

MEDIATION IN THE NINTH CIRCUIT COURT OF APPEALS

LISA EVANS

In recent years, as filings in the federal courts of appeals have increased significantly, appellate mediation has become an increasingly attractive alternative to continuing litigation, because it allows the parties to reassess the merits of their case and to pursue settlement options early in the appellate process before additional resources are expended. This article provides an in-depth description of how the mediation program at the Ninth Circuit is structured.

Mediation is a flexible, informal alternative dispute resolution (ADR) process in which an impartial third party facilitates settlement discussions and negotiations among litigants to help them achieve a mutually acceptable, global resolution of their dispute. Ideally, a mediator does not render decisions, take sides, or offer legal advice to the participants. The role of the mediator is to facilitate discussions, ask questions, reframe issues, and assist the parties in identifying solutions to their problems. All the federal circuit courts of appeals now sponsor some type of program for dispute resolution. These programs are increasingly popular with litigants and counsel in circuits, like the Ninth Circuit, where significant increases in annual filings can lead to a protracted and costly appellate process.

NINTH CIRCUIT MEDIATION PROGRAM

The Ninth Circuit Mediation Program offers litigants an attractive alternative to continuing litigation through the traditional appellate process. The program was established in the 1980s, pursuant to Federal Rule of Appellate Procedure (FRAP) 33 to facilitate settlement of cases on appeal. The program is broadly based on that rule, Ninth Circuit Rule 33-1, and the Advisory Committee Note to Local Rule 33-1. (For the rules and additional information, see www.ca9.uscourts.gov.)

The program is staffed by a chief circuit mediator and nine circuit mediators, who work exclusively for the court of appeals. They are all licensed attorneys; are experienced and highly trained in appellate mediation, negotiations, and Ninth Circuit practice and procedure; and have an average of twenty-three years of combined private-law and mediation practice. Collectively the mediators, whose office is located in San Francisco, with a satellite office in Seattle, settled nearly 900 cases for the court in 2004.

Most civil cases in which all parties are represented by counsel are eligible for the Ninth Circuit Mediation Program, and almost 50 percent of eligible cases are selected for inclusion in the program. In addition to civil cases, the Ninth Circuit Mediation Program is attempting to mediate immigration disputes. With escalating numbers of petitions for review—872 in 2,000, but over 6,000 expected in 2005—the

Mediation Unit launched a pilot program in 2004 to help the court identify groups of immigration cases that might be good candidates for settlement.

The Selection Process. The circuit mediators strive to select cases for the program pre-briefing before the parties have invested considerable additional resources and have become wedded to their respective substantive positions on appeal. Selection of cases for mediation typically involves a two-step evaluative screening process. In the first step, the circuit mediator reviews the Civil Appeals Docketing Statement (CADS). In all civil appeals, counsel for appellant must file this document with the district court upon filing the Notice of Appeal; counsel for someone filing a Petition for Review of an agency decision are required to file a CADS with the appellate court. The CADS submission includes a copy of the order from which the appeal is taken, as well as a description of the nature of the action, the result below, the principal issues proposed to be raised on appeal, and counsel's assessment of the possibility of settlement. The circuit mediator reviews these documents, the lower court's order, and any other appended materials and decides whether the appeal would be a good candidate for the Mediation Program.

In most cases, the circuit mediator proceeds to the second step in the evaluative selection process by setting up an Assessment Conference. If a case is not selected for such a conference, a party may request to be included in the program at any time before a panel of judges rules on the dispute. The Assessment Conference is a court-ordered telephonic conference during which a circuit mediator and the parties' counsel discuss in more detail the information provided in the CADS, any post-judgment activity, such as an award of costs or attorneys' fees, and the history of settlement discussions to date. To encourage a frank discussion and evaluation of the dispute, the Assessment Conference involves only the litigants' counsel and the circuit mediator. Court rules, however, require that counsel confer with their clients about settlement before the Assessment Conference, to ensure that the clients' interests are fairly represented at this initial stage.

The purpose of the Assessment Conference is to allow counsel and the mediator an opportunity to assess the parties' willingness to participate in a process to resolve the dispute. If the parties are interested, the circuit mediator then discusses whether mediation or some other process would be most appropriate. While the initial Assessment Conference lasts from thirty minutes to an hour, in complex cases the circuit mediator may have several follow-up telephonic conferences with counsel to structure the best process for the parties.

In determining whether a case is appropriate for the Mediation Program, the circuit mediator, counsel, and the parties will consider many factors. These include, but are not limited to, the parties' interest in settling the dispute at this juncture and the likelihood of settlement; their desire to have a neutral third party take a fresh look at the dispute; the certainty or possibility that a decision by the Ninth Circuit Court of Appeals will not end the dispute; the existence of other pending appeals that

address the same legal issue; a party's desire to make or avoid legal precedent; the parties' desire to preserve an ongoing business or personal relationship; and any history of bad feelings among the parties that may have protracted the litigation and hampered previous settlement efforts.

It is important to note that when cases are selected for the program, the dispute may involve others who are not parties to the appeal, as well as related cases pending in other courts or venues, or issues that are not a part of the pending litigation. For example, in cases in which the payment of a judgment may involve insurance proceeds, the insurer may not be a party to the appeal but would be instrumental in resolving the matter. Accordingly, a representative of the insurance company involved would be asked to participate in the mediation. Similarly, preliminary injunction appeals, appeals involving a party who has a pending bankruptcy proceeding, and environmental appeals where there is a parallel state proceeding are examples of cases in which the mediation, by necessity, would be broader in scope than the issue in the immediate appeal in order to accomplish a global resolution of the dispute.

The selection process just described accounts for 90 percent of a circuit mediator's caseload, but there are two other points in the appellate process in which cases may be selected for the program. The first is after briefing, when the parties have had an opportunity to review each others' substantive arguments and to reevaluate their chances for success on appeal. The second opportunity is after oral argument, when either the three-judge panel hearing the case refers the matter back to mediation or the parties request deferral of formal submission to allow for additional settlement discussions through mediation.

The Mediation Process. Every case presents unique circumstances and personalities. Mediation allows flexibility to structure a process that will provide the optimal chance for resolution. In most cases, by the time the matter has reached the Ninth Circuit Court of Appeals, the parties and their counsel have been living with the dispute for years and, along the way, there may have been several failed attempts at settlement. At the appellate level, there is the added challenge of trying to resolve a case in which one party has been declared a "winner" and another a "loser" in the lower court or agency. The circuit mediator is trained and sensitive to these matters and will work with the litigants and their counsel to structure the most-efficient, cost-effective process, considering the issues and personalities involved.

In preparation for the mediation, the circuit mediator may ask the parties to prepare short mediation briefs; typically, one-half of the brief is served on the opposing party or parties and one-half is submitted confidentially to the mediator. The circuit mediator will review the mediation briefs and any relevant pleadings, caselaw, evidence, or other materials the parties submit. The Mediation Program's most familiar and effective model is in-person mediation, in which decision makers for the parties, their counsel, and the circuit mediator meet and spend at least a day trying to resolve the dispute. In-person mediations generally are held at the court and may use

separate or joint sessions. In particularly acrimonious cases, the in-person mediation may involve only counsel, who must have full authority to settle or have clients on telephone standby. In smaller cases, the mediation may be carried out by telephone.

To encourage frank and honest settlement discussions, the proceedings in the Mediation Program—from the Assessment Conference through the mediation itself—are strictly confidential. Ninth Circuit Rule 33-1 expressly prohibits a circuit mediator from disclosing any information regarding settlement discussions to judges who may decide the dispute or to any person other than the mediation participants. In addition, any documents submitted for settlement purposes are kept confidential. The circuit mediators maintain confidential records separate from the court files, and those records are destroyed one year after the appeal is settled and dismissed or decided by a panel. Any new information a party learns through the mediation process cannot be used against another party in any future proceeding, and the court expects the parties to and participants in mediation not to mention any confidential communications in their briefs or oral argument if the case does not settle.

Regardless of how the mediation is structured, it assists the parties to identify what issues are truly in dispute; clarify what it would take to resolve the dispute; generate possible options for settlement; and negotiate a global resolution. For efficiency, and to facilitate the settlement program, circuit mediators are authorized to address procedural and case-management issues. Beginning with the Assessment Conference, the circuit mediator will work with counsel to structure court proceedings in a manner that will encourage settlement. In most cases, the parties choose to delay the briefing schedule to allow settlement discussions to take place. Generally, such delays have no effect on when the case ultimately is decided. The mediator may issue procedural orders to coordinate the settlement process with other proceedings or to accommodate private mediators or settlement processes outside of the court.

If the mediation is successful, counsel will work together to memorialize the settlement in a legally binding form and, upon the filing of a motion or stipulation to dismiss, the circuit mediator or clerk of the court will dismiss the appeal pursuant to FRAP 42(b). If the settlement efforts are unsuccessful, the circuit mediator will promptly issue a new briefing schedule and any other procedural orders necessary to ensure smooth processing of the appeal.

CONCLUSION

The Ninth Circuit Mediation Program is a flexible and effective alternative to what can be a lengthy and costly appellate process. On the one hand, it offers litigants control, certainty, closure, and finality, while, on the other hand, it preserves precious judicial resources for those cases that cannot be settled. When used effectively, the Mediation Program provides a win-win opportunity for litigants, counsel, and the court. **jsj**