 45 days after they have been docketed in the Court of Appeals. Lead counsel and intervenors involved in cases selected for mediation receive a letter from the Court describing the program and assigning a mediator. A copy of the Court's *en banc* Order defining the procedures to be followed is included in the mailing. At the same time, the Court sends to the assigned mediator a copy of

the judgment or order on appeal, any opinion issued by the District Court or agency, the appellant's or petitioner's statement of issues on appeal, D.C. Cir. Rule 28(a)(1) statements, and all relevant motions.

Within fifteen days of the selection of a case for mediation, counsel are required to submit a position paper, not to exceed ten pages, to the mediator. The position paper will outline the key facts and legal issues in the case and will include a statement of motions filed and their status. Position papers **are not briefs, are not filed with the Court and need not be served on the other party unless the mediator so directs.**

The mediator sets the date for the initial mediation session, which must be held within 45 days of the selection of the case for mediation, and schedules follow-up sessions as needed. The initial session is normally held at the Court. However, a mediator may decide to hold this or subsequent meetings in his/her office or at another location. All cases in mediation are subject to normal scheduling for briefing and oral argument. If it appears that the briefing schedule will interfere with the mediator's ability to convene necessary sessions or otherwise proceed with the mediation, the attorneys shall file a motion to defer or postpone the briefing and/or oral argument date(s), representing that the mediator, whom they shall not identify by name, concurs in the request. **The motion must indicate, in both the caption and the first paragraph, that the change is needed to accommodate a pending mediation.** Attorneys may not file any other motions that would notify the Court that the case is in mediation.

The Court requires that counsel for parties attend all mediation sessions. All parties are also strongly urged by the Court to attend each mediation session. Each party represented must have counsel or another person present with actual

authority to enter into a settlement agreement during the session. In cases involving the United States government or the District of Columbia government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached by telephone during conference sessions. It is the responsibility of the United States Department of Justice and the District of Columbia Corporation Counsel attorneys during these sessions to furnish the mediator with the names and titles of the government officials who are authorized under applicable laws and regulations to effectuate settlement, including the Justice Department officials who possess settlement authority under 28 CFR, Part O, Subpart Y. The attorneys who participate in the mediation sessions shall also identify the officials whose participation in the discussions would be helpful, even though such officials may lack ultimate settlement authority. When settlement authority for the United States rests with an official at the rank of Assistant Attorney General, its equivalent or higher, or with members of an independent agency, or when settlement authority for the District of Columbia rests with 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 provides otherwise in writing after reviewing the mediation papers.

If settlement is reached, the agreement, which shall be binding upon all parties, will be put into writing, and counsel will file a stipulation of dismissal. If the case is not settled, it will remain on the docket and proceed as though mediation had not been initiated. Regardless of the outcome of a case, mediators will complete a case evaluation form for each case mediated. Each attorney participating in the mediation will be asked to complete an evaluation form.

THE MEDIATION PROCESS

Mediation begins at a joint meeting attended by the mediator, counsel for the parties and, whenever possible, the parties themselves. The mediator explains how the mediation is to be conducted. After this introduction, each party is asked to explain to the other party or parties and to the mediator its views on the matter in dispute. The party who filed the appeal typically speaks first. The mediator is likely to refrain from asking questions or allowing the parties to ask questions of each other until all parties have had an opportunity to speak.

Once the views of all parties have been stated in the joint session, the mediator usually caucuses individually with each of the parties. The purpose of these caucuses is to allow the mediator and the parties to explore more fully the needs and interests underlying their stated positions. It is also to help the parties begin thinking about settlement options that perhaps go beyond what could be accomplished in the court proceeding alone. The mediator encourages the parties to think broadly about the problem and helps them explore options for settlement.

After the initial series of meetings, the mediator may convene follow-up sessions to help the parties continue to explore settlement possibilities. These discussions may take place in person or over the telephone, whichever the mediator thinks likely to be most beneficial under the circumstances of the particular case.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
ORDER ESTABLISHING APPELLATE MEDIATION PROGRAM

REVISED ORDER

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDERED, by the Court, *en banc*, that civil appeals from the United States District Court, petitions for review of agency action, and original actions may be referred to a mediator designated by the Court to meet with counsel and parties to facilitate settlement of the case, to simplify issues or otherwise to assist in the expeditious handling of an appeal. It is

FURTHER ORDERED that mediation sessions must be attended by counsel for each party or another person with actual authority to settle the case. Additionally, the parties themselves are strongly encouraged to attend the sessions. In cases involving the United States government or the District of Columbia government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached by telephone during conference sessions. When settlement authority for the United States rests with officials of the rank of Assistant Attorney General (or its equivalent) or higher, or with the members of an independent agency, or in cases in which settlement authority for the District of Columbia rests with officials above the rank of Corporation Counsel, the requirement that the officials or members be reachable during the mediation session is waived unless the mediator for good reason specifically provides otherwise in

writing after reviewing the mediation papers. Failure of counsel to attend sessions may result in the imposition of sanctions.

The Circuit Executive for the D.C. Circuit shall serve as the program administrator of the Appellate Mediation Program. A party may request mediation, but the Director of the Legal Division of the Clerk's Office will ultimately determine which cases are appropriate for mediation. Case selection will take place no sooner than 45 days after a case has been docketed in the Court of Appeals. Lead counsel will receive notice of case selection and of the mediator assigned.

An initial mediation session will be held by the mediator within 45 days of a case's selection for mediation. The mediator will schedule additional sessions as needed. Mediation sessions will normally be held at the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. The mediator has discretion, however, to hold sessions at any other location he/she thinks appropriate.

The Court will send the mediator a copy of the judgment or order on appeal, any opinion issued by the District Court or agency, the appellant's or petitioner's statement of issues on appeal, D.C. Cir. Rule 28(a)(1) statements, and all relevant motions. Within fifteen days of the case's selection for mediation, counsel shall prepare and submit to the mediator a position paper of no more than ten pages, stating their views on the key facts and legal issues in the case. The position paper will include a statement of motions filed and their disposition. Mediation statements shall not be filed with the Court and need not be served on opposing counsel unless the mediator so directs.

All motions filed or decided while mediation is underway are to be identified for the mediator and submitted to him/her upon request. Like mediation statements, documents submitted

to the mediator or prepared for mediation sessions need not be served on opposing counsel unless the mediator so directs and shall not be filed with the Clerk's Office.

All cases in mediation remain subject to normal scheduling for briefing and oral argument by the Clerk's office. If the mediator, in consultation with the parties, believes that additional mediation sessions or discussions are required and that the briefing schedule in the case would interfere with such efforts, the attorneys shall request an extension by filing a joint motion to defer or postpone the briefing and/or oral argument date(s). The motion must indicate, in both the caption and the first paragraph, that the change is needed to accommodate a pending mediation. The attorneys shall represent that the mediator, whom they shall not identify by name, concurs in the request. Attorneys may not file any other motions that would notify the Court that the case is in mediation, nor may they use information obtained through the mediation as a basis for any other motion.

The content of mediation discussions and proceedings, including any statement made or document prepared by any party, attorney or other participant, is privileged and shall not be disclosed to the Court or construed for any purpose, in any proceeding in any forum, as an admission against interest. Mediators shall not comply with requests for information about mediated cases and, if subpoenaed, are hereby instructed not to testify. Participating counsel and their clients will refrain from commenting publicly about the fact that a case is in mediation or from disclosing any information about the parties' discussions or the status of the talks to anyone who is not, directly or indirectly, a party to the negotiations.

No party shall be bound by anything said or done at a mediation session unless a settlement is reached. If a settle-

ment is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement.

Mediators who have been selected by the Court to serve in the Appellate Mediation Program are highly experienced members of the bar who have been involved in the types of litigation that come before the Court. Mediators, who will serve without compensation, have received special training to help parties reach agreement and avoid the time, expense and uncertainty of further litigation. Mediation is offered to parties at no cost.

Mediators may, in their discretion, call or write to private clients or to representatives of government agencies to request their attendance at mediation sessions. Any communication by the mediator with such persons must, however, be fully disclosed to the counsel of record. Mediators may communicate, in the presence of counsel, settlement offers or other appropriate information to private clients or to representatives of government agencies. If a mediator makes any oral or written suggestion as to the advisability of a change in any party's position with respect to settlement, counsel for that party shall promptly transmit the suggestion to his or her client if that client is not present at the mediation session. Counsel shall explain to clients, whether present at mediation or not, the suggestions put forward by mediators and their import. It is

FURTHER ORDERED that if a case is settled, counsel shall file a stipulation of dismissal. Such stipulation must be filed within 30 days after the settlement is reached unless a short extension is requested by the attorneys by motion. If a case cannot be resolved through mediation, it will remain on the docket and proceed as if mediation had not been initiated; therefore, no notification to the Court is necessary.

A copy of this Order will be posted in the Office of the Clerk of the United States District Court for the District of Columbia and the Office of the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

EFFECTIVE: April 14, 1998 *Per Curiam*