Alternative Dispute Resolution

Mediation in the U.S. Court of Appeals for the Third Circuit

By Penny Ellison
Appellate Mediator

Cases Selected for Mediation

In the Third Circuit, Local Appellate Rule (LAR) 33 governs the circuit's mediation program. LAR 33.2 defines the range of cases eligible to be referred to mediation. LAR 33 provides that most counseled civil appeals and petitions for review or for enforcement of an agency action are referred for possible mediation.[1] The program director then reviews the files and selects the cases he believes are appropriate for mediation. In order to assist in the case selection process, the local rules require the appellant to file a "Concise Summary of the Case" with the clerk within 10 days of the docketing of the appeal. Approximately 65 to 70 percent of eligible cases are selected for mediation. The determination is principally based on the nature of the case.

Nearly all cases seeking monetary damages—such as employment discrimination, personal injury, insurance cases, contract disputes, and commercial claims—are selected for mediation. Cases that appear to require a court ruling on a legal or constitutional question or otherwise appear inappropriate for mediation are rejected and returned to the clerk's office for issuance of a briefing order. In some cases, the program director will contact counsel to solicit their confidential views as to how amenable the case is to mediation. In addition, counsel are able to contact the mediation office to request that a case be mediated. Such requests are generally granted and kept confidential if counsel so requests.

Mandatory Mediation

The Third Circuit's mediation program is "mandatory" in the sense that, once the case is selected for mediation, the parties cannot refuse to participate. That being said, the mediators recognize that it makes no sense to force truly recalcitrant parties to sit around a table simply to announce that they will not settle. Therefore, if a case has been selected for mediation and counsel believe mediation would not be productive, they are generally asked to put their reasons in their mediation position papers for the mediator assigned to the case to review the objections. If the mediator considers the reasons given sufficient, the program will not proceed with the mediation and the case will be returned to the clerk's office for issuance of a briefing schedule.

Issuance of the Briefing Schedule

In the Third Circuit, LAR 33.3 requires mediation to occur before a briefing order is issued. No briefing order is issued until either the program decides not to schedule the case for mediation or, if it is scheduled, the mediation does not result in a settlement. If the parties request, the mediator has the discretion to request the clerk to issue the briefing schedule prior to the mediation. In addition, because many cases are not settled at the initial mediation session, but neither the parties nor the mediator has abandoned hope of a settlement, a briefing schedule may be issued after the initial session while the parties and the mediator continue to work on a settlement. Typically, though, to save the time and expense that would ordinarily be incurred in the briefing process, the stay in briefing remains in place while the parties continue to discuss a settlement.

Assignment of a Mediator

If a case is selected for mediation, the program director will assign a mediator and issue a notice to counsel setting forth the date and time of the mediation session and requiring submission of confidential position papers. The position papers are "for the mediator's eyes only" and therefore are not filed with the clerk nor served on opposing counsel. Accordingly, the focus of position papers should be candor about settlement positions and issues that may affect settlement, rather than extensive discussion of the facts or applicable law. A surprising number of position papers fail to address the party's settlement position. Counsel should bear in mind that the mediator has read the district court's opinion, and information bearing on settlement is infinitely more useful to the mediator than legal argument is.

The Third Circuit currently has two full-time mediators, and cases are assigned randomly to each of them. On occasion, senior circuit judges and senior district judges serve as mediators in cases that, by virtue of geography or particular background or experience, lend themselves to mediation by a senior jurist. For example, when an in-person mediation is desirable but travel to the court's principal location in Philadelphia would be inconvenient or impractical for the parties, a senior judge located closer to the parties could conduct an in-person mediation, thereby obviating the need for the parties to travel.

Conduct of Mediation

The Third Circuit's LAR 33.5(b) requires the senior attorney in charge of the appeal and the person or persons with actual authority to negotiate a settlement to attend the mediation session.[2] If the mediation is in person and the client representative is located more than 150 miles from the courthouse, the notice will permit the appropriate client representative to participate in the session by telephone. This rule is designed to ensure the involvement

Editor's Note: At press time, submissions had not been received from the First, Second, and Eighth Circuits. All Circuits were contacted for information.

of the individuals who can meaningfully participate in the mediation. As a practical matter, a person with "actual authority" is someone who has the experience and judgment to exercise that authority without having to consult with anyone who is not in attendance at the mediation. The importance of this requirement cannot be overstated. Unfortunately, too often either no client representative is present at the session or the representative who does attend cannot act with full authority. One side's failure to bring to the mediation the person who can make the actual decision about settlement can destroy the settlement dynamic by giving the impression that the party is not serious about settlement or does not respect the mediation process. The lack of an authorized decision-maker also deprives the mediator of the ability to play the role he or she is supposed to play in the process.

Approximately half of the mediations in the Third Circuit are conducted in person and half by telephone. The decision to schedule mediations in person or by telephone is essentially based on a cost-benefit analysis. If counsel and the parties are located near the mediation site, usually Philadelphia, the mediation is likely to take place in person. It is interesting to note that historical statistics reveal no material difference in success rates between the two methods. Telephone mediations are initiated by the court through a conferencing system that permits private consultations between attorney and client even if they are in different locations, thus providing the ability to simulate going into different "rooms."

Mediations are typically conducted in the familiar mediation format of a joint session, followed by a separate meeting between the mediator and each side in "private caucuses." The mediator informs the parties at the outset that, under LAR 33.5(c), discussions during the mediation are to be kept strictly confidential and that the mediator will also abide by the confidentiality rule and not discuss anything that occurs during mediation with any judge of the court or anyone else. The mediator then discusses the likely timing of the court's decision in the absence of a settlement and the possible paths the case could take from this juncture. To ensure that counsel and the parties share the same understanding of the issues on appeal, the mediator will typically summarize the background of the case and the issues to be raised on appeal, inviting comment (but not argument) from counsel.

In private caucuses, the mediator is likely to provide candid feedback about the strengths and weaknesses of the case. The mediator will rarely, if ever, assign a dollar value to a case. Rather, the mediator shuttles between the parties conveying proposals and counterproposals together with further discussion of the merits of the appeal and other factors that may favor a settlement, such as cost and delay. In many instances, the mediator may determine that the case cannot be settled at the initial mediation session but that further negotiations between the parties would be productive. Sometimes, a second formal session is scheduled; more often, the mediator follows up with counsel by telephone to see if a further progress can be made.

If the parties reach a settlement, the mediation program will send a confirming letter to counsel and will inform the clerk's office that a tentative settlement has been reached. The actual documentation of the settlement is the responsibility of the parties. The confirming letter also provides a form for the stipulation to dismiss the appeal; the form must be filed within 30 days after the parties have documented and concluded the settlement.

Conclusion

The Third Circuit's success rate in mediation consistently hovers around 37 percent of cases mediated, thus relieving the court of the burden of deciding and eliminating the need for the parties to litigate approximately 140 cases annually. Many parties who sought to have the mediation session canceled because they deemed the effort hopeless later express great surprise that the case was, in fact, settled.

To maximize the chances that your case is one of those that gets resolved to everyone's satisfaction, you should sit down with your client in advance of the mediation and have a frank discussion about the expense, time, and risk that still lie ahead. Even if the issue of damages has not yet been reached in the district court, you should be prepared to discuss the topic at the mediation session. It is also helpful to provide the mediator with a history of any previous settlement negotiations in the case and what may have gone wrong with those efforts. At the mediation, it is advisable to avoid creating a hostile environment and to be creative about ways the case might be resolved. The process requires an open mind, a great deal of patience, and counsel's willingness to communicate candidly with both the mediator and the client. The rewards are substantial and sometimes beyond measure.

For more information about mediation in the Third Circuit, please visit www.ca3.uscourts.gov and click on "Mediation." In addition, an extensive article on mediation in the Third Circuit, *Appellate Mediation in the Third Circuit—Program Operations: Nuts, Bolts and Practice Tips*, is available at 47 VILL. L. REV. 1055 (2002). **TFL**

Endnotes

[1]Some pro se cases are also referred for mediation by the staff attorneys who review them. *See* LAR. 33.6. In those cases, the program director will seek counsel to represent the pro se client for purposes of the mediation process only.

[2]This requirement will only be waived for governmental bodies as to which settlements must be approved by a board or upon a showing of exceptional circumstances.

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The Office of the Circuit Mediator: Settling Cases on Appeal in the Fourth Circuit

By Thomas F. Ball III
Senior Circuit Mediator

In 1994, the judges of the U.S. Court of Appeals for the Fourth Circuit decided to join the emerging trend in the circuits to implement mandatory appellate mediation. The Fourth Circuit's Office of the Circuit Mediator (OCM) is charged with conducting all mediation conferences pursuant to the circuit's plan. The judges' confidence in the concept has proved to be justified—since Oct. 1, 1995, OCM has mediated 8,975 cases and settled 3,158 cases, for a settlement rate of 35 percent. Moreover, OCM mediators have helped attorneys and parties in the many cases that have not been settled by answering procedural questions and by helping to refine issues to be raised on appeal. Feedback from mediation participants suggests that OCM is viewed as a valuable service provided by the court.

How It Works

Mediations in the Fourth Circuit are a service provided entirely by the court with no cost to the parties involved. Following the example of the Sixth Circuit, most OCM mediation conferences take place by telephone.[1] Only attorneys are required to participate in each conference, but parties may attend if they wish. Such conferences impose minimal burdens on parties and counsel. While telephonic conferences have some obvious shortcomings, the convenience to the parties and attorneys, as well as the notable success rate, outweighs any deficiencies.

Under Fourth Circuit Local Rule 33, OCM conducts mediation sessions only in civil cases that have counsel. Except for a limited number of agency cases, all such civil cases are eligible for mediation and are randomly assigned to the three active mediators by the clerk.

In every case, an initial mediation session is held and, in most cases, follow-up conferences are required.[2] The fact that a case is placed with OCM does not ordinarily affect the court's normal briefing processes, although OCM can extend briefing deadlines if all parties consent and the mediator thinks the extension will aid the mediation process.

Parties who participate in OCM mediations can rest assured that all mediation information is confidential. Fourth Circuit Local Rule 33 and the decision in *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002), make it clear that the only way to be released from the strict confidentiality rule is by permission granted by a standing panel charged with monitoring the rule.[3] The scope of Local Rule 33 is broad and applies to mediators, attorneys, and parties.

Challenging Common Assumptions: The OCM Approach

OCM mediators are well familiar with the skepticism surrounding appellate mediation. Attorneys repeatedly recite a variety of "truisms" that counsel against appellate mediation: for example, there is no uncertainty here because a winner has been declared; the parties are invested financially and emotionally in a way that makes them want a resolution; all lawyers know that chances for reversal on appeal are minimal; the fact that the parties did not settle the case in the district court is indicative of their resistance to settlement; the appeal concerns only a matter of law that is not susceptible to mediation; and the attorneys know best if a case has a chance of reaching a settlement. The simple response to these concerns is that the court requires mediation in every case. However, an equally important factor should motivate parties to participate fully: the demonstrated success rate of OCM (and other circuit mediation programs) suggests that it is in the best interest of parties to approach appellate mediation seriously.

The reality is that circumstances—both legal and nonlegal—change. Thus, for example, the law applied in the district court may no longer control. Or the client's resources and motivation can be dramatically different than when the case was brought initially. Finally, as lawyers know well, litigation in the appellate court is fundamentally different from proceedings in the district court. Consequently, the evolving nature of the case dictates that attorneys and clients keep an open mind about settlement until the case is over.

How do OCM mediators facilitate discussions? First, it is important to note that OCM mediators are not judges and do not speak for the court. However, OCM mediators do not shy away from active participation in the negotiations. Naturally, OCM mediators cannot predict the outcome of cases, but they do raise hard questions that help counsel assess the strengths and weaknesses of the full gamut of factors that affect settlement on appeal. In addition, OCM mediators are experienced in appellate practice in the Fourth Circuit and can bring to bear a useful appellate perspective to the case.

How Lawyers Can Maximize Chances of Settlement in OCM Mediations

Attorneys can play an important role in increasing the chances for a productive OCM mediation. Initially, they can begin by taking seriously the responsibility to initiate discussions with their clients regarding settlement. The OCM Notice of Scheduled Mediation provides a useful platform on which to base a new conversation about settling the case. When attorneys properly prepare their clients to understand the appellate posture of their case, the mediator's questions often reinforce the need for the client to confront new realities.

Attorneys can also prepare themselves for mediation. Often, proceedings in the district court are a dim memory. If attorneys brush up on events and arguments that happened a long time ago, as well as the record on appeal and any new relevant precedent, the chances for a successful OCM mediation increase.

Conclusion

Attorneys and parties owe it to themselves to re-evaluate the propriety of settlement on appeal. A fresh look at even old factors serves the best interests of the client. Thus, OCM mediations should be viewed as an opportunity to help achieve something meaningful for the client. On the one hand, a settlement brings obvious benefits. On the other hand, even if a case is not settled on appeal, full participation in an OCM mediation session means the decision to go forward will be a fully informed one. Thus, mediation is a win/win proposition. **TFL**

Endnotes

[1]OCM mediators can, and do, conduct in-person mediation sessions. However, mediators require attendance at such conferences only when the parties are in agreement and the mediator believes such a session will be helpful.

[2]Follow-up conferences frequently involve a telephone call between the mediator and one of the parties.

[3]The Fourth Circuit is the only circuit that requires the permission of the court before any disclosure of mediation information is allowed. Clearly, the court views confidentiality as an important value.

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Appellate Mediation in the Fifth Circuit: A Brief Overview

By Joe St. Amant
Circuit Mediator

The Fifth Circuit Appellate Conference Program reviews appeals of civil cases that have counsel and consults with the attorneys in those cases to determine whether mediation might be useful. Case selection occurs very early in the appellate process, so that the possibility of settlement can be explored before work begins on the briefs.

Typically, the program sends letters via fax to the attorneys to schedule an initial telephone conference call or an in-person meeting if all counsel are from New Orleans. Any party has the right to opt out of the program after receipt of the letter or at any other time. If, after the initial conference, the attorneys and the mediator think that further discussions could be productive, they determine how best to proceed—usually either by negotiations over the telephone or by an in-person mediation session. Because of the geography of the circuit, in a majority of cases, negotiations over the telephone are more practical.

The court views the conference program as a vehicle that provides a service that parties to a case can take advantage of if they wish to do so. The program is in no sense mandatory, and the process used to try to reach a settlement is the subject of mutual agreement. As a result, most negotiations are conducted in a relatively informal manner. The program does not require extensive written submissions in connection with conferences or in-person mediations, unless the parties agree that such submissions would be helpful.

If, for some reason, representatives of the conference program have not set the case for an initial conference, any party may request a conference (or, for that matter, a mediation). Parties are free to communicate with the conference attorneys ex parte, and the fact that a party requested mediation will not be conveyed to the other side without permission. The program will not compel parties to appear at a mediation session if they indicate their unwillingness to participate.

The conference program is governed by a standing confidentiality order that essentially prohibits anyone participating in a program negotiation from communicating with anyone who is not involved in the program about the substance of the discussions being conducted. This confidentiality order also provides an effective barrier between the program process and the deliberations of the court.

Selection of a case for the conference program does not in itself extend any appellate deadlines. If the parties are making progress in negotiations, however, and no party is opposed to a requested extension in a briefing schedule, the conference attorneys can help facilitate an extension. **TFL**

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Mediation in the Sixth U.S. Circuit Court of Appeals

By Robert W. Rack Jr.
Chief Circuit Mediator

The Sixth Circuit's mediation program functions much the same as most other circuits' programs do. Cases are selected for mediation in one of three ways. Most are scheduled routinely or randomly from eligible civil appeals that have counsel for both sides as soon after the notice of appeal as practicable. Some cases are scheduled at the request of the parties involved, and a few are referred by hearing panels after oral argument.

The randomly selected cases are scheduled as telephone conferences unless counsel work within 50 miles of the court. Scheduling notices encourage counsel to contact the Mediation Office to suggest that the conference be held in person when they think this might be advantageous. Clients are encouraged to attend initial conferences but usually are not required to do so. Clients' participation in mediation sessions is usually helpful, however, and is becoming the norm in the Sixth Circuit.

The style of the Sixth Circuit's mediators tends to be more facilitative: they are more likely to encourage candid appraisal of risks and to facilitate voluntary settlement offers than to try to pressure parties or push their own opinions. Mediators can and will adjust briefing schedules

to accommodate good faith negotiations when all parties agree to do so, and mediators will work with counsel as long as the parties wish to negotiate.

One of the challenges facing court mediators today is the impact of all the private mediation and settlement conference experience many lawyers and clients bring with them. Experience can build expertise but can also lead to routine behavior and habits that hinder sincere mediation efforts. At its best, mediation is a creative, challenging, and sometimes uncomfortable process. Participants are asked to reconsider carefully crafted, self-serving and emotionally entrenched positions. Some parties can change hats and quickly move from litigation to interest-based negotiation; others cannot. Some take the more comfortable route of waiting for the other side to make the big moves or for the mediator to come up with an attractive proposal.

In a private mediation, where all parties have declared their commitment to negotiate by hiring the mediator at an agreed hourly rate, the comfortable route is not so problematic. In a court-initiated mediation, however, the parties have asked for a court decision, not for mediation. Court-appointed mediators seek to determine if the parties have an interest in settling and are aware of their responsibility to not waste everyone's time. Even though a private mediator can comfortably and profitably adopt whatever pace the participants set—even if the pace is slow—court mediators have many more cases waiting for exploration and must practice a kind of triage, always trying to efficiently decide when "no" really means no and when it is time to get out of the way of an appeal.

In appellate mediations that parties have not requested, therefore, counsel are encouraged to keep this situation in mind as they decide what signals they want to send with their opening positions and early counteroffers. Taking extreme positions and holding on to them too long can kill a negotiation and make the parties miss an opportunity to settle the case. In these situations, it is wise to at least cue the mediator to the client's true needs and interests—that does not mean their bottom line—so that the mediator will not misread the size of the gap and quit too early.

Obviously, no one wants to give up any more than necessary to reach settlement, so the level of candor counsel can responsibly offer to the mediator depends on the confidence counsel has that the mediator will not immediately give away his or her position for a fast settlement. Mediators understand the value of confidential candor and know how to protect parties' negotiating positions. Counsel can and should make any concerns in this regard explicit by discussing with the mediator strategies for maximizing long-term goals with specific offers and counteroffers. Private communications of this kind are perfectly appropriate and can be very helpful.

Most initial mediation conferences are scheduled as telephone conferences because the parties' interests in reaching a settlement are unknown and the geographic size of the Sixth Circuit makes travel to Cincinnati burdensome and expensive. There are advantages to in-person meetings, however, and the Mediation Office is happy to help parties exploit this option. In-person conferences are often arranged as a follow-up to initial telephone conferences and can also be arranged for initial meetings if one or all parties suggest doing so. Keeping the suggestion of an in-person meeting confidential from the other parties can be tricky, but the mediators have ways to do this and will work with requesting counsel to find the best approach.

Lawyers who practice nonagency civil cases in the Sixth Circuit or its sister circuits are probably familiar with the services and opportunities available. The bottom line is that the Mediation Office exists to assist counsel and their clients in fully exploring any and all alternatives to a panel decision in their appeal.

Communications with and through the Mediation Office are totally confidential. The office welcomes calls from counsel at any time and is willing to answer general or specific questions about its practices or about strategies for negotiating in a particular situation. Mediators are also available to assist parties with procedural problems; and the clerk's case managers are also available, helpful, and knowledgeable regarding most procedural matters.

Along with scheduling notices, the office provides a mediation background information form that asks counsel to indicate possible obstacles to productive negotiations as well as ways to make them productive. Providing this ex parte information enables the mediator to prepare better for the negotiation and to steer mediation discussions toward topics and objectives of interest to counsel and their clients more efficiently. This information form is a useful and underused tool for parties coming into mediations.

It is difficult to provide an accurate number of the number of appeals that were settled in the Sixth Circuit as a result of mediation, because reported settlement statistics are an unreliable source of information for comparing mediation programs; programs count cases mediated and cases settled in different ways. In 2008, 823 appeals were mediated at the Sixth Circuit. Of those, 342 cases—42 percent—were settled. The office counts as settlements all cases that have been dismissed without judicial involvement following the initiation of mediation efforts.

Most eligible civil appeals that have counsel for both sides are scheduled routinely. Exceptions occur when waves of filings make it impossible to get to all available cases before briefing. If counsel have not received notice of a mediation conference within a few weeks of the due date of the appellant's brief, a call to the Mediation Office will get the case on the mediation calendar. The briefing schedule may be adjusted to allow the conference to go forward before briefs are submitted. In the program's experience, the motivations and probabilities for settlement drop precipitously once briefs are filed.

The Sixth Circuit's Mediation Office is scrupulous about not disclosing to judges or procedural decision-makers in the court anything that could affect their opinions of the case, the parties, or counsel. Similarly, mediators will not disclose to other parties anything counsel ask them to keep confidential. Requests for mediation are treated by the office as confidential, although counsel are welcome to disclose anything they wish to other parties.

Mediation works well when participants think of the

mediation as their own. If the mediation process does not work for counsel and their clients, it will not be productive. The circuit has mediators whom litigants can use, and the mediators like to be used effectively. The Sixth Circuit's mediators are experienced and well trained in the art and skill of negotiation. Counsel can serve their clients well by collaborating with the mediator to create the best chance of getting their clients' needs met through a negotiation process. Counsel should not be intimidated by the formality of the process, nor should they be too coy. Counsel are encouraged to call the Mediation Office at any time to confidentially suggest or discuss the value of or any specific strategies for the mediation of their appeal. Mediation is a pragmatic business in which practical problems can be addressed and solved. Counsel should think of mediation as a flexible and valuable tool and should learn to use it well. **TFL**

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Mediation in the U.S. Court of Appeals for the Seventh Circuit

By Joel N. Shapiro
Senior Conference Attorney

At the U.S. Court of Appeals for the Seventh Circuit, litigants in many civil appeals are required to participate in court-sponsored mediation, which are referred to as Rule 33 settlement conferences, because they are conducted pursuant to Federal Rule of Appellate Procedure 33. If you have not participated in a Rule 33 conference, you may not know how the process works and how successful it can be in resolving cases that the parties had assumed would have to be decided by the court.

Every federal court of appeals has a settlement program. The Seventh Circuit's program differs from some of the others in that it is mandatory; litigants cannot opt out. The court requires parties to make every reasonable effort to resolve appeals before they relinquish that responsibility to the court, with all the attendant uncertainty and expenditure of resources that accompany a court proceeding.

Most types of civil appeals are eligible for mediation, as long as all parties are represented by counsel. Because so many appeals are eligible, Rule 33 conferences are not scheduled in every case. Nonetheless, any party may *request* that a Rule 33 conference be conducted. Such a request is made directly to the Settlement Conference Office and is kept confidential unless the requesting party prefers that it be disclosed to the other parties. The Settlement Conference Office accommodates such requests to the extent its calendar permits.

Whether a conference has been scheduled at the court's initiative or a party's request, attendance is compulsory. Requiring clients to attend is left to the court's discretion. Litigants are not required to settle their case, but they *are* required to explore possibilities of settlement fully and make reasoned, informed judgments about what sort of settlement could be mutually acceptable.

This is a mandate that many parties and counsel welcome but others are skeptical about initially. After all, how likely is it that a case can be settled on appeal when one side has "won" and the other "lost," when previous settlement efforts have failed, or when months or years of litigation have exacerbated the antagonism and mistrust between parties and between counsel? Notwithstanding such doubts, experience shows that many cases mediated in the Seventh Circuit are voluntarily disposed of by the litigants. So, the requirement to participate in appellate mediation is not so much a burden as it is an opportunity to substitute a certain and mutually acceptable result for the delay, expense, and uncertainty of a decision by the appellate court.

The Seventh Circuit's Rule 33 conferences are conducted by attorneys on the court's staff who devote all their time to assisting counsel and their clients with settlement. As settlement facilitators—in this circuit they are called "settlement conference attorneys" or simply "conference attorneys"—they play no part in deciding appeals on the merits nor do they discuss the merits of appeals or the substance of Rule 33 conferences with judges in the district or appellate court. Facilitators' sole responsibility is to help the parties arrive at a settlement on which they can all agree or, after diligent efforts by all concerned, conclude with regret that no such settlement is possible.

Appellate mediation in the Seventh Circuit might be described as a hybrid between private mediation and a judicial settlement conference. At the initial meeting—which is generally conducted in person when the participants are in the Chicago metropolitan area and by telephone if they are located elsewhere—the conference attorney typically asks each side to speak about the issues on appeal and the background of the parties' legal dispute. The conference attorney is not, of course, a trier of fact or an arbiter of legal issues. Argument is out of place at the initial session, but it is important to define the issues clearly so that each side is in a position to assess its prospects if the litigation were to go forward. In due course, the conference attorney meets privately with each side to learn more about the party's needs and interests, probe the party's assessment of the case, and explore alternatives to proceeding with the appeal. Often the conference attorney conducts "shuttle negotiations" to bring the parties closer together on the terms of settlement. If the appeal is not resolved at the initial session and additional conversations are warranted, a follow-up conference may be arranged for all participants, or the conference attorney may conduct further discussions in person or by telephone with one side at a time. The conference attorney tries to be scrupulously neutral while at the same time encouraging each side to be realistic in its assessment of the case and its expectations of settlement. If a settlement is reached, counsel prepare and finalize the settlement documents. If intractable issues arise in documenting the settlement, the conference attorney may be

called upon to assist in resolving them.

The court insists that all communications that take place in the course of Rule 33 proceedings, whether oral or in writing, be kept strictly confidential; the communications are for the ears and eyes of the parties and their counsel only. Nor does the conference attorney disclose to the court or to the public what has been discussed at the mediation session. Thus, participants are assured that they may speak freely and make every effort to settle the case without fear that their candor might later be used against them.

How can advocates use the opportunities presented by Rule 33 proceedings to their best advantage?

- Attorneys can acknowledge to themselves that settlement is no less worthy a litigation goal than "victory" is—that skill at settlement is no less an accomplishment than skill at "winning." A case that is settled on terms that serve the client's interests is a case that ends well and reflects credit on the lawyer who guided the case to a successful conclusion.
- Attorneys can counsel their clients forthrightly on the risks and costs—emotional as well as financial—of continuing to litigate and also on the benefits of settlement. If this means acknowledging to the client that his or her case is not as strong as it may once have appeared, so be it. Lawyers are also called "counselors" because they have to tell clients what they *need* to hear instead of what they *want* to hear.
- Attorneys can pay close attention to the other parties' interests (because a settlement has to work for everyone or it will not work at all) and should think about how to provide sufficient value to all parties to make settlement possible.
- Attorneys can make a point of acting respectfully toward one another and one another's clients. Even if that were not the *right* thing to do, it would be the smart thing to do. Respect is a powerful motivator.

If "success" in mediation is measured by reaching agreement, then Rule 33 conferences can be surprisingly successful. But even when parties fail to reach agreement, mediation can is worthwhile if the parties have thoughtfully explored *all* their options and chosen the alternative that best serves their interests. Cases don't just get "settled," nor do mediators "settle" them. With or without assistance from a mediator, it is the parties and counsel who settle cases. In appellate mediation, the role of the lawyer, in particular, is crucial. Most lawyers who participate in Rule 33 conferences recognize that there is value and honor in compromise. Without ceasing to advocate for their clients—indeed, because they *are* advocates for their clients—attorneys become advocates for settlement. Time and time again, their commitment to make the most of mediation is what makes the mediation successful.

For further information, please contact the Settlement Conference Office at (312) 435-6883 or settlement@ca7.uscourts.gov. **TFL**

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Mediation in the Ninth Circuit Court of Appeals

By Claudia Bernard
Chief Circuit Mediator

With nine circuit mediators, the Ninth Circuit's mediation program is the largest among the federal circuits. The nine professional mediators are full-time employees of the court who bring a depth and breadth of experience from a variety of legal practice areas. All have mediated in the circuit mediation office for at least 10 years. Each year the Circuit Mediation Office, which is governed by Circuit Rule 33-1 and Chapter VII of the court's General Orders, facilitates the settlement of approximately 1,000 civil and administrative matters before the court.

What's Different about the Ninth Circuit's Program?

In The Ninth Circuit, the initial conference, which is called a Settlement Assessment Conference, is conducted over the telephone and and is held in about 80 percent of the counseled civil cases filed in the court. At the conference, which is mandatory and for counsel only, counsel and the mediator decide together whether the case might benefit from the assistance of a circuit mediator. The circuit mediator and counsel explore the background of the case, its settlement history, and the appellate issues that are likely to be brought. The mediator also describes to counsel how mediation through the court's program might be of service to their clients. The case goes further in the Circuit Mediation Office only when all participants agree to engage in the mediation process.

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

- the certainty, or the possibility, that a Ninth Circuit decision will not end the dispute;
- the desire to make or avoid legal precedent;
- the existence of other appeals that raise the same legal issue;
- the desire to preserve a business relationship or a personal relationship;
- the existence of nonmonetary issues;
- the possibility that a creative resolution might provide better relief than a court could fashion;
- a history of strong feelings that may have prevented effective negotiations;
- the possibility that one or all parties could benefit from a fresh look at the dispute;
- a desire to open and improve communications between or among the parties;
- the possibility that settlement efforts include more than the issue on appeal (for example, interlocutory appeals or cases in which portions have been remanded to state court); and

- the risks, benefits, and transaction costs of continuing with the litigation.

The Ninth Circuit has found that using the Settlement Assessment Conference to inform counsel about the mediation program and to show them—through the specifics of their particular case—how appellate mediation might benefit their clients enhances the quality and likely success of the subsequent mediation efforts. The conference also engenders future enthusiasm for the program among lawyers whose cases do not go forward in the mediation process.

Planning the Mediation

Depending on the year, about 50–60 percent of the cases participating in a Settlement Assessment Conference ultimately go further in the mediation program. Once there is consensus to proceed, the mediator, along with counsel, designs a mediation process appropriate for each specific dispute. In some cases, that process will be continued mediations with counsel over the telephone; in others, the process will be an in-person mediation with clients and, possibly other participants. The in-person mediation will be held at the courthouse in San Francisco or Seattle (where the mediators are located) or, in appropriate cases, in other locations within the Ninth Circuit. The court bears the cost of the mediator's travel.

Counsel can greatly enhance the planning that goes into the mediation session by considering the following questions:

- Who are the appropriate decision-makers on each side?
- If a party is a governmental entity, who is the person most likely to be able to "sell" a negotiated solution to the appropriate decision-making body?
- Are there any nonparties whose presence at the mediation is necessary to effectuate a resolution—for example, insurance carriers, lien-holders, spouses, and so forth?
- What information does each side need in order to make the mediation productive?
- What does the mediator need to know to in order to prepare for the session and what is the best way to get the mediator prepared?
- Is there any related litigation that should be included in the mediation session? (The program is not necessarily limited to the case that is on appeal in the Ninth Circuit as long as all parties are in agreement; the discussions may include additional parties and related cases in other courts, as well as issues that are not part of any litigation.)

The Mediation Session

In some cases, the focus of the mediation will be on the legal issues and possible outcomes of the appellate process. In other cases, the session may be aimed at rebuilding relationships or joint problem solving. Sometimes the mediator will facilitate direct discussions between the parties; at other times he or she will act as an intermediary, shuttling back and forth between the parties. The mediator will try to resolve these various process issues in a manner that best serves the interests of the participants. No matter what the content of the discussions, the mediator will facilitate negotiations among the parties to help them devise a mutually acceptable resolution of their dispute. The mediator will ask questions, reframe problems, facilitate communications, and help identify creative solutions. The mediator will not take sides, render decisions, offer legal advice, or reveal confidences. A settlement is reached when the parties find a resolution that is preferable to continued litigation.

Tips for Preparation for Successful Mediation

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

Second, since mediation works best when all participants know what really matters to them, counsel should explore with their clients the key needs and interests that, if satisfied, would allow them to resolve the matter—for example, certainty, closure, economic security, avoidance of legal precedent, avoidance of future litigation, fairness, respect, understanding, institutional change, and so forth.

Third, counsel and their clients would be wise to have a negotiation strategy. They should come to the mediation session with a thought-out opening offer (or demand) and a concession plan. In considering an optimal strategy, counsel should be optimistic for their own side—something that is not usually a problem—but also mindful of how their actions will be received by the other side. A plan that serves to entice the opposing side to one's own is much more likely to meet one's own goals and to achieve resolution than is a plan that serves merely as a stanchion against the other side's demands.

Further Information

About 10 percent of the cases mediated by the Ninth Circuit's Mediation Office come from referrals by panels of judges after oral argument. In addition, the court's appellate commissioner refers matters related to attorneys' fees. Counsel may always send confidential requests to be included in the mediation program to the chief circuit mediator. For additional information, please see the program's Web site at www.ca9.uscourts.gov/mediation/. **TFL**

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Mediation in the Tenth Circuit

By David Aemmer
Chief Circuit Mediator

The mediation program of the U.S. Court of Appeals for the Tenth Circuit shares many of the features of programs that are modeled on the Sixth Circuit's program, one of the progenitors of federal appellate mediation. The Tenth Circuit's program, formally the Circuit Mediation Office, has been in operation since 1991 and employs three staff mediators, who are seasoned attorneys with substantial experience in appellate mediation. Their work is devoted exclusively to the settlement of appeals. The program intervenes early in the appeal, before parties incur the expense of briefing and before appellate positions have become entrenched. The Mediation Office initiates the process, in which counsel are required to participate. This requirement preserves the parties' negotiating position by removing any appearance of weakness from a party's coming forward to express an interest in mediation.

Current resources enable the Tenth Circuit's mediation program to provide mediation services in substantially all its civil appeals in which all parties are represented by counsel, with the exception of some agency cases. Mediation is not routinely scheduled in cases involving Social Security claims or immigration, although the office will mediate them on occasion. If for some reason counsel does not receive a mediation notice, counsel can call the Circuit Mediation Office at (303) 844-6017 to request mediation. The office keeps the fact of a mediation request confidential unless counsel authorizes its disclosure.

The Tenth Circuit's mediation process is designed to provide maximum access and flexibility while keeping litigation costs down. Mediation is provided at no cost to the parties and is initiated by the Mediation Office early in the appeal process. The initial mediation conference is almost always conducted by telephone, although an in-person conference is held when the parties agree to hold one. Counsel are required to participate in the mediation conference, but their clients are not. The decision to include clients in the initial mediation session is left to the judgment of counsel. If it is clear at the initial conference that all avenues for settlement have been exhausted, efforts at mediation are concluded. If, as is usually the case, a proposal is floated or an idea is presented that warrants further exploration, the mediator continues efforts to settle the case.

The process proceeds in a flexible manner and is adjusted to accommodate the dynamics and particularities of each individual negotiation; it is not limited to a prescribed structure. This flexibility does not mean that there is no purpose or focus to the discussions. The mediator's job is to promote credible, confidential, and trustworthy negotiations: offers get responses, the mediator buffers clashes between counsel and parties, confidences of the parties are preserved, and the mediator acts to keep the negotiations fair and the process moving and on track. If the case is not settled, the parties are told, consistent with maintaining confidentiality, how far apart they are and why, and they are invited to reopen the discussions should something change in the future.

Confidentiality is protected by Tenth Circuit Rule 33.1, which prohibits anyone involved in a mediation—mediators, attorneys, parties—from disclosing communications related to the settlement to anyone outside the mediation process. The Mediation Office's operation if totally separate and apart from the Tenth Circuit's decision-making process and the offices of the court. Documents and correspondence related to the settlement are not accessible to anyone outside the Mediation Office, including court personnel.

Attorneys can make the most of mediation by preparing for it. At a minimum, that means knowing both the strengths and weaknesses of the case; knowing the client; and talking to her or him before the mediation to understand objectives, interests, changed circumstances, and realistic options for settlement. Careful preparation anticipates the interests of the parties on the other side, crafting proposals to accommodate or at least acknowledge those interests, thereby promoting a basis for effective negotiation. The advocate in a mediation session has a much broader role than he or she has in litigation, because the interests relevant to settlement are often broader than the issues relevant to litigation.

Attorneys can also prepare by giving some thought to the mediation process itself. In the Tenth Circuit, clients are not required to participate in the first mediation session, but they are welcome to do so. Therefore, counsel should consider whether it would be useful for the client to hear what a neutral third party has to say; it might be helpful to hear from an informed outsider who can deliver sobering news and offer another viewpoint without damaging the attorney's relationship with the client. It can also be useful to have a client present at the session to raise concerns and to respond to proposals as they develop. Counsel need not fear excessive pressure being put on the client. The negotiating environment is designed to be noncoercive; counsel and clients are not separated from each other; and parties are not pressured to settle. On the other hand, counsel might decide not to have the client present if, for example, the client is emotionally vulnerable or combative. In that situation, it might make sense to relay a proposal outside of the actual mediation session in a more familiar setting that might allow a more relaxed and reflective response. These are important judgments to consider before the mediation session.

Thought should be given about how to use the mediator. Direct party-to-party negotiation entails a very different dynamic than one in which an independent neutral party is involved. The mediator can be used in many ways and for many purposes—for example, as a sounding board to test legal theories or settlement proposals; as a settlement coach, someone who can offer negotiating advice or suggest an approach on how to cast an offer; or as a traffic cop

in pacing the negotiations.

Another important consideration is negotiating style. Different dynamics might suggest use of a different style. One style that is particularly *in*effective is excessive posturing. The other party always sees posturing for what it is, and this wastes time and makes it more difficult to move to a productive discussion. This type of attitude undermines negotiations and, taken to the extreme, destroys possibilities for constructive engagement. A better approach is to be candid with information and respond to proposals with a reasoned and objective rationale. Such behavior uses time efficiently, builds credibility and trust, and encourages greater openness and creativity from the other party.

Counsel are encouraged to use the Tenth Circuit's Mediation Program to help facilitate negotiated settlements of their civil appeals as a way to achieve solutions that might not be possible through continued litigation or by the parties acting alone. The Circuit Mediation Office welcomes questions; you can call (303) 844-6017. **TFL**

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Mediation in the Eleventh Circuit

By Donald Hawbaker
Chief Circuit Mediator

The Eleventh Circuit's mediation program differs from the majority of the programs in the other circuit courts of appeals only by its presence in more than one location in the circuit; otherwise, the program is materially the same. Established in 1992, the mediation program was previously administered under the auspices of the circuit's Mediation Office. The court renamed the office Kinnard Mediation Center in 2001 in honor and upon the passing of the court's first chief circuit mediator, Stephen O. Kinnard. The current chief circuit mediator and two circuit mediators are located at the court's principal location in its historic building in downtown Atlanta. A fourth circuit mediator is located at the federal courthouse in Tampa, and two additional circuit mediators serve in Miami. Generally, the mediators located in Atlanta attend to all civil appeals arising from the federal district courts in Georgia and Alabama; the mediator located in Tampa deals with civil appeals arising from the Northern and Middle Districts of Florida; and the mediators in Miami handle civil appeals arising from the federal district courts in the Southern District of Florida.

Common Mistakes

To make mediation more successful or effective, counsel should understand and appreciate the court's statistics on rates of reversal. The appellant's counsel is commonly too optimistic about his or her prospects for a successful appeal and unrealistically calibrates a settlement demand or expectation upon that optimism. An appellant's counsel who is prudent would thoroughly research the court's reversal rate, including a request for that information confidentially and in advance from the mediator, and would manage expectation levels by informing the client of the difficulty of achieving a reversal from the Eleventh Circuit. On the other hand, the appellee's counsel, who typically knows about the conservative reversal rate, is often too confident that the lower court's decision will not be reversed and advises his or her client to make no meaningful offer leading toward settlement. A circuit mediator can accomplish only so much by way of persuading an appellant to reduce settlement expectations with such information as precedents that may be applicable. A meaningful settlement offer is also required in order to place the appellant at risk of losing more than time and attorneys' fees by proceeding with the appeal, and the circuit mediator can accomplish a surprising amount with even modest offers.

Another mistake that counsel often makes is failure to provide the circuit mediator with sufficient useful information about the underlying facts of the case or the client's legitimate settlement interests and objectives, even though the Mediation Office requests that the information be submitted confidentially in advance of the conference. In addition, counsel representing the interests of a corporate party or insurer sometimes neglect to obtain the participation of a settlement decision-maker who has meaningful authority to resolve the case. Finally—and perhaps the cause of each of the foregoing mistakes—counsel fail to read and comply with all the provisions of the scheduling notice received from the circuit mediator, Eleventh Circuit Rule 33-1, or notices that appear on the court's Web site.

In addition, counsel and their appellate client sometimes mistakenly withhold and fail to communicate their best, good faith settlement offer or do not authorize the circuit mediator to communicate the offer. If, for whatever reason—including the failure of the circuit mediator to ask for the party's permission to convey the settlement offer—a party's best settlement offer has not been communicated, then the mediation and settlement negotiation process has not been fully exhausted. Parties should communicate their best offers—or give the circuit mediator the authority to communicate and try and sell it—rather than continue to litigate ignorant of what that offer might do in way of settling the case.

In-person Mediation Sessions

Not only does the Eleventh Circuit permit appeals to be mediated in person as often as possible and attended by both counsel and the parties individually or through authorized settlement decision-makers, the court prefers this method. Typically, the first contact between counsel and the assigned mediator takes place when counsel receives a notice scheduling the case for an in-person mediation. However, the mediation sessions will be conducted over the telephone when appropriate—to avoid extraordinary travel expense for the parties, for example—and counsel need only ask for a telephonic format and proffer a reasonable explanation supporting the request. Over the course

of the past two years, approximately one-half of all eligible civil appeals have been mediated in person. In general, all civil appeals are eligible for mediation, except for those involving Social Security claims, immigration cases, and cases in which one or more of the parties are proceeding pro se; but even a civil appeal that is not eligible for mediation might be mediated upon special request of one or more of the parties involved in the case.

Tips for Successful Mediation

First, upon scheduling of the mediation or even in advance of receiving communication from the circuit mediator, counsel should consider immediately adjusting the briefing schedule so that all efforts on the civil appeal are initially directed toward settling the case rather than expending resources on a briefing. The circuit mediator has the authority to grant unopposed extensions of briefing due dates to accommodate the mediation process, and briefing extensions rarely, if ever, make a difference in the promptness with which the Eleventh Circuit disposes of the case on the merits. However, an appellant's attorney who knows the process well will file his or her brief in advance of the mediation conference in order to actualize the risk to the appellee of spending resources on the appeal unless the case is promptly settled—resources that the appellee might better direct toward final resolution of the dispute.

Second, counsel should know that the circuit mediators are experienced, highly trained attorneys and professionals, who are absolutely dedicated to the resolution of all civil appeals and are available at any time to assist in any good-faith attempt to resolve an appeal. The mediators are in a unique position to help resolve a case on terms that are acceptable to all parties. The circuit mediators welcome the opportunity to spare the judges of the court of appeals from the need to process one more civil case so that the court can spend more time on the many criminal cases and other civil cases that cannot be resolved through mediation. Counsel should proactively call upon the circuit mediators to continue to attempt to settle the appeal up through issuance of the court's opinion disposing of the appeal. And the court itself is open to counsel's suggestion to order that cases return to mediation after oral argument.

In 2008, 33 percent of all eligible civil appeals to the Eleventh Circuit were settled after they were assigned to mediation. Historically (since the program began in 1992), nearly 10,000 civil cases have been referred to mediation, and 39 percent of all eligible civil appeals were settled after assignment to mediation.

Confidentiality

The Eleventh Circuit's mediators consider all communication related to mediations as confidential from the court. The mediators will also treat as confidential any unilateral communication from one of the parties and not convey it to the opposing party unless prior permission is given and the information will aid in resolving the case. Because mediation of all civil cases is required and not a matter of a party's request, whether a party has requested mediation and whether that request should be kept confidential from the other side is rarely an issue. Normally, if one side requests mediation, that information will not be disclosed to the other side, because there is no need to do so.

Scheduling a Mediation Session

All procedures involved in the mediation process are explained in detail on the court's Web site (www.ca11.uscourts.gov/offices/mediation.php). Counsel may, immediately contact the Kinnard Mediation Center to begin the scheduling process as soon as the appeal is filed, but they are not required to do so. However, counsel may safely assume that they will receive scheduling communication from the circuit mediator assigned to the case shortly after the appellant files a civil appeals statement, as required by Eleventh Circuit Court Rule 33-1 (a). If limited to a single request, the circuit mediators request that counsel read and comply with all the provisions of the scheduling notice received from the circuit mediator, Eleventh Circuit Rule 33-1, or notices that appear on the court's Web site. Following this advice will give an appeal its best chance of being settled early in the process on terms acceptable to all parties, rather than after months or years on terms imposed by the court. **TFL**

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Appellate Mediation Program of the D.C. Circuit

By Amy E. Wind
Chief Circuit Mediator

The U.S. Court of Appeals for the D.C. Circuit created its Appellate Mediation Program in 1987. An integral part of the court's case management system, the program is designed not only to reduce the court's caseload but also to facilitate the development of creative or more comprehensive resolution options that are not likely to be achieved through a court order or through the independent action of the parties. Mediation is provided at no cost to the parties.

Unique Aspects of the Program

The D.C. Circuit's Appellate Mediation Program is unique in several ways. First, it is the only federal appellate mediation program that employs an all-volunteer cadre of senior and distinguished members of the bar to mediate its cases. For more than 20 years, the court has enjoyed high-quality mediation services provided pro bono by highly experienced litigators, academicians from local law schools, and senior attorneys with specialized expertise in a wide variety of subject areas and experience with federal agencies. These mediators, who have received training from the court and elsewhere, are supervised by the D.C. Circuit's mediation staff.

Second, the vast majority of appellate mediations are

conducted in person—either in a suite of mediation conference rooms located in the courthouse or in the offices of the attorney-mediator. Under the court order establishing the program, mediation sessions must be attended by counsel for each party or by another person with actual authority to settle a case; the parties themselves are strongly encouraged to attend the sessions. Special rules applicable to federal and local government litigants require that a person with actual authority be available by telephone during the mediation sessions.

Finally, because of its location in the nation's capital, the Court of Appeals for the D.C. Circuit receives a large number of appeals from administrative decisions made by federal agencies, challenges to federal agencies' decisions or practices, and cases involving constitutional rights. Mediators often are assigned cases that take advantage of their specialized experience and knowledge in a particular area; and the program's staff members have developed procedures and relationships with government entities that expedite the mediation process and increase the chances of a productive mediation. In addition, under the court's rules, mediators are empowered to call or write directly to representatives of government agencies (as well as clients in the private sector) to request their attendance at mediation sessions.

How Cases Enter and Are Mediated in the Program

All civil cases in which both parties are represented by counsel are eligible to be mediated through the program. Either or both parties may request mediation through a confidential process that is disclosed neither to the judges nor to the opposing party. However, the decision to place the case in mediation remains with the program. The legal division of the clerk's office and then the staff of the Appellate Mediation Program initially screen the cases carefully to determine appropriateness for mediation. The program's staff often contacts counsel of record before making a final determination as to whether the case should be mediated in order to conduct confidential discussions about whether mediation would be potentially productive.

Case selection for mediation takes place no earlier than 45 days after a case has been docketed and after any pending substantive motions have been decided. Counsel receive notice by letter or e-mail regarding case selection and informing them which mediator has been assigned. Position papers are due to the mediator within 15 days of that notice, and initial mediation sessions generally are held within 45 days of the notice. Mediations can take place at any point in the appellate process—even after oral argument—although experience suggests that cost-saving incentives make earlier mediation dates more likely to achieve a resolution.

All cases in mediation remain subject to the normal schedule for briefing and oral argument, unless the parties request otherwise. If the parties believe that mediation could be facilitated by staying the briefing schedule, and the mediator agrees, the attorneys may request an extension by filing a joint motion to defer or postpone the briefing schedule and/or the date set for oral argument. The motion must indicate that the change is needed to accommodate a pending mediation and that the mediator (who is not named for confidentiality purposes) concurs in the request.

The judges of the D.C. Circuit are not advised as to which cases are or have been referred to mediation. In addition, the judges are not informed as to the identity of the mediator assigned to a case. The content of mediation discussions and proceedings is privileged and may not be disclosed to the court or used for any purpose. Under the court's order, participating counsel and clients are instructed to refrain from commenting publicly about the fact that a case is in mediation and from disclosing information about the confidential discussions or the status of the talks to anyone who is not directly or indirectly a party to the negotiations.

Keys to a Successful Appellate Mediation

Counsel can undertake a few key actions that will greatly increase the chances of a successful appellate mediation in the D.C. Circuit:

- Broaden your view of the topics to be discussed at mediation to include not only the legal arguments and merits of the appeal but also all the real-life circumstances surrounding the case and needs of either side that might be met through a negotiated settlement;
- Bring your client or the client's high-level representative who has settlement authority to the mediation session; and
- Consult in sufficient detail with your client before the mediation session as to the kinds of things that might be achieved in a settlement as well as concrete goals for the mediation. **TFL**