

# **UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## **Appellate Mediation Program Guidelines (Effective May 1, 2008)**

### **1. Introduction**

The United States Court of Appeals for the Federal Circuit established an appellate mediation program pursuant to Federal Rule of Appellate Procedure 33, which commenced on October 3, 2005.

The program is administered by the Chief Circuit Mediator, James M. Amend, and the Circuit Mediation Officer, Wendy L. Dean ("mediation officers"). A three-judge committee monitors the program and makes recommendations to the Chief Judge. The program is periodically assessed by the court.

The purpose of the program is to help the parties achieve settlement. The mediation program provides a confidential, risk-free opportunity for parties to resolve their dispute with the help of the circuit mediation officers or an experienced volunteer neutral, third-party mediator. Mediation, unlike arbitration where a decision that may be binding is issued, will result in a settlement only if all parties agree on that resolution.

### **2. Eligible Cases**

All cases where the parties are represented by counsel are eligible for the program.

### **3. Case Selection Process**

Participation in the court's mediation program is mandatory for all cases selected for participation in the program that were docketed after September 18, 2006. The circuit mediation officers contact principal counsel in cases selected for mediation to determine whether the case is a good candidate for mediation and seek the opinion of counsel regarding participation in the program. At that time, the circuit mediation officers ask counsel to determine whether the appeal and, if pertinent, the cross-appeal, present any jurisdictional defects. If at the outset it appears to the

circuit mediation officers that mediation will not be fruitful, then court mediation efforts cease. Counsel may jointly request that a case be included in the mediation program. A Confidential Joint Request to Enter Mediation Program form is available from the Clerk's Office and on the court's website. Such a request should be submitted to:

Circuit Mediation Office  
United States Court of Appeals for the Federal Circuit  
717 Madison Place, NW  
Washington, DC 20439

The circuit mediation officers may review the notice of appeal, the trial tribunal's docket sheet, the decision of the trial tribunal, the court's docketing statement, and briefs to aid in selecting cases for mediation. The docketing statement is a three-page form to be completed by counsel. The form is included in the docketing packet sent to counsel by the Clerk of Court. All counsel must complete the form in duplicate and return it to the Clerk of Court within 14 days of docketing. When the United States or its officer or agency is a party, all counsel must complete the form in duplicate and return it to the clerk within 30 days of docketing. The docketing statement is not part of the formal mediation process, but assists the circuit mediation officers with the selection process. One copy is retained in the Clerk's Office case file and the other copy is transmitted to the Circuit Mediation Office.

#### **4. Mediators**

In appropriate cases, the Chief Circuit Mediator or the Circuit Mediation Officer or both may serve as mediator. In other cases, the mediator is an outside volunteer mediator. The court has selected a roster of outside mediators. The court's mediators include distinguished, experienced attorneys, and academicians with expertise in the substantive areas of the court's jurisdiction, as well as attorneys with experience mediating. The court invites more applicants. The application is available on the Federal Circuit Bar Association and the court's websites. The candidates are encouraged to be members of the bar of the court, but are not required to be members.

Mediators and applicants to be mediators must not be in active practice. For purposes of these guidelines "not be in active practice" means that the applicant or mediator is not appearing, and will not appear while a member of the court's

mediation panel (i) as counsel for a party or amicus in any matter that would or could be appealed to this court, or (ii) as counsel for a party or amicus in any appeal to this court.

Mediators are not paid for their services, but are reimbursed by the court for minor out-of-pocket expenses such as photocopying costs, telephone charges, facsimile charges, and transportation to the courthouse. Mediation proceedings may be held in the courthouse if desired. Reimbursement for reasonable travel and lodging expenses of the mediator is assumed by the litigants if the mediator must travel to conduct the mediation.

If the circuit mediation officers do not conduct the mediation, the circuit mediation officers select a mediator from the court's list with the following exception. If counsel, under the program, jointly propose a mediator not on the list, then the circuit mediation officers have the option of appointing that mediator, provided the parties agree to pay any travel, lodging, and out-of-pocket expenses of the mediator and the mediator agrees to serve *pro bono*. Parties are free, of course, to participate in mediation outside the court's program under terms to which they agree, whether or not the case is selected for mediation under the court program.

If the mediator is affiliated with a law firm and that law firm represents or has represented a party to an appeal within the last 5 years, the mediator will recuse him or herself if appointed to mediate any case involving that party. Before final selection of a mediator, the circuit mediation officers inquire about conflicts of interest. The mediator must not presently represent either party or any amicus for any purpose, must disclose any past relationships that he or she had with counsel, counsels' firms, and the parties, and must disclose any potential "issues" conflicts. Mediators are required to decline from participating in any cases in which there is a conflict of interest, in which they perceive a conflict, or in which a reasonable person would perceive a conflict.

## **5. Confidentiality**

Confidentiality is ensured throughout the mediation process except as noted in these guidelines. The circuit mediation officers do not communicate with the judges about the substance of mediation proceedings. During the program, however, the mediation committee from time to time has discussions with the circuit mediation officers with a view to revising the program while it is ongoing, as appropriate and necessary. Communications concerning statistical information

and information needed to assess the program are not prohibited. All mediators must protect the confidentiality of the substance of all proceedings and are prohibited from complying with subpoenas or other requests for information about mediated cases. All communication with the court about mediation matters is between the mediator and the circuit mediation officers.

The substance of mediation is confidential and may not be disclosed by the mediator or any participants, except in the course of litigation concerning enforceability of any agreements reached through mediation. The fact that a case is in mediation is not confidential. Any motions for extensions of time that are filed because the parties are engaged in mediation are part of the public file in the Clerk's Office. Section 7 sets forth the procedures for seeking extensions of time.

## **6. Mandatory Mediation Process**

Mediation is a flexible process. The mediator is not bound by a defined formula or approach to mediating a case and the mediator conducts the mediation as he or she deems appropriate. Mediation ceases at any time the mediator concludes that further efforts will not be fruitful.

The purpose of mediation is a settlement of the case. This may include a global settlement. Under the program, the mediator is not asked to narrow the issues on appeal. To the extent that the parties agree to narrow the issues, that may be reflected in their briefs.

If the circuit mediation officers determine that mediation may be fruitful, then principal counsel must participate in any initial telephone conference that is ordered. The initial telephone conference may be arranged and conducted in any manner by the circuit mediation officers, by an outside mediator, or both. If an initial telephone conference is ordered, then participation is mandatory. If the participants agree that a telephone conference is not necessary and that they wish to meet for a mediation session, then no telephone conference will be ordered. If, in the judgment of the mediator, a mediation session might be fruitful, then participation in at least one session is mandatory.

The court requires that the principal attorney attend all sessions and that at the initial session a party representative with actual settlement authority also attend. "Actual settlement authority" does not simply mean sending a person allowed to accept or offer a minimum or maximum dollar amount. Rather, the party

representative should be a person who can make independent decisions and has the knowledge necessary to generate and consider creative solutions. These requirements may be modified or waived by the mediator, if the circuit mediation officers concur and if circumstances dictate. When the United States government is one of the parties, the requirement that a party representative with actual settlement authority attend any mediation session is waived because government settlement decisions must be made collectively and approved by the authorized representative of the Attorney General, as set forth in 28 C.F.R. Part 0, Subpart Y. A government attorney with authority to negotiate on behalf of the government and to make recommendations concerning settlement must participate in the mediation session.

## **7. Briefing and Oral Argument Schedule Extensions**

It is contemplated that after a case is referred to a mediator, mediation should be completed in 90 days. At the outside, mediation should be completed within 150 days of the date of reference. Cases generally are selected before the first brief is filed. However, cases in which briefs have been filed may also be selected. While cases in mediation remain subject to the normal scheduling for briefs and oral argument by the Clerk of Court, counsel are of course free to file a consent motion for an extension of time pursuant to Fed. Cir. R. 27(h)(4) in the ordinary course. If the mediator believes that multiple mediation sessions are required, that the filing of a brief or the scheduling of oral argument will interfere with good faith settlement efforts, and that additional extensions of time are needed, then motions for additional extensions may be filed. A motion for an extension, beyond the time granted under Rule 27(h)(4), is referred to the circuit mediation officers. The court has given the circuit mediation officers the authority to grant motions for extensions, upon the showing of good cause, up to a date that is generally no more than 150 days after a case is referred to a mediator. Any consent motion for an extension of time under this paragraph need not disclose that the extension is sought in order to facilitate mediation. Opposed motions will be decided by the court.

Any motions for extensions of time are entered on the docket in the ordinary course. In addition to an original and three copies, movant must file one additional copy prominently stamped "Direct to the Circuit Mediation Officer."

## **8. The Conclusion of Mediation**

The purpose of the mediation program is to help the parties achieve settlement. If settlement is reached, then the agreement must be in writing and binding on all parties. The appellant or the parties jointly must file a motion or stipulation of voluntary dismissal or other appropriate motion. If the case is not settled, then it remains on the docket and proceeds as if mediation had not been initiated.

## **9. Noncompliance Sanctions**

Any party, counsel or outside mediator who fails to materially comply with any of the provisions of this document, including failing to cooperate with the circuit mediation officers may be subject to appropriate sanction by the court. Notwithstanding the confidentiality provisions of Paragraph 5, the court may be apprised by the circuit mediation officers of the substance of a mediation only to the extent necessary to explain any recommendation for sanctions. Any judge ruling on such a recommendation shall be recused from hearing the case on the merits.

## **10. Evaluation**

At the conclusion of the mediation process in an individual case, the mediator notifies the circuit mediation officers of the resolution of the mediation. The circuit mediation officers send a questionnaire to counsel and the mediator inviting their candid confidential responses, which are not provided to the judges or others, about the effectiveness of the program. The questionnaire responses are summarized by the circuit mediation office – without identification of any specific case – for purposes of evaluating the program, compiling statistics, etc. The summary is provided to the court for purposes of assessing the program, but it does not reveal any details about or names of specific cases. In a case in which the Chief Circuit Mediator or the Circuit Mediation Officer or both serve as the mediator, the circuit mediation officers shall prepare the response to the mediation questionnaire.