



*File -  
Commission  
Appellate*

# Court of Appeals

## Memorandum

---

To: Chief Judge Beasley  
From: *WZM*  
Bill Martin  
Subject: Appellate Settlement Conference - Final Report  
Date: September 13, 1996

---

Attached please find a copy of the final Appellate Settlement Conference case disposition history. This is inclusive of all cases filed, rejected, elected, settled and terminated without settlement in the Conference's history. Also, I have done a percentage breakdown of cases elected, rejected, settled and not settled.

The second attachment is a report of the fiscal history of the Appellate Settlement Conference which was prepared by Kaye Carter. Moneys collected in the Settlement Conference were not retained by the Court, but passed through to the General Fund of the State Treasury.

If I can be of further assistance to you in this matter, please contact me.

Attachments

cc: Judge Johnson

Kaye Carter

APPELLATE SETTLEMENT CONFERENCE CASE  
DISPOSITION HISTORY [1989 - 1995]

YEAR	CASES FILED	CASES REJECTED	CASES ELECTED	CASES SETTLED	TERMINATED W/OUT SETT
1989	172	163	9	2	7
1990	995	914	81	38	43
1991	893	823	70	32	38
1992	1181	1100	81	31	50
1993	1179	1102	77	36	41
1994	728	639	89	33	56
1995	700	669	31	9	22
<b>TOTAL</b> =====	<b>5848</b>	<b>5410</b>	<b>438</b>	<b>181</b>	<b>257</b>

7.5 % of all cases elected

92.5 % of all cases rejected

3.0 % of all cases settled

41.3 % of cases electing settled

58.7 % of cases electing did not settle

\*Conference began in July, 1989

\*\*Conference suspended in July, 1995

## APPELLATE SETTLEMENT CONFERENCE

## APPROPRIATION

Fiscal Year 1990	\$ 250,000
Fiscal Year 1991	250,000
Fiscal Year 1992	100,000
Fiscal Year 1993	100,000
Fiscal Year 1994	100,000
Fiscal Year 1995	100,000
Fiscal Year 1996	50,000
Fiscal Year 1997	50,000

## EXPENDITURES

Fiscal Year 1990	\$ 59,910
Fiscal Year 1991	61,288
Fiscal Year 1992	60,492
Fiscal Year 1993	61,968
Fiscal Year 1994	68,288
Fiscal Year 1995	37,213
Fiscal Year 1996	10,568**
Fiscal Year 1997 to date	0**

\*\*Expenditures for Senior Judge Program not included

## COLLECTIONS

Fiscal Year 1990	\$ 1,480
Fiscal Year 1991	5,050
Fiscal Year 1992	14,170
Fiscal Year 1993	9,400
Fiscal Year 1994	15,975
Fiscal Year 1995	15,249
Fiscal Year 1996	6,125
Fiscal Year 1997 to date	0

SETTLEMENT CONFERENCE CASES [1989 - 1995]

YEAR	TOTAL CONF.	SETTLED	TERMINATED	PENDING
1989	9	2	7	0
1990	81	37	43	1
1991	70	32	38	0
1992	81	31	50	0
1993	77	36	41	0
1994	89	32	56	1
1995	31	9	22	0
<b>TOTAL</b> =====	<b>438</b>	<b>179</b>	<b>257</b>	<b>2</b>

Breakdown of Appellate Settlement Conference financial data by fiscal year since inception:

Total Amount Budgeted for each year in existence:

Fiscal Year 1990	-	\$ 250,000
Fiscal Year 1991	-	\$ 250,000
Fiscal Year 1992	-	\$ 100,000
Fiscal Year 1993	-	\$ 100,000
Fiscal Year 1994	-	\$ <u>100,000</u>
TOTAL		\$ 800,000

Total Program Cost for each year:

Fiscal Year 1990	-	\$ 59,910
Fiscal Year 1991	-	\$ 61,288
Fiscal Year 1992	-	\$ 60,492
Fiscal Year 1993	-	\$ 61,698
Fiscal Year 1994	-	\$ <u>54,900</u> (as of 4-30-94)
TOTAL		\$ 298,558

Total Assessed Costs Collected for each year:

Fiscal Year 1990	-	\$ 1,480
Fiscal Year 1991	-	\$ 5,050
Fiscal Year 1992	-	\$ 14,170
Fiscal Year 1993	-	\$ 9,400
Fiscal Year 1994	-	\$ <u>13,545</u> (as of 4-30-94)
TOTAL		\$ 43,645

Total Uncollected Assessed Costs for each year:

Fiscal Year 1990	-	\$ 50
Fiscal Year 1991	-	\$ 675
Fiscal Year 1992	-	\$ 1,275
Fiscal Year 1993	-	\$ 1,400
Fiscal Year 1994	-	\$ <u>1,850</u> (as of 4-30-94)
TOTAL		\$ 5,250



**JUDICIAL COUNCIL OF GEORGIA**  
**Administrative Office of the Courts**

**SUITE 550**  
**244 WASHINGTON STREET, S.W.**  
**ATLANTA, GEORGIA 30334-5900**

**(404) 656-5171**

**FAX: (404) 651-6449**

**M E M O R A N D U M**

**TO:** Each Member of the Commission on Appellate Courts

**FROM:** Research Staff, Administrative Office of the Courts

**DATE:** September 4, 1996

**RE:** Appellate Court Settlement Conference

At the Commission meeting on July 12, 1996, Senator Mary Margaret Oliver requested that the Commission try to determine the most effective state appellate mediation program. This memorandum attempts to address her inquiry.

There are now as many programs which have halted or been abandoned as are in operation. New Jersey (1983) and California (1988) appear to have the longest continuous programs. There are currently 16 states with an ongoing program. Few of these programs have been formally evaluated and very few have tracked results over more than a couple of years. Many programs operate as an overall screening mechanism as well as providing mediation. In the majority of the programs, the number of cases involved do not greatly reduce the volume of caseload of the court. The most effective programs, as rated in the few studies done, appear to be those which require mandatory participation; but there are few studies of the long-term judicial workload relief provided by the settlement process. Also these programs may be affected by the availability of alternative dispute resolution processes in the trial courts. Those who have litigated after a trial-level ADR process failed to resolve the issues might be less likely to go to mediation again at the appellate level.

The following pages list the states with an appellate level settlement program and provide a short description. Thirty-eight states have at some time had programs. Twenty-three states halted or abandoned programs since 1983, but some of these states have reestablished new programs or a pilot in a different district of that state. Eight states report having current intermediate appellate court programs and eight states have a process in the court of last resort. New pilot programs have recently begun in five other states.

**TO:** Each Member of the Commission on Appellate Courts  
**DATE:** September 4, 1996  
**PAGE:** 2

A. States with Intermediate Appellate Court Programs

These (8) states have settlement conferences in their intermediate appellate courts. All, except those noted, use sitting or retired judges. (Abstracted from "The Docket." See the endnote.)

California: Fourth District - uses senior volunteer attorneys

\*\*Connecticut

\*Florida: First District - uses a full-time senior trial court attorney (A description is attached. This program is funded by the legislature.)

Maryland

Massachusetts

\*\*Michigan uses volunteer attorneys

Missouri

\*\*New Jersey

B. These (8) states have settlement conferences in their court of last resort and use sitting or retired judges.

\*\*Connecticut

\*Idaho

Kentucky

New Jersey

New York

Ohio

\*Rhode Island

\*\*South Dakota

C. The following (5) states have new pilot programs or initiatives underway.

\*Alaska

\*Hawaii

\*Montana

\*New Mexico

\*Oregon

D. The following states have halted or abandoned programs.

The following (16) states reported having a settlement conference program in 1983 and reported not having a program in 1993.

Alabama

Colorado

**TO:** Each Member of the Commission on Appellate Courts  
**DATE:** September 4, 1996  
**PAGE:** 3

Hawaii (Program started again in 1995)  
Indiana  
Kansas  
Louisiana  
Minnesota  
Nebraska  
Oklahoma  
Pennsylvania  
South Carolina  
Texas  
Washington  
Wisconsin  
Washington

2. These (7) states have abandoned the settlement conference concept or the program has become inactive since 1993.
- \*California: Third District
  - \*Florida: Fourth District
  - Georgia
  - Nevada
  - New Mexico
  - North Carolina
  - Vermont

**Endnotes:**

- a. This information, except as otherwise noted, comes from "The Docket," a publication of the National Conference of Appellate Court Clerks. Three articles were published, as a series, in Volumes 24(1, 2, & 3) from October 1995 through May 1996. The first article describes two studies that gave rise to the data. The first study was published in 1983 by J. Kramer and titled "Outline of appellate court procedure." The Bureau of Justice Statistics published the second in 1993. Responses were received from 51 jurisdictions in both. H. Henson of "The Docket" compared the results of the Kramer and BJS studies and recently did a follow-up of both studies.
- b. The court programs designated with the symbol (\*\*) were studied by C. Grandy, formerly of the NCSC and results were published in "Program and Site Subcommittee on Alternative Dispute Resolution" of the Conference of Chief Justices during its July 1996 meeting, and a copy of the report is attached to this memorandum.
- c. Information about states with an asterisk ( \* ) were taken from annual reports or from a telephone survey conducted by the Administrative Office of the Courts.

## Alternative Dispute Resolution in State Appellate Courts

State	Court	Type of Cases	State with IAC	Date of Program	Court Caseload
<b>Alaska</b>					
1. Program is being considered.					
<b>Alabama</b>					
Discontinued according to a 1993 Bureau of Justice Statistics (BJS) study.					
<b>California</b>	Court of Appeals	Civil		1988	
1. Suspended in Third District.					
2. Active in Fourth District					
a. Uses highly respected volunteer attorney-mediators with prior litigation experience.					
b. Cases reviewed by senior staff attorney.					
c. Settled 39 cases in 1995.					
3. Civil only. NO pro se.					
<b>Colorado</b>					
Discontinued according to a 1993 BJS study.					
<b>Connecticut</b>	Court of Appeals Supreme Court	Civil Criminal		1987	Year 1994 - 95 733 Eligible Cases 44.7% disposed by settlement or attrition
<b>See attached program analysis.</b>					
1. Retired justice coordinates program.					
2. All appellants complete pre-argument conference form.					
3. Criminal, juvenile, pro se, habeas corpus and known hostile attorneys screened-out.					
4. 12 retired judges participate and are paid on a per diem basis.					
5. Indirect costs to state for short term, intermittent staff attorney and clerical staff help.					
6. Mandatory					
7. Second program-1st program ended-unsuccessful eliminating backlogs.					
8. No formal evaluation					
<b>District of Columbia</b>	Court of Appeals	Rarely Used	No		
Discontinued according to a 1993 BJS study.					
<b>Florida</b>	First District Court of Appeals			1989	
<b>See attached program analysis.</b>					
1. Program in the Fourth District recently discontinued.					
2. Pilot Program has been implemented in the First District.					
3. State paid mediator and administrative assistant.					
4. Once a case is selected during screening it becomes mandatory.					
5. Based on 11th Federal District Court model.					
<b>Georgia</b>					
1. Dormant since 1995.					
2. Voluntary					
3. Requested at trial court level.					
4. Used retired judges.					
5. Civil only.					

## Alternative Dispute Resolution in State Appellate Courts

State	Court	Type of Cases	State with IAC	Date of Program	Court Caseload
<b>Hawaii</b>	Supreme Court Intermediate Court of Appeals	Civil		1995	
	<ol style="list-style-type: none"> <li>1. Was proposed in 1995.</li> <li>2. Intended to reduce significant growth in the Intermediate Appellate Court and the Supreme Court.</li> <li>3. Proposes that all civil cases be mandatorily reviewed by the Appellate Conference Program.</li> <li>4. In the beginning stages, cases would be reviewed by volunteer "highly respected retired justices and judges, and highly respected retired or semi-retired practitioners;" the program anticipates the employment of a full-time conference attorneys.</li> </ol>				
<b>Idaho</b>	Supreme Court	Civil		1990	Settled 17 of 811
	<ol style="list-style-type: none"> <li>1. Uses both sitting and retired justices and judges.</li> <li>2. Is voluntary.</li> </ol>				
<b>Indiana</b>	Discontinued according to a 1993 BJS study.				
<b>Kansas</b>	Discontinued according to a 1993 BJS study.				
<b>Kentucky</b>	Court of Appeals	Civil			
	<ol style="list-style-type: none"> <li>1. Uses staff attorney.</li> <li>2. Domestic cases with minor children and contract cases most likely to be selected.</li> <li>3. Personal injury cases are selected by reputation of insurance company.</li> <li>4. Medical malpractice cases are rarely selected.</li> <li>5. About 35% of conferences lead to settlement (7 to 8% of total filings in the court.)</li> </ol>				
<b>Louisiana</b>	Discontinued according to a 1993 BJS study.				
<b>Maryland</b>	Court of Special Appeals	Civil			During 1993 - 94
	<ol style="list-style-type: none"> <li>1. Prehearing information report required within 10 days of notice of appeal to screen for:               <ol style="list-style-type: none"> <li>a. domestic cases</li> <li>b. money judgments</li> <li>c. indications of a willingness to settle</li> </ol> </li> <li>2. Pro se cases are not normally scheduled for settlement conference.</li> </ol>				
					a. 1,409 cases filed
					b. 528 selected
					c. 25% settled
					d. about 9% of all cases filed
<b>Massachusetts</b>	Appeals			1993	Maximum of 300 cases
	<ol style="list-style-type: none"> <li>1. Conference Project initiated in 1993 was expanded in 1994.</li> <li>2. Uses experienced trial attorney or retired judge.</li> <li>3. Preliminary data suggest that a significantly higher number of cases are settled or withdrawn under the Conference Project than would be otherwise.</li> <li>4. Continued and expanded accelerated panels: a three (3) judge panel sits for four (4) days monthly and considers 30 cases rather than the usual 18 cases in three (3) days.</li> <li>5. Excludes pro se, adoptions, and custody cases and some other unspecified cases.</li> <li>6. Program has survived original funding allocations.</li> </ol>				
					Settle about 25%

## Alternative Dispute Resolution in State Appellate Courts

State	Court	Type of Cases	State with IAC	Date of Program	Court Caseload
<b>Michigan</b>	Court of Appeals	Civil		1979-80	June 96 - Sept 96 80 selected cases
<b>See attached program analysis.</b>					
<ol style="list-style-type: none"> <li>1. Program originally implemented in 1979 was ended in 1980. A new experimental effort underway as of 1995 to end Sept 96.</li> <li>2. Currently voluntary</li> <li>3. Uses volunteer attorneys.</li> <li>4. Insufficient cases for evaluation.</li> <li>5. Funding has been requested but not authorized.</li> <li>6. Goals expedite disposition &amp; narrow, clarify issues.</li> <li>7. Exclude pro se, juvenile, domestic relations &amp; criminal.</li> </ol>					1995 - 17 of 41 (41%) selected settled
<b>Minnesota</b>					
Discontinued according to a 1993 BJS study.					
<b>Missouri</b>	Court of Appeals	Civil	No		Screens about 200 cases Settlement rate of about 30 to 50%
<ol style="list-style-type: none"> <li>1. Eastern District</li> <li>2. Uses one sitting judge.</li> <li>3. No pro se, zoning, municipal ordinances, and known hostile attorneys.</li> <li>4. Cases screened by the judge within seven days of notice of appeal.</li> <li>5. Questionnaire revealed that bar support program.</li> <li>6. Increase in filings has necessitated the assistance of a retired judge.</li> </ol>					
<b>Montana</b>	Supreme Court	Civil	No		
<ol style="list-style-type: none"> <li>1. Was proposed in 1995.</li> <li>2. Proposed amendments to the Montana Rules of Appellate Procedure have been promulgated.</li> <li>3. Would be mandatory.</li> </ol>					
<b>Nebraska</b>					
Discontinued according to a 1993 BJS study.					
<b>Nevada</b>	Supreme Court	Civil	No		
<ol style="list-style-type: none"> <li>1. Dormant since 1993.</li> <li>2. Based on appellant's request on docketing form.</li> <li>3. Rules were changed to allow respondent to object and no further settlements have been recorded.</li> <li>4. Rules maybe changed to allow for more time for trial transcript.</li> <li>5. Do not expect change in the rule allowing respondent objection.</li> <li>6. Civil only.</li> </ol>					
<b>New Jersey</b>	Appellate Division of Superior Court			1983	Select 55% of total civil filings. Settle about 35%
<b>See attached program analysis.</b>					
<ol style="list-style-type: none"> <li>1. Identifies cases that can be settled at initial stages. Also schedules pre-argument conferences for cases with complex issues.</li> <li>2. Administered by an Appellate Division judge, retired on recall, and is normally is staffed with three (3) additional Appellate Division judges also retired and on recall. Administrative support is provided by Appellate Division Clerk's Office.</li> <li>3. Caseload was almost equivalent to that handled by a "regular part."</li> <li>4. Exclude pro se, environmental cases, and other such as paternity, mental capacity, termination parental rights etc.</li> <li>5. Goals settles cases, narrow issues, abbreviate length of transcripts filed.</li> </ol>					
Mandatory					

## Alternative Dispute Resolution in State Appellate Courts

State	Court	Type of Cases	State with IAC	Date of Program	Court Caseload
<b>New Mexico</b>	Court of Appeals	Civil			
<ol style="list-style-type: none"> <li>1. Program is between phases.</li> <li>2. Conducted a "settlement week" where pending but not submitted civil cases were required to attend.</li> <li>3. Used members of the bar.</li> <li>4. Settlement rate of about 15% did not exceed that observed without the program.</li> <li>5. Program is being reconsidered actively and may become mandatory.</li> <li>6. Civil only.</li> </ol>					
<b>New York</b>	Appellate Term of Supreme court	Civil			
<ol style="list-style-type: none"> <li>1. Staff attorney selects cases based upon domestic relations without custody issues, money judgments, and limited issues.</li> <li>2. Uses retired judges; in the summer will use sitting judges.</li> <li>3. No statistics available - but "has settled thousands of cases."</li> </ol>					
<b>North Carolina</b>	Court of Appeals	Civil			
<ol style="list-style-type: none"> <li>1. Recently discontinued.</li> <li>2. Elected judges reviewed staff recommendations and referred cases to retired judges.</li> <li>3. Now use attorney reviewed fast-tracking.</li> <li>4. Civil only.</li> </ol>					
<b>Ohio</b>	Court of Appeals (Tenth District)	Civil Criminal			1,570 cases have been conference 951 have settled about 150 per year
<ol style="list-style-type: none"> <li>1. Uses staff attorney.</li> <li>2. Screens docketing statements.</li> <li>3. Excludes criminal and administrative agency cases.</li> </ol>					
<b>Oklahoma</b>	Supreme Court				
Discontinued according to a 1993 BJS study.					
<b>Oregon</b>				1995	
<ol style="list-style-type: none"> <li>1. SJJ</li> <li>2. Uses volunteer attorney</li> <li>3. Operational for about one (1) year.</li> </ol>					
<b>Pennsylvania</b>	Superior Court (IAC)	Civil		1980	
Discontinued according to a 1993 BJS study.					
<ol style="list-style-type: none"> <li>1. Evaluation using experimental and control groups.</li> <li>2. Used retired appellate judge.</li> <li>3. No criminal, juvenile, or pro se cases.</li> <li>4. Mandatory.</li> </ol>					
<b>Rhode Island</b>	Supreme Court	Civil	No		
<ol style="list-style-type: none"> <li>1. Used sitting Supreme Court justice.</li> <li>2. Voluntary for parties and mandatory for attorneys.</li> <li>3. No criminal, juvenile, child custody, or pro se cases.</li> </ol>					
<b>South Carolina</b>					
Permitted under rules. Emphasized in late 80s. Not used at present.					

## Alternative Dispute Resolution in State Appellate Courts

<u>State</u>	<u>Court</u>	<u>Type of Cases</u>	<u>State with IAC</u>	<u>Date of Program</u>	<u>Court Caseload</u>
South Dakota	Supreme Court	Civil	No	About 1985	Total filings 2,300 200 settled 66 settled

**See attached program analysis.**

1. Voluntary program.
2. Uses retired judges and sr members of bar
3. Hears domestic cases excluding custody & alimony, worker's compensation, administrative agency, and appeals from money judgements.
4. Most success with domestic cases.
5. Does not appear to expedite cases - seems to reduce judicial effort.
6. Have begun to use fast-track.
7. Goal reduce # of appeals, reduce costs of transcripts, cost of court.

**Texas**                      Court of Appeals  
                                    (Fifth District - Dallas)  
Discontinued according to a 1993 BJS study.

**Utah**

1. Utah Appellate Operations Task Force created in May 1994.
2. Designed to "Provide the judges of the Court of Appeals with procedural tools that will allow a significant increase in the number of appeals that the court is able to decide... The task force urged specific changes to the Utah Rules of Appellate Procedure in order to establish a presumption that cases will be decided without oral argument and by brief memorandum decision.
3. Proposed to implement a three (3) year pilot program of mediated settlement conferences in the Court of Appeals.
4. Proposed the addition of one (1) judge and two (2) law clerks to the Court of Appeals in 1996 and additional judges and law clerks dependent upon continued need.

**Vermont**                      Supreme Court    No

1. Discontinued recently.
2. Used staff to select cases where issues "did not threaten established precedents."
3. Now use fast-track but would continue program if funding were available.
4. Civil only.

**Washington**  
Discontinued according to a 1993 BJS study.

**Wisconsin**  
Discontinued according to a 1993 BJS study.

## A Practical Overview of Appellate Mediation at the First District Court of Appeal

The pilot mediation program at the First DCA gives attorneys and their clients an opportunity to attempt to negotiate a mutually satisfactory settlement of their dispute, while simultaneously pursuing their appellate rights. Eligible cases include all fully counseled civil, administrative and worker's compensation cases. Counsel for appellants and appellees in eligible cases will receive a request for preliminary mediation information shortly after appellants file their Notice of Appeal. Their responses will be reviewed by the Court Mediation Officer, who will then select cases that appear appropriate for mediation. Counsel for either or both parties are encouraged to confidentially request mediation of their case or to advise the mediation officer whether they feel mediation would be appropriate and beneficial. If a case is selected for mediation, counsel for both parties will receive written notification of the selection and will be advised of the date and time of the initial conference and provided with instructions on how to proceed. Mediation conducted by the Court Mediation Officer will be at no cost to the parties. Upon notification that a case has been selected for mediation, participation in the process is mandatory. The case then proceeds *in tandem on two separate tracks*; attempts to facilitate a mediated settlement of the dispute occur simultaneously with the uninterrupted appeal process. It is important to stress that the Court is completely unaware of which cases have been selected for mediation. The Mediation Office operates independently of the court, and everything related to the mediation process is completely confidential. All attempts will be made to schedule initial mediation conferences prior to the time briefs are due to maximize the economic benefit of mediation. The fact that mediation has been scheduled in a case will not operate to alter or extend the briefing schedule. Mediation is not to be cited as a reason for request of extension of time for filing of briefs in any motion filed with the Clerk of the First District Court of Appeal. Mediation attempts may continue throughout the appellate process, up to and after oral argument, but prior to judicial decision.

The role of the Mediation Officer is to facilitate communications between the parties during joint mediation sessions and then to assist the parties in evaluating the merits of their cases and their positions during separate sessions. The success and effectiveness of the process is facilitated by the mediator's having a clear concept of the position each of the parties takes prior to the mediation conference. For that reason, counsel for the parties will be required to submit to the mediator prior to the initial conference a mediation summary setting forth the facts of the case and identifying the statutory and case law authority upon which they rely in support of their positions. The mediator will carefully review each mediation summary and will read and become thoroughly familiar with all statutory authority and case law cited in support of each party's position prior to the initial mediation conference. Because the objective of mediation is to provide the parties with an opportunity to reach their own decision about the resolution of their dispute, active party participation in the process is essential.

Anyone who wants to obtain more information about the program is encouraged to contact Donna Riselli Gebhart at the Court Mediation Office of the First District Court of Appeal. Ms. Gebhart will be pleased to respond to your individual questions or to address your group.

*Donna Riselli Gebhart is the Court Mediation Officer for the First District Court of Appeal. She has been practicing law for 15 years, and has had considerable jury trial and appellate experience. For the past several years she has concentrated her practice exclusively on dispute resolution and has extensive experience in the mediation of ERISA, Title VII, employment, and other complex disputes.*

## REPORT ON APPELLATE ADR PROGRAMS AND RESEARCH: 1995-1996

### Part II—Comparative Analysis of Appellate ADR Programs

## CONNECTICUT

### *Courts*

Connecticut Supreme Court  
Connecticut Appellate Court

### *Name of appellate ADR program*

Preargument Conference

### *Type of program*

The preargument conference has been in existence since September 1, 1987. The program's features have not changed over the last two years. The program has been institutionalized in the appellate rules of procedure and state statutes. This program is the court system's second attempt at settlement conferences. Under the earlier program, the courts were not successful in eliminating backlogs of 13 to 19 months.

### *Program goals*

The goals of the program are to:

- Settle cases.
- Clarify or narrow the issues for the cases that do not settle.
- Reduce backlog and delay.
- Provide the parties and attorneys with a sense of procedural justice.
- Perform certain case management functions.

### *Characteristics of the Connecticut appellate system*

Most appeals in Connecticut are filed initially in the Appellate Court, the state's intermediate court of appeals. Appropriate appeals are transferred to the Supreme Court upon motion of one of the parties or upon action taken by one of the courts. The appellate clerk and central staff attorney offices provide administrative and legal support for both courts.

### *Case management aspects of the program*

In addition to the focus on case settlement, the program includes case management and case processing functions. These case management functions are performed by the host. For example, the Judge's Preargument Conference Report, which the host submits to the court at the end

### **Characteristics of the Appellate Court**

The Connecticut Appellate Court has nine judges that sit in three-judge panels. In 1987, 945 appeals were filed and 893 appeals were disposed. The figures for 1990 were 1107 and 1107. In 1993, 1164 appeals were filed and 1034 were disposed. This court has 131 mandatory appeals per judge and 36 mandatory appeals per 100,000 population. The court has mandatory jurisdiction in appeals from civil, non-capital criminal, workers' compensation, juvenile, lawyer disciplinary, and original proceedings cases. The court has discretionary jurisdiction over zoning appeals.<sup>1</sup>

### **Characteristics of the Supreme Court**

The Supreme Court has seven justices who sit in panels of five. In 1987, 58 mandatory appeals were filed. In 1990, 281 were filed with 285 dispositions. In 1993, 158 appeals were filed and 255 were disposed.<sup>2</sup> As of 1994 there were five mandatory appeals per justice and one mandatory appeal per 100,000 persons of the state's total population.<sup>3</sup> The Supreme Court's mandatory jurisdiction includes civil, criminal, and judge disciplinary cases. Its discretionary jurisdiction includes civil, non-capital criminal, and administrative agency cases.

of the preargument conference, requires the host to determine whether a case filed in the Appellate Court should be transferred to the Supreme Court. (In Program Year 1994-1995, 81 cases were transferred to the Supreme Court.) It also requires the host to assess and rate

<sup>1</sup> Table 3, *State Court Caseload Statistics*, (National Center for State Courts: 1994).

<sup>2</sup> The figures for mandatory appeals are calculated by the filing of notices of appeal, Table 13; Table B, *ibid.*

<sup>3</sup> Table 3, 1994 *ibid.*

the complexity of the case, and determine whether oral argument should be waived. Other case management tasks that the hosts can perform are obtaining amendments to the preliminary statement of issues, setting a briefing schedule for consolidated or complex cases, and recommending *en banc* review.

### **Participation**

Participation in the program is mandatory. The host has the discretion to excuse a party from appearing in person, but the party must be available by telephone, and must provide, in writing, authorization for counsel to fully settle the case. By judicial rule, the court has the authority to sanction an offender for failing to appear at a settlement conference.

### **Timing of the ADR conference**

The Connecticut preargument program is a pre-briefing program. Excluding "good cause" delay, conferences are held about 60 days after the appeal is filed.

### **Case selection process and screening criteria**

All civil matters, except for the following case types, are eligible for the program: administrative appeals, family, juvenile, criminal, certification of law, and *habeas corpus*. Any case with a *pro se* party is excluded, even if settlement is requested, in order to avoid a confrontation between the host and the *pro se* party.

Screening for case eligibility is performed by a central staff attorney who reviews the Statement for Preargument Conference that must be filed by the appellant, and its attachments. The

attachments are the preliminary statement of the issues, either a transcript of the oral decision or a copy of the memorandum of decision. The court sends these documents to the host so that the host can prepare for the conference.

### ***Qualifications and training of host***

Court officials participating in the program report that they perceive that the credentials of the hosts are a vital element in the success of the program. These credentials include knowledge of the appellate process, the ability to analyze the case, and knowledge of the law. Retired appellate judges and retired trial judges serve as hosts.

The host is assigned, not by a central staff attorney or deputy clerk, but by a retired justice, who acts as the program's champion and *de facto* presiding justice. Geography is a consideration in making the assignment.

Hosts are provided a copy of the *Judge's Preargument Conference Manual*. The manual describes procedures and contains copies of pertinent rules, statutes, and forms, needed by the host. In addition to providing each host a manual, the courts conduct a training conference for the hosts each year.

### ***Effect on scheduling***

The briefing schedule can be stayed during the conference and post-conference period.

### ***Conference tools***

The initial conference is scheduled to last at least 90 minutes. This time allocation is made so that something can be accomplished at the

conference and so those involved get a feeling of procedural justice. The host may conduct conferences in-person and by telephone. Post-conference follow-up is encouraged because the program recognizes that cases do not always settle on the day of the conference and that a significant number of cases settle within a reasonable time. The date for the follow-up conference is requested on the Judge's Preargument Conference Report.

### ***Program results***

If settlement is reached, a court reporter is summoned and a proceeding is held on the record at which counsel moves to reopen the judgment of the trial court. After ruling on the motion, the host reads into the record the new judgment, including the settlement agreement. If the settlement conference fails, briefing begins in 45 days. The briefing schedule can be extended by the host.

### ***Monitoring mechanisms***

On the individual case level, the host completes a report to the court, the *Judge's Preargument Conference Report*, at the end of the initial and each follow-up conference. The court prepares an annual statistical report that includes statistics on the appeal intervals.

The Preargument Conference Statistical Report is prepared annually and provides both annual and cumulative data. The statistical report gives data on the items listed below. Each data element is followed by the number, average, or percentage reported for program year 1994-1995:

- Number of appeals eligible for the preargument conference program. (733 appeals)
- Average interval between the date of the appeal and the assignment to the host, not including the number of days a case waits due to waiting for a ruling on motions or waiting for the trial court jacket. (33 days)
- Average interval between assignment to the host and the preargument conference, not including the number of "good cause" days reported by the host. (26 days)
- Number of cases disposed by either settlement or attrition. (328 appeals)
- Combined (attrition and settlement) disposition rate. (44.7%)

### **Evaluations**

No formal evaluation of the program was reported. The reported anecdotal information is that the program is accepted by the bar and that attorneys expect to have a preargument conference in an appeal and are cooperative. The program has not conducted any surveys of either the attorneys or parties participating in the program.

### **Elements of success for the program**

The officials associated with the program attribute certain factors with the program's perceived effectiveness. These factors are:

- Case eligibility is clearly-defined.
- The judiciary controls the program.
- The judiciary controls each case.
- Participation is mandatory and sanctions are available.
- The conference is held before the briefs are prepared.
- The procedures allow conferences to be meaningful.
- Well-respected judges are the program's hosts.
- Post-conference follow-up is encouraged.
- The program is well-established.

Information about the program includes a letter from Justice Santaniello describing the program, the "Judge's Preargument Conference Report", the *Judge's Preargument Conference Manual*, the cumulative statistical report for program year 1994-1995, and a copy of a preliminary issues statement.

### **Contact persons**

Associate Justice Angelo G. Santaniello (Retired), (860) 442-7190; and John DeMeo, Staff Attorney, (860) 566-3256.

# MICHIGAN

## **Court**

Michigan Court of Appeals

## **Name of appellate ADR program**

Preargument Settlement Conference Program

## **Type of program and program authority**

The Michigan Court of Appeals' first experiment with appellate ADR was conducted between 1979 and 1980. That project was not continued or institutionalized because it was concluded that the program did not encourage settlements. The current Preargument Settlement Conference Program commenced in June 1996 and will end in September 1996. This current experiment is the second phase of a pilot project that was conducted in 1995. The current project, like the two previous experiments, has a group of cases selected for the program and a control group of cases not selected for the program. The program is authorized by a judicial rule of procedure.

## **Program goals**

The goals of the program are 1) to expedite case disposition and 2) to clarify or narrow the issues.

## **Case management aspects of the program**

This program does not include any case management features.

## **Characteristics of the court**

The Michigan Court of Appeals is an intermediate appellate court with 24 judges who sit in panels. In 1984, 4796 mandatory appeals were filed, calculated by the filing of notices of appeal. In 1993, 9270 cases were filed and 13,037 were disposed. In 1994, 8054 cases were filed with 12,824 dispositions.<sup>4</sup> As of 1994, the appellate court had 149 mandatory cases filed per judge and 52 mandatory cases filed per 100,000 population.<sup>5</sup>

The Michigan Court of Appeals' mandatory jurisdiction includes civil, criminal, administrative agency, and juvenile cases. The court's discretionary jurisdiction includes civil, non-capital criminal, administrative agency, juvenile, original proceeding, and interlocutory decision cases.

## **Participation**

The judicial rule establishing the program gives the court the authority to mandate participation in the settlement conferences. Participation can also be voluntary. Generally settlement is requested on the docketing statement by the appellant and agreed to by the appellee. The host has the discretion to require the attendance of the parties or other persons with the authority to settle. Sanctions are available if a person fails to attend a settlement conference. The sanctions may include reasonable expenses, including attorney's fees, costs, or dismissal of the appeal.

<sup>4</sup> The figures for 1993 and 1994 mandatory appeals include discretionary appeals, Table 13, *ibid*. The number of appeals is calculated by counting the number of notices of appeal that are filed. Table B. *ibid*.

<sup>5</sup> Table 3, *ibid*.

### ***Timing of the ADR conference***

The court is trying to determine if cases settle at a higher rate if the briefs have not been prepared. Therefore, cases selected for the program are from all stages of the appeals process. The effect of participating in the program on the appeals process depends on which stage the case is in relative to briefing. If the appellant's brief has not been filed, the briefing schedule is stayed. If the appellant's brief has been filed prior to selection of the case for participation in the program, no stay is issued for the appellee's brief.

### ***Pre-screening statement***

The docketing statement, which must be filed in all appeals, serves as the pre-screening statement.

### ***Case selection process and screening criteria***

The cases that are eligible for the program are civil appeals as of right. Cases with *pro se* representation are excluded. The case types that are excluded from the program are juvenile, domestic relations, criminal, interlocutory appeals. The court has special fast tracks for child custody and termination of parental rights cases, so these two categories of cases are excluded from the appellate ADR program. Eligible cases were screened by a central staff attorney who reviews the docketing statements. Case selections were made at the beginning of June 1996. Eighty cases were selected for the experimental group.

### ***Qualifications and training of hosts***

Volunteer attorneys serve as the host of the settlement conference. The volunteers receive free training in mediation from the program. The arbitration/mediation section of the State Bar of Michigan provides the training. The state bar sends to the Court of Appeals a list of attorneys who have completed the training with a recommendation for appointment to the moderator panel. After completion of their training and upon their certification to the Court of Appeals, the chief judge, staff attorney, and clerk of the court meet with the volunteers to discuss the program.

### ***Ethics governing the conduct of the host***

The hosts must adhere to Rule 1.7 of the Michigan Rules of Professional Conduct. They must also observe the program's guidelines concerning confidentiality.

### ***Pre-conference preparation***

The central staff attorney prepares and sends to the host an informational memorandum for moderators. This package sets out the rules, procedural information, and provides forms. The trial court jacket is not available at the time of the review for most cases. The central staff attorney does not prepare a substantive memorandum. The central staff also sends to the host the docketing statement, and a computer printout of the docket. If the briefs have been prepared, the host can request a copy of the briefs.

### **Settlement techniques**

The program emphasizes traditional mediation to facilitate a voluntary, uncoerced agreement among the parties. Case evaluation, which sets a value on the case, is discouraged. The settlement techniques, however, are left to the discretion of the host.

### **Effect on scheduling**

If the appellant's brief has not been filed, participation in the program stays briefing, by order of court. If the appellant's brief has been filed, the appellee is encouraged to file its brief as soon as possible because the briefs are helpful to the settlement process. The host is given 60 to 90 days to settle the case. This period will be expanded if needed. In-person conferences are held. The parties do not have to attend the first conference, but must attend one conference before settlement.

### **Program results**

For the 1979-1980 program, the experimental group had only 2.5 percent more settlements than the control group, the group of cases not selected for the program. The settlement rate for the first phase of the program in 1995 was 41 percent (17 cases settled out of 41 cases selected for the program). These results encouraged the court to conduct the current program. No data is now available for the current program.

### **Monitoring mechanism**

Day-to-day coordination is performed by the central staff attorney. Judge Maura D. Corrigan and the chief judge supervise and monitor the program.

### **Evaluations**

The host drafts an evaluation memorandum at the conclusion of the case. The evaluation memorandum includes the following information: case name and number; the date of the first contact, person contacted, and the time involved; the steps and techniques used to settle the case or to limit the issues; the factors that contributed to the settlement or limitation of the issues; and the contributing factors if no settlement was reached. The evaluation will be performed by the central staff attorney who serves as the program coordinator.

Reference material about the program includes an article in the journal of the state bar association about the 1979-1980 program, and the information package that was sent to the hosts. This package includes instructions and procedures, sample orders, reports, and a copy of the ethical standards.

### **Contact persons**

Judge Maura D. Corrigan, (313) 256-9624, and Ella Williams, Chief Clerk, (517) 373-0786.

## NEW JERSEY

### **Court**

Superior Court of New Jersey, Appellate Division

### **Name of appellant ADR program**

Civil Appeals Settlement Program

### **Type of program and program authority**

The Civil Appeals Settlement Program was authorized in spring 1981, and implemented in June 1983.

### **Program goals**

- To settle cases.
- To clarify or narrow the issues for nonsettled cases.
- To abbreviate the length of the transcripts filed in the appeal.

### **Case management aspects of the program**

The Supreme Court has granted the Civil Appeals Settlement Program judges the authority to issue procedural orders. These procedural orders can be incorporated in the scheduling order. Procedural orders (other than the scheduling orders) include orders consolidating appeals, directing the clerk to calendar appeals back-to-back, abbreviating transcripts, and enlarging page limitations for briefs.

### **Participation**

Participation in the program is mandatory for attorneys. Parties may attend the settlement conferences, but generally are not permitted to participate in the process. A client who does not appear must arrange to be available for

consultation by telephone. Sanctions may be imposed for the failure to appear.

### **Characteristics of the appellate court**

The Superior Court of New Jersey, Appellate Division is an intermediate appellate court with 32 judges. The court has eight parts, with four judges assigned to each part. The judges sit in two- or three-judge panels. In 1984, 6224 mandatory appeals were filed and the court disposed of 6262 appeals. In 1993, 6712 appeals were filed, with the court disposing of 6601 cases. In 1994, there were 7,148 mandatory appeals and 6980 of these were disposed.<sup>6</sup> This court has 223 mandatory cases filed per judge and 90 cases filed per 100,000 persons of the state's population.<sup>7</sup>

### **Timing of the ADR conference**

This appellate ADR program is a pre-briefing program. The case should be delivered to the potential settlement judge within 30 days after the notice of appeal was filed.

### **Case selection process and screening criteria**

The document used to screen cases for eligibility and suitability for the Civil Appeals Settlement Program is the "Civil Case Information Statement." This statement is filed and contains a notice that informs the appellant that a case is selected for the ADR program based upon its potential for settlement and simplification of the issues, and its potential for eliminating preparation of some of the transcripts. The appellant

<sup>6</sup> Table 13, counting notices of appeal, Figure B, *ibid.*

<sup>7</sup> Table 3, *ibid.*

then has an opportunity to check a box if it thinks that the case would benefit from the program. A Civil Case Information Statement filed by the appellee is not refused.

This program has two screenings. The first screening is a clerical review by the intake staff of the clerk's office of all civil appeals to identify those cases eligible for the program. The clerk reviews the notice of appeal, the court transcript request form, the copy of the order or judgment on appeal, and the Civil Case Information Statement. The types of cases excluded from the program are cases in which paternity, mental capacity, custody or the constitutionality or validity of a statute, ordinance, or regulation is the sole issue; cases involving the termination of parental rights, adoption, Casino Control Commission matters, unemployment compensation, election matters, closing a landfill, a gun permit, summary contempt proceedings, the imposition of sanctions or penalties upon a litigant or attorney; and cases from professional boards. Also excluded, on grounds other than cases type, are cases with *pro se* parties, unless the party is an attorney, interlocutory appeals, and an appeal that has already been calendared. An ineligible case will be selected from the program if a written request for a conference is submitted by counsel.

Cases eligible for the program are sent to a judge for case selection. The judge who conducts the case selection is the same judge who will serve as the host if the case is selected for the program. The potential settlement judge, after reviewing the same documents reviewed by the clerk, selects enough appeals to

form a schedule for two to four weeks. The cases not selected by the settlement judge are returned to the clerk.

### ***Qualifications and training of host***

All of the hosts are judges. The hosts are five retired appellate judges on recall. The clerk sends cases to the potential host based upon geographic considerations.

### ***Settlement techniques***

The host can use a variety of dispute resolution methods, including outcome prediction, case evaluation, and mediation. The technique used is within the discretion of the host. The host can give counsel a fixed time, up to 30 days, to consider a settlement proposal. The host can assign additional time if it is appropriate. The host can schedule follow up conferences in addition to the initial conference.

### ***Effect on scheduling***

Participation in Civil Appeals Settlement Program stays briefing for the appeal. If appellant's counsel does not want preparation of the transcript to begin or to continue pending the conference, the attorney sends a copy of the conference notice to the court reporter. The court reporter will then suspend preparation of the transcript.

### ***Monitoring mechanisms***

The clerk's office provides the host a docket sheet for each appeal that the host has an option of using. In addition to the docket sheet, regular reports provide information about the program and control the timeliness of the dispositions. Each settlement judge prepares a monthly report showing the status of cases pending for more than 90

days and the new dates of rescheduled conferences.

The court prepares two reports. The Civil Appeals Settlement Program Disposition Report lists the appeal by name and shows the type of disposition. The second report, the Civil Appeals Settlement Program Summary Report, shows the number of cases sent to each settlement judge, and the number of cases that each judge rejected for the program.

The program's statistical report combines the disposition of appeals in a manner that combines normal attrition with cases settled under the program. The disposition categories used in the report are: 1) settled before conference, 2) settled after conference, and 3) not settled at conference, but settled, and 4) withdrawn or dismissed administratively.

The report also shows the number of carry-over, post-conference settlement cases from the previous

calendar year, cases not settled, and pending cases. This last category includes cases sent to the settlement judge for screening as well as cases that have been screened and selected by the settlement judge but not yet conferenced.

According to the program, of the approximately 16,500 appeals selected for the appellate ADR program since 1981, approximately 40 percent have been disposed of by normal attrition, settlement, withdrawal, dismissal before, during, or after the settlement conference.

Further information about the program is found in the *Manual of the Procedure of the Civil Appeals Settlement Program* (Revised April 1996).

**Contact person**

Jack G. Trubenbach, Chief Counsel, 609  
292-4822

## **SOUTH DAKOTA**

### **Court**

South Dakota Supreme Court

### **Name of appellate ADR program**

Settlement Conference Program

### **Type of program and program authority**

The Settlement Conference Program is an established program that has been in existence for ten years. The program is authorized by a judicial rule that has been codified as SDCL Ch 15-26B—Appellate Settlement Conferences.

### **Program goals**

- To reduce the number of appeals through reasonable, coercion-free settlements.
- To reduce costs to the parties of transcript preparation.
- To reduce costs to the court.

### **Participation**

Participation in the program is voluntary, but parties are expected to attend the settlement conference. If a party cannot attend the settlement conference due to some hardship, the party must be available by phone. Sanctions are available for failing to comply with the program rules once the case has been submitted to the program.

### **Timing of the ADR conference**

The program begins early in the appeals process. A motion of a party or an invitation from the host is to be filed within 20 days from the filing of the notice of appeal.

### **Characteristics of the appellate court**

South Dakota has two levels of courts, the trial court and the court of last resort, the Supreme Court, with no intermediate appellate court. Five justices sit en banc. In 1985, 358 mandatory appeals were filed. In 1988, 428 mandatory appeals were filed and 463 appeals disposed. In 1994, 351 appeals were filed with 463 dispositions.<sup>8</sup> As of 1993 the South Dakota Supreme Court had 70 mandatory cases filed per judge and 49 mandatory cases filed per 100,000 population.<sup>9</sup>

### **Case selection process and screening criteria**

The Docketing Statement, which must be filed by the appellant, instructs the appellant to check a box requesting a settlement conference. The appellee has 10 days to note its unwillingness to participate; otherwise, a conference is scheduled. If the appellant checks the box indicating that no settlement conference is desired, the party is asked to explain why.

<sup>8</sup> This category of mandatory appeals, includes discretionary advisory opinions. These calculations are based upon notice of appeals filings. *State Court Caseload Statistics, 1994*, NCSC. The calculations and definitions used by the clerk of the court differ from those used by the NCSC. Total dispositions include mandatory dispositions as well as others. Notices of appeal and notices of review of administrative agency cases are included, while certificates of probable cause, and original or advisory opinions are not included. By the clerk's calculations, in 1985, 337 mandatory appeals were filed and 419 total dispositions. In 1988, 386 mandatory appeals were filed and 465 appeals were disposed. In 1994, 330 appeals were filed with 470 total and 391 mandatory dispositions.

<sup>9</sup> Table 3, 1994 *ibid.*

Case screening is performed by a central staff attorney, who reviews the docketing statement. The staff attorney exercises discretion in screening the cases. Four types of cases are included in the program: workers' compensation, administrative agency appeals, domestic relations, and appeals from money judgments. The four case types have never been changed during the ten years that the program has been in existence. The program has evolved a practice of not scheduling settlement conferences, even when requested, for cases with *pro se* parties and domestic relations cases involving custody and alimony.

#### ***Qualifications and training of host***

Retired trial judges and about three senior members of the bar are under contract with the court to serve as hosts of the settlement conferences. Retired justices are also eligible under the judicial rule. The program does not provide training for the hosts. Several of the retired judges have arbitration and mediation skills and have had formal training in this area. Geographic convenience of the parties and the host is the most important factor in selecting the host in this geographically large state. If geography is not an issue, then the next criterion is the complexity of the case. If the case is complex, the staff attorney selects as host someone who has demonstrated success in settling complex cases in that area of the law.

#### ***Pre-conference preparation***

The type and amount of preparation varies by host. The court sends to the host copies of the notice of appeal, docketing statement, and the order on appeal. Most hosts review the trial jacket. Some review the entire trial

record, the transcripts, depositions, and exhibits.

#### ***Settlement techniques***

Each host has his or her own approach. The degree of active encouragement to settle varies as well, from strong encouragement to merely providing a forum for the parties who wish to settle.

#### ***Effect on scheduling***

Under the judicial rule establishing the program, participation in the settlement conference program stays all matters pertaining to the appeal. In practice an order stays the briefing schedule and the preparation of the transcripts, but the order usually is silent on preparation of the record.

#### ***Program results***

The ten-year evaluation of the program will determine if the program has reduced the time on appeal. Another unanswered question is whether the program should be mandatory.

#### ***Conference tools***

The program encourages the hosts to follow up in those cases in which a settlement is not reached during the conference. This follow up includes having the host schedule subsequent in-person and phone conferences.

#### ***Monitoring mechanisms and evaluations***

A statistical report is prepared each year documenting by case type and by host the number of conferences held, the number of settlements, the success rate, the number of conference requests, refusals to participate, requests in ineligible cases, the total number of

conferences held, the total number of cases settled, and the number of carry-over cases at the end of the fiscal year. For 1995 there were 253 docketing statements filed<sup>10</sup>; 74 requests; 25 ineligible requests; 14 refusals; 24 settlement conferences held; 8 settlements; and 10 carry-over cases.

A unique feature of the South Dakota statistical report is that it provides information on the costs of the conferences and the average number of days delaying the final disposition of the conference appeals. This ten-year old program will be studied by staff this summer to assess its effectiveness and to develop recommendations. Program material that is available includes sample orders, docketing statement, a statistical report, and the court rule establishing the program.

**Contact person**

Mrg Simon, Staff Attorney, (605) 773-5678.

---

<sup>10</sup> No docketing statement is required for criminal appeals as of right.

---

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPELLATE MEDIATION PROGRAM

United States Court of Appeals **FILED** MAR 26 1993  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RON GARVIN  
CLERK

No.

September Term, 19

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg,  
Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle,  
Henderson and Randolph, Circuit Judges.

O R D E R

It is Ordered, by the Court en banc, that the order of  
November 28, 1988, establishing an Appellate Mediation Program, be,  
and the same hereby is, amended, as follows:

Paragraph two, line 5

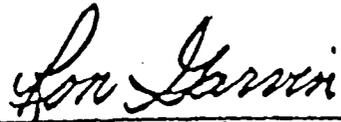
delete

government,

and insert in lieu thereof

government or the District of Columbia Government,

FOR THE COURT:



Ron Garvin  
Clerk

**DISPUTE RESOLUTION PROGRAMS  
UNITED STATES COURTS  
DISTRICT OF COLUMBIA CIRCUIT**

*Linda J. Ferren  
Circuit Executive*

*Nancy E. Stanley  
Director*

**REVISION**

In the Appellate Mediation Program brochure of the United States Court of Appeals for the District of Columbia Circuit, please replace the second paragraph of the section titled CONFIDENTIALITY, on pages three and four, with the following:

The above is not intended to guarantee absolute secrecy about the identity of the cases that are chosen for mediation. Nor is it meant to preclude dissemination of information about the types of cases going through the mediation process and about overall program results. Generic information about the program and cases entering it is available, and reports are generated for analysis and evaluation. Individual cases that have been resolved through mediation may be publicly identified or brought to the Court's attention as program successes if the litigants consent to such a disclosure.

January 1995

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

A number of federal Circuit Courts of Appeal and state appellate courts have implemented mediation projects within the last few years in response to increasing caseloads and delay. Mediation is often one component of a larger effort to manage the Court's work. In the D.C. Circuit, mediation is intended to supplement the Court's 1986 Case Management Plan, which was undertaken to accommodate a sixty percent increase in filings and pending cases over a two-year period. Mediation is also intended to help parties by curtailing the expense involved in protracted appeals and by providing a forum which stimulates the development of creative resolution options that would otherwise not be achievable by Court order or by the parties acting on their own.

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

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

The Appellate Mediation Program handles fewer than one hundred cases a year. Nonetheless, it has had a significant impact on the Court's workload. Cases that are settled do not proceed to oral argument, thus saving the time of judges and law clerks who would otherwise prepare for argument. Issues and positions are clarified in the mediation process so that, even if settlement is not achieved, the Court benefits from

more efficient briefing. Finally, mediation frequently saves time and money for the litigants themselves. It can also produce agreements that meet their needs more effectively than the relief that could be provided through the court proceeding. Mediation is offered at no cost to the parties.

### CASE SELECTION

Cases filed with the Court of Appeals are screened by attorneys in the Chief Staff Counsel's Office for their appropriateness for mediation. Screening occurs approximately 45 days after a case has been docketed in the Court of Appeals.

No criminal cases enter the program. Civil cases are reviewed on an individual basis, with a number of factors considered in making the eligibility determination. These factors include the nature of the underlying dispute, the relationship of the issues on appeal to the underlying dispute, the availability of incentives to reach settlement or limit the issues on appeal, the susceptibility of these issues to mediation, the possibility of effectuating a resolution, the number of parties and the number of related pending cases.

Parties are encouraged to request mediation by completing a "Request to Enter Appellate Mediation Program" form and sending it to the Clerk *in duplicate*. Although such requests are not automatically granted, the Chief Staff Counsel gives them special consideration.

## PROGRAM MEDIATORS

The Court has selected distinguished senior members of the bar to serve as mediators as well as attorneys who have had broad experience mediating complex civil cases. The mediators are experienced litigators who enjoy the Court's full confidence.

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

Mediators are not paid for their services, but are reimbursed by the Court for minor out-of-pocket expenses such as trips to the Courthouse. The Court also provides parking, administrative support and limited secretarial services if needed.

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

## CONFIDENTIALITY

Confidentiality is ensured throughout the mediation process. Attorneys in the Chief Staff Counsel's Office do not confer with judges in selecting cases for mediation. Mediators protect the confidentiality of all proceedings. Papers generated by the mediation process are not included in Court files, and information about what transpires in the mediation process is not at any time made known to the Court. The Circuit Executive's Office, which is responsible for program administration and evaluation and liaison between the mediators and Court personnel, maintains strict confidentiality about the content of the mediation in particular cases.

The above is not intended to guarantee absolute secrecy about the identity of the cases that are chosen for mediation.

Nor is it meant to preclude dissemination of information about the types of cases going through the mediation process and about overall program results. Generic information about the program and cases entering it is available, and reports are generated for analysis and evaluation. However, these reports do not identify individual cases.

## MEDIATION PROCEDURES

The Chief Staff Counsel will identify cases for mediation approximately 45 days after they have been docketed in the Court of Appeals. Lead counsel and intervenors involved in cases selected for mediation will receive a letter from the Court describing the program and assigning a mediator. A copy of the Court's *en banc* Order defining the procedures to be followed will be included in the mailing. At the same time, the Court will send to the assigned mediator a copy of the judgment or order on appeal, any opinion issued by the District Court or agency, the appellant's or petitioner's statement of issues on appeal, D.C. Cir. Rule 11(a)(1) statements, and all relevant motions.

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

The mediator will schedule the initial mediation session within 45 days of the selection of the case for mediation. The mediator will set the date for the initial session, which will normally be held at the Court. However, a mediator may decide to hold a session in his/her office. The mediator will schedule additional mediation sessions, as needed. Whereas all cases in mediation are subject to normal scheduling for briefing and oral argument, it is possible that additional mediation sessions in a case will affect the scheduling process. If so, the attorneys

w/in  
90 days of docketing

shall file a motion to defer or postpone the briefing and/or oral argument date(s), representing that the mediator, whom they shall not identify by name, concurs in the request. Attorneys may not file any other motions that would notify the Court that the case is in mediation.

The Court requires that counsel for parties attend all mediation sessions. All parties are also strongly urged by the Court to attend each mediation session. Each party represented must have counsel or another person present with actual authority to enter into a settlement agreement during the session. In cases involving the United States government or the District of Columbia government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached during conference sessions. It is the responsibility of the United States Department of Justice attorneys in these sessions to furnish the mediator with the name and title of the government official authorized to effectuate settlement under 28 CFR, Part O, Subpart Y, whom the mediator and attorney can contact by phone during the mediation session. In cases involving the District of Columbia government, it is the responsibility of Corporation Counsel attorneys to furnish the mediator with the name and title of the government official authorized to effectuate settlement who can be contacted by phone during the mediation session. When settlement authority for the United States government rests with an official at the rank of Assistant Attorney General, its equivalent or higher, or with members of an independent agency, or when settlement authority for the District of Columbia government rests with officials above the rank of Corporation Counsel, the requirement that the official or members be reachable during the mediation session is waived unless the mediator for good reason specifically so provides in writing after reviewing the mediation papers.

If settlement is reached, the agreement, which shall be binding upon all parties, will be put into writing, and counsel will file a stipulation of dismissal. If the case is not settled, it will remain on the docket and proceed as though mediation had

not been initiated. Regardless of the outcome of a case, mediators will complete a case evaluation form for each case mediated. Each attorney participating in the mediation will be asked to complete an evaluation form.

## THE MEDIATION PROCESS

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

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

Additional joint sessions may be held to explore settlement possibilities, or this work may be done just in the separate caucuses. The mediator, in consultation with the parties, will decide which approach is likely to be more beneficial under the circumstances of the particular case.

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

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson and Randolph, Circuit Judges

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

FURTHER ORDERED that mediation sessions must be attended by counsel for each party or another person with actual authority to settle the case. Additionally, the parties themselves are strongly encouraged to attend the sessions. In cases involving the U.S. government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached during conference sessions except that in cases in which settlement authority for the United States government rests with officials of the rank of Assistant Attorney General (or its equivalent) or higher, or with the members of an independent agency or in cases in which settlement authority for the District of Columbia government rests with officials above the rank of Corporation Counsel, this provision shall not apply unless the mediator for good reason specifically so provides in writing after reviewing the mediation papers. Failure of counsel to attend sessions may result in the imposition of sanctions.

The Circuit Executive for the D.C. Circuit shall serve as the program administrator of the Appellate Mediation Program. A party may request mediation, but the Chief Staff Counsel will ultimately determine which cases are appropriate for mediation. Case selection will take place approximately 45 days after

a case has been docketed in the Court of Appeals. Lead counsel will receive notice of case selection and of the mediator assigned.

An initial mediation session will be scheduled by the mediator within 45 days of a case's selection for mediation. The mediator will schedule additional sessions, as needed. Mediation sessions will be held at the U.S. Courthouse for the District of Columbia, 3rd and Constitution Avenue, N.W., Washington, D.C. If mutually agreeable, however, the mediator may hold sessions in his/her office.

The Court will send the mediator a copy of the judgment or order on appeal, any opinion issued by the District Court or agency, the appellant's or petitioner's statement of issues on appeal, D.C. Cir. Rule 11(a)(1) statements, and all relevant motions. Within fifteen days of the case's selection for mediation, counsel shall prepare and submit to the mediator a position paper of no more than ten pages, stating their views on the key facts and legal issues in the case. The position paper will include a statement of motions filed and their status. All motions filed or decided while mediation is underway are to be identified for the mediator and submitted to him/her upon request. Copies of documents submitted to the mediator need not be served upon opposing counsel unless the mediator so directs. Documents prepared for mediation sessions are NOT to be filed with the Clerk's Office except as noted below.

All cases in mediation remain subject to normal scheduling for briefing and oral argument by the Clerk's office. If it is the mediator's view that additional mediation sessions are required and that such sessions would affect the briefing schedule in the case, the attorneys shall request an extension by filing a motion to defer or postpone the briefing and/or oral argument date(s). The attorneys shall represent that the mediator, whom they shall not identify by name, concurs in the request.

The content of mediation discussions and proceedings, including any statement made or document prepared by any party, attorney or other participant, is privileged and shall not

be disclosed to the Court or construed for any purpose as an admission against interest. To that end, the parties shall not file any motion or other document that would disclose any information about the content of a mediation, whether or not it has been concluded. This means that parties are prohibited from using any information obtained as a result of the mediation process as a basis for any motion other than a motion affecting the briefing or argument schedule.

No party shall be bound by anything said or done at a mediation session unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement.

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

If a mediator makes any oral or written suggestion as to the advisability of a change in any party's position with respect to settlement, counsel for that party should promptly transmit the suggestion to his or her client if that client is not present at the mediation session. Counsel should explain to clients, whether present at mediation or not, the suggestions put forward by mediators and their import. It is

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

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

and the Office of the Clerk of the United States Court of Appeals for the District of Columbia Circuit. A copy of this Order also will be provided to all counsel in cases ordered into mediation.

EFFECTIVE: November 28, 1988  
As amended April 19, 1989, and May 1, 1992

*Per Curiam*

#### ADDENDUM

In response to inquiry by the program's volunteer mediators, the Court has determined that the order establishing the appellate mediation program allows the mediators, in their discretion, to call or write clients or representatives of government agencies to request their attendance at mediation sessions. Any communication by the mediator with the persons or entities described above, however, must be fully disclosed to the counsel of record. The order also permits the mediator to communicate, in the presence of counsel, settlement offers or other appropriate information to clients or representatives of government agencies.

March 7, 1990

THE FEDERAL JUDICIAL CENTER  
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING  
ONE COLUMBUS CIRCLE, N.E.  
WASHINGTON, DC 20002-8003

RESEARCH DIVISION

TEL: 202-273-4070  
FAX: 202-273-4021

April 24, 1996

Honorable Gerald B. Tjoflat  
Chief Judge, U.S. Court of Appeals  
for the Eleventh Circuit  
P.O. Box 960  
Jacksonville, FL 32201

Re: FJC Sourcebook on Appellate Conference Programs

Dear Chief Judge Tjoflat:

Enclosed please find for your review a draft description of your court's Rule 33 program. We plan to include this description in a new Federal Judicial Center publication: a "sourcebook" on Rule 33 programs. The sourcebook will be a reference guide for courts and others interested in learning more about these programs. We structured the sourcebook in a format similar to the forthcoming publication ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers.

Stephen Kinnard has been very helpful during the drafting and editing of the enclosed description of your court's program. If you have any comments or changes to propose, we would appreciate a response within the next two weeks.

Sincerely yours,



Robert J. Niemic

Enclosure

cc: Circuit Executive, Norman E. Zoller  
Clerk of Court, Miguel J. Cortez  
✓ Stephen O. Kinnard, Esquire

## ELEVENTH CIRCUIT COURT OF APPEALS

### APPELLATE CONFERENCE PROGRAM

#### OVERVIEW

**Summary Description.** The Appellate Conference Office (ACO) selects a cross-section of cases that are eligible for the program and schedules conferences in all cases selected. With certain exceptions, all civil cases docketed in the court are eligible for the program. In addition, if a judge of the court of appeals or any party requests a conference in a program-eligible case, the ACO automatically schedules a conference. Once the ACO schedules a conference, participation is generally mandatory; however, a party may request the ACO to remove a case from the program. The court's conference attorneys conduct the conferences.

#### **Objectives.**

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

**Authorization.** The ACO, created in 1992, conducts conferences pursuant to Fed. R. App. P. 33 and 11th Cir. R. 33-1.

**Volume of Cases.** With current staff, about 25% of program-eligible cases are scheduled for a Rule 33 conference. In recent years, the ACO has scheduled cases at the rate of about 200 new cases per year per conference attorney.

#### **Features of Interest.**

- *Pro se* and prisoner cases are not included in the conference program, even if a party requests participation.
- Most initial conferences are conducted by telephone.
- Participation at a conference is usually through lead counsel; however, the conference attorney permits and may require parties to attend. The parties and their counsel may communicate *ex parte* with the ACO at any time.
- If a case does not settle in the conference process, the case may continue in the program until the court decides the issues on appeal.
- In addition to mediating issues on appeal, the ACO may also mediate related trial court cases, frequently in an attempt to achieve a "global settlement" of various lawsuits or proceedings.

## REFERRING CASES TO THE PROGRAM

- Program-Eligible Cases** All non-prisoner civil cases are eligible for selection into the program, if all parties are represented by counsel. Prisoner cases (including those involving *habeas corpus*) and cases with at least one party appearing *pro se* are not scheduled for Rule 33 conferences, even if a party requests participation in the program.
- Referral Process** The clerk's office sends the documents described below to the ACO for all program-eligible cases after they clear the court's jurisdictional review.
- Documents Provided** A completed Eleventh Circuit civil appeal statement form is required in all civil cases except *pro se* and *habeas corpus* cases and cases where the appellant/petitioner is incarcerated. The appellant files the form with the clerk of the court of appeals within 21 days after filing the notice of appeal in the district court (or in agency cases within 21 days from the date the form was mailed to the petitioner). The civil appeal statement sets forth a description of the facts and issues on appeal, citations of relevant authority, the judgment or order appealed from, and any supporting opinion or findings below. The appellee may file a response within seven days of receipt.
- Judicial Referrals** Cases may also be referred to the program by an active or senior judge of the court of appeals.

## SELECTING CASES FOR CONFERENCES

- Selection Process** The ACO reviews all program-eligible cases and selects a cross-section for the program.
- Requests by Parties** Attorneys are encouraged to request a conference if they believe a conference would be helpful. At any time during the pendency of a case, a request by one or more parties in a program-eligible case is always accepted if all parties are represented by counsel. If an attorney makes an *ex parte* request for a conference and desires that the request be kept confidential, the ACO honors that request.
- Removal from the Program** On a case-by-case basis, a case may be removed from the program but only after the mediator and counsel consult on the issue of removal.

## SCHEDULING THE CONFERENCES

- Scheduling Process** Two to three weeks before the conference date, the ACO sends lead counsel written notice of the initial conference.
- Timing of Conferences** The ACO selects most cases for the program soon after court of appeals docketing and before briefing.
- Teleconferences** Most initial conferences are conducted by telephone with the court initiating the calls.
- In-Person Conferences** If all counsel are located in the Atlanta area, the initial conference generally will be held in person. At the conference attorney's discretion, conferences for cases outside the Atlanta area also may be conducted in person. If all parties agree that an in-person conference would be beneficial, counsel is encouraged to contact the ACO to discuss the possibility of scheduling a conference at a mutually agreeable location. Occasionally, at no expense to the parties, the conference attorney travels to other locations in the circuit to conduct in-person conferences. The ACO travel budget, however, is limited.

## PREPARING FOR CONFERENCES

- Attorney Submissions** After a case is scheduled for a conference, counsel may send, and are encouraged to send, to the conference attorney a short confidential mediation statement assessing the case. The conference attorney does not share the mediation statement with opposing counsel, and it does not become part of the court's case file. If a party files a brief before the conference date, that party is to send the ACO a copy.

## CONFERENCE SESSIONS

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

The conference attorney initially talks with both sides together... and then meets with each side separately. Conferences generally begin with an inquiry as to any procedural questions or problems that can be resolved by agreement. These might include questions about record excerpts or the need for a specially tailored briefing schedule. Discussion then moves quickly to an explanation by each party of the issues on appeal. The purpose of this discussion is not to decide the case or reach a conclusion about the issues, but to understand the issues and evaluate risks to both sides. In many cases, a candid examination of the case is helpful in reaching a consensus on the settlement value of the case.

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

#### **Party Participation**

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

Although clients are not required to be present at most initial conferences, the court encourages clients to be actively involved in the mediation process. The court suggests that counsel may wish to have clients attend the conference or be available by phone at the time of the conference. The conference attorney, however, may require that clients attend. Also, sometimes settlement cannot be achieved without the involvement of individuals or groups who are not parties to the appeal. Such parties may be invited to participate.

**Number and Length of Sessions**

The initial teleconference may last up to two hours. The initial in-person conference may last up to four hours. Typically, three joint conferences are scheduled per case, not including *ex parte* follow-up telephone calls. In almost all cases, to pursue fully all opportunities for negotiated settlement, there is extensive follow-up activity such as additional telephone calls, in-person conferences, or caucuses with each side separately.

**Post-Conference Procedures**

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

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

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

**OTHER RULES/POLICIES**

**Effect on Appellate Proceedings**

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

If a case does not settle in the conference process, the case may continue in the program until the court decides the issues on appeal.

**Confidentiality** Statements and comments made during a conference and subsequent discussions related to the conference are kept strictly confidential by the ACO. Parties and their counsel also agree to maintain such confidentiality; this oral confidentiality agreement extends to non-disclosure in briefs or arguments to the court. The court strictly enforces the confidentiality rule, and it applies in all cases including those referred for mediation by the court. The ACO does not report case-identifiable information to the court, and the court's docket contains no record of the scheduling of a conference.

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

**Sanctions** Upon failure of a party or attorney to comply with the provisions of the conference program rules, the court may assess reasonable expenses (including attorneys' fees) caused by the failure, assess all or a portion of the appellate costs, dismiss the appeal, or take such other appropriate action as the circumstances warrant. If the appellant has not timely filed the civil appeal statement and other documents required by the court's rules, the clerk may dismiss the appeal after notice.

#### CONFERENCE ATTORNEY STAFFING

**Assignment of Cases** Each conference is conducted by a conference attorney employed by the court.

**Qualifications and Training** The conference attorneys have extensive trial and appellate experience, as well as significant training and experience in mediation.

**Recusal** The Code of Conduct for Judicial Employees applies.

## PROGRAM ADMINISTRATION

### Organization and Management

The staff of the Appellate Conference Office consists of two conference attorneys and a conference administrator. The senior conference attorney manages the program and reports to the circuit executive on administrative matters and to the chief judge on policy matters. For operational purposes, the office is a separate unit of the court and is independent of the court in the following respects: the office is solely responsible for selecting cases for the program, does not report to the court concerning any particular case, and keeps confidential all communications in program cases.

### Reports and Evaluation

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

### FOR MORE INFORMATION CONTACT:

Stephen O. Kinnard  
Senior Conference Attorney  
404-730-2820

# ELEVENTH CIRCUIT APPELLATE CONFERENCE PROGRAM

United States Court of Appeals  
Eleventh Judicial Circuit  
Atlanta, Georgia

## CONTENTS

Summary Description of the Appellate Conference Program .....	1
Program Objectives .....	1
Program Staff .....	1
Program Settlements and Settlement Rate .....	1
Program Operation .....	2
Program Demand .....	3
11th Cir. R. 33-1 .....	4
Filing Civil Appeal Statement .....	4
Portions of Record to Accompany Completed Civil Appeal Statement .....	5
Conference .....	6
Conference Order .....	7
Filing Deadlines .....	7
Noncompliance Sanctions .....	7
Civil Appeal Statement Form .....	8
Notice of Appellate Conference .....	10
Appellate Conferences .....	11
Case Selection .....	11
Conference Scheduling and Format .....	12
What Participants Can Expect .....	13
What the Court Expects .....	13
Mandatory Participation--Voluntary Settlement .....	14
Confidentiality .....	15
Some Case Evaluation Factors .....	16
Case Disposition Time Tables .....	17
Notable Eleventh Circuit Procedural Decisions .....	18
Illustrative Standards of Review in Civil Cases .....	19
Notice of Post-Settlement Dismissal Procedures .....	26
Conference Attorney Process (flow chart) .....	27

March 1996

*United States Court of Appeals  
for the Eleventh Circuit*

***SUMMARY DESCRIPTION OF THE APPELLATE CONFERENCE OFFICE***

**Program Objectives**

The Appellate Conference Office (ACO) was created in August 1992 to implement Eleventh Circuit Rule 33-1, effective October 1, 1992, and to add a new dimension to resolving civil disputes in the Eleventh Circuit Court of Appeals. The program has the following objectives:

- (a) To offer parties and counsel a confidential, risk-free opportunity to evaluate their case with an informed, neutral mediator and to explore all possibilities for voluntary settlement;
- (b) To narrow and refine the issues on appeal as much as possible and assist in the resolution of any procedural issues; and
- (c) To bring the bench, bar, and public closer together through utilization of a dispute resolution process that is convenient, economical, and flexible.

**Program Staff**

The staff of the office presently consists of two conference attorneys and a conference administrator. Legal interns from the Northeastern University School of Law's Program of Cooperative Legal Education also assist as law clerks for the conference attorneys.

**Program Settlements and Settlement Rate**

The primary function of the office is to mediate and settle cases while they are pending appeal. The settlement rate for the program cases that have terminated has been consistently over 50%. The program also settles cases pending trial.

## Program Operation

The program operates as follows:

(a) It is a two-tier program that permits litigants to pursue simultaneously a resolution of their dispute by legal decision or by voluntary settlement.

(b) The ACO, for operational purposes, is independent of the appellate court in the following respects:

(1) The ACO is solely responsible for selecting a cross-section of eligible cases for the program. To date, the ACO can handle only about 25% of the eligible cases with the current staff. If any party wants its case in the program, however, the case is automatically included.

(2) The ACO does not report to the court concerning any particular case.

(3) All communications in the cases are kept confidential by the ACO.

Parties and their counsel may communicate *ex parte* with the ACO at any time.

(c) The program is a *process* that may continue until the court decides the issues on appeal. If the attorneys or parties are not in the greater Atlanta area, the initial mediation conference is by telephone, initiated by the ACO, and may last from one to three hours. There is extensive follow-up activity in almost all cases: additional telephone calls, in-person conferences, and *ex parte* conferences with one party. Initial in-person conferences are also frequent. The conference attorney will also travel throughout the circuit to conduct initial and follow-up in-person conferences, at no expense to the parties. The settlement rate in these circumstances is particularly high.

(d) The ACO will also mediate *related* trial court cases, frequently in an attempt to achieve a "global settlement" of various lawsuits.

### Program Demand

One of our objectives in the Eleventh Circuit is to promote this particular dispute resolution process (whether or not the case settles). One indication of how the program is being received by the bar and public is the demand for its services, and there is considerable demand for the program. The demand has been measured by the number of times counsel contacted the ACO to request that a case that had not been selected for the program or had not yet reached the ACO nonetheless be included in the program. Since the program's inception, we have received numerous requests from counsel who had prior experience in the program or had heard about the program as a result of the ACO's publicity efforts. All requests are granted as a matter of ACO policy.

*United States Court of Appeals  
for the Eleventh Circuit*

**ELEVENTH CIRCUIT RULE 33-1**

**11th Cir. R. 33-1. Appellate Conference Program**

(a) **Filing Civil Appeal Statement.**

A Civil Appeal Statement is required in all civil cases, except as provided in section (a)(3) below.

(1) Civil appeals from United States district courts. The clerk of the district court shall mail an Eleventh Circuit Civil Appeal Statement form to the appellant(s) when the notice of the filing of a notice of appeal is mailed pursuant to FRAP 3(d). The appellant(s) shall file with the clerk of the court of appeals, with service on all other parties, an original and one copy of a completed Civil Appeal Statement within 21 days after filing the notice of appeal in the district court. The completed Civil Appeal Statement shall set forth information necessary for an understanding of the nature of the appeal and shall be accompanied by the portion of the district court record described in 11th Cir. R. 33-1(b)(1). Any appellee may file an original and one copy of a response with the court of appeals within seven days of the receipt of the completed Civil Appeal Statement and shall serve a copy of the response on all other parties.

(2) Review of administrative agency orders and appeals from the United States Tax Court. The clerk of the court of appeals shall mail to the appellant(s)/petitioner(s) an Eleventh Circuit Civil Appeal Statement form, which will accompany the notification to the parties that the case has been docketed. The appellant(s)/petitioner(s) shall file with the clerk of the court of appeals, with service on all other parties, an original and one copy of a completed Civil Appeal Statement within 21

days from the date the form was transmitted by the clerk of the court of appeals. The completed Civil Appeal Statement shall set forth information necessary for an understanding of the nature of the appeal or petition and shall be accompanied by the portion of the record described in 11th Cir. R. 33-1(b). Any appellee/respondent may file an original and one copy of a response with the court of appeals within seven days of the receipt of the completed Civil Appeal Statement and shall serve a copy of the response on all other parties.

(3) A Civil Appeal Statement is not required to be filed in (1) appeals or petitions in which the appellant/petitioner is proceeding without the assistance of counsel or in which the appellant/petitioner is incarcerated and (2) appeals from habeas corpus actions filed under 28 U.S.C. §§ 2241, 2254, and 2255.

(4) Availability of Civil Appeal Statement forms. Copies of the Civil Appeal Statement form are available in the clerk's office of each district court within the Eleventh Circuit and may also be obtained from the clerk of the court of appeals.

(b) Portions of Record to Accompany Completed Civil Appeal Statement.

(1) Civil appeals from United States district courts and the United States Tax Court. The appellant shall file with the completed Civil Appeal Statement two copies of the following portions of the district court or tax court record:

- (i) the judgment or order appealed from;
- (ii) any other order or orders sought to be reviewed, including, in bankruptcy appeals, the order(s) of the bankruptcy court appealed to the district court;
- (iii) any supporting opinion, findings of fact, and conclusions of law filed by the court;
- (iv) the magistrate judge's report and recommendation, when appealing a court order adopting same in whole or in part; and

(v) findings and conclusions of an administrative law judge, when appealing a court order reviewing an administrative agency determination involving same.

(2) Review of administrative agency orders. The petitioner shall file with the completed Civil Appeal Statement two copies of the following portions of the agency record:

(i) the agency docket sheet, or index of documents comprising the record, if one exists,

(ii) any order or orders sought to be reviewed; and

(iii) any supporting opinion, findings of fact, and conclusions of law filed by the agency, board, commission, or officer.

(c) Conference.

(1) An active or senior judge of the court of appeals or a conference attorney appointed by the court may direct counsel for the parties in a case to attend one or more conferences, in person or by telephone. The topics addressed at the conference(s) include the possibility of settlement, simplification of the issues, and in cases in which oral argument is to be heard, the issues to be argued, sequence of and time permitted for oral argument, as well as any other matters the judge or conference attorney determines may aid in the disposition of the appeal. Parties may also be permitted or required to attend. Such conference(s) shall be conducted by the judge or conference attorney. Prior to a conference, counsel shall secure the broadest authority possible to settle the appeal or agree on any case management matters. Counsel for any party may also request a conference in a case if he or she thinks it would be helpful. Such requests will not be revealed by the court or the conference attorney to opposing counsel without permission of the requesting party.

(2) A judge who participates in a conference or becomes involved in settlement discussions pursuant to this rule will not sit on a judicial panel that deals with that case.

(3) Statements and comments made during a conference and subsequent discussions related thereto shall be confidential, except to the extent disclosed by the conference order entered pursuant to 11th Cir. R. 33-1(d), and shall not be disclosed by the conference judge or conference attorney or by counsel in briefs or argument to the court.

(d) Conference Order. At the conclusion of the conference(s) an order may issue controlling the subsequent course of the appeal.

(e) Filing Deadlines. The filing of a Civil Appeal Statement or the scheduling of a conference does not extend the time for ordering any necessary transcript (pursuant to 11th Cir. R. 10-1) or for filing briefs (pursuant to 11th Cir. R. 31-1). Such time may be extended to comply with these rules if there is a substantial probability the case will settle and the extension will prevent the unnecessary expenditure of time and resources by counsel, the parties, and the court.

(f) Noncompliance Sanctions.

(1) If the appellant or petitioner has not taken the action specified in paragraph (a) of this rule within the time specified, the appeal or petition may be dismissed by the clerk of the court of appeals after appropriate notice pursuant to 11th Cir. R. 42-1.

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

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT  
CIVIL APPEAL STATEMENT FORM**

PLEASE TYPE OR PRINT. ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:	DISTRICT: NAME OF JUDGE:
	DATE COMPLAINT FILED: DISTRICT COURT DOCKET NUMBER:
	DATE NOTICE OF APPEAL FILED: IS THIS A CROSS APPEAL? <input type="checkbox"/> Yes <input type="checkbox"/> No
	HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, STATE: CASE NAME: CITATION: DOCKET NUMBER:

ATTORNEYS FOR:	NAME	ADDRESS	TELEPHONE
APPELLANT:			
<input type="checkbox"/> Plaintiff			
<input type="checkbox"/> Defendant			
<input type="checkbox"/> Other (Specify)			
APPELLEE:			
<input type="checkbox"/> Plaintiff			
<input type="checkbox"/> Defendant			
<input type="checkbox"/> Other (Specify)			

CIRCLE THOSE ITEMS BELOW THAT APPLY.

**A. JURISDICTION**

**B. DISTRICT COURT DISPOSITION**

1. FEDERAL	2. APPELLATE	1. STAGE OF PROCEEDINGS	2. TYPE OF JUDGMENT/ ORDER APPEALED	3. RELIEF
Federal Question  Diversity  Other (Specify)	Final Decision of District Court  Interlocutory Decision Appealable as of Right  Interlocutory Order Certified by District Judge (Specify)  Other (Specify)	Pretrial  During Trial  After Trial	Default Judgment Dismissal/Jurisdiction Dismissal/Merits Summary Judgment Declaratory Judgment Judgment/Court Decision Judgment/Jury Verdict Judgment/n.o.v. Directed Verdict Other (Specify)	Damages:  Amount Sought by Plaintiff: \$ _____  Amount Sought by Defendant: \$ _____  Awarded \$ _____ to _____  Injunctions: <input type="checkbox"/> Preliminary <input type="checkbox"/> Permanent <input type="checkbox"/> Granted <input type="checkbox"/> Denied

**C. NATURE OF SUIT**

FEDERAL STATUTES

Antitrust	Communications	Freedom of Information
Bankruptcy	Consumer Protection	Immigration
Banks and Banking	Copyright ( ) Patent or ( ) Trademark	Labor
Civil Rights	Election	OSHA
Commerce Routes	Energy	Securities
Indemnity	Environmental	Social Security
Commodities		

TORTS

Admiralty-Maritime  
Assault Defamation  
FELA  
Product Liability  
Warranty

CONTRACTS

Admiralty-Maritime  
Arbitration  
Commercial  
Employment  
Insurance  
Negotiable Instruments

OTHER

Arbitration  
Atty Disqualification  
Class Action  
Counsel Fees  
Forfeiture—Penalty  
Real Property  
Shareholder Derivative Transfer  
Other: Specify

**D. GENERAL**

BASED ON YOUR PRESENT KNOWLEDGE:

(1) DOES THIS APPEAL INVOLVE A QUESTION OF FIRST IMPRESSION? ( ) Yes ( ) No

WHAT IS THE ISSUE YOU CLAIM IS ONE OF FIRST IMPRESSION?

(2) WILL THE DETERMINATION OF THIS APPEAL TURN ON THE INTERPRETATION OR APPLICATION OF A PARTICULAR CASE OR STATUTE? ( ) Yes ( ) No

IF YES, PROVIDE:

CASE NAME/STATUTE

CITATION

DOCKET NUMBER, IF UNREPORTED

(3) IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT OR ANY OTHER COURT OR ADMINISTRATIVE AGENCY THAT

(A) ARISES FROM SUBSTANTIALLY THE SAME CASE OR CONTROVERSY AS THIS APPEAL?  
( ) Yes ( ) No

(B) INVOLVES AN ISSUE THAT IS SUBSTANTIALLY THE SAME, SIMILAR OR RELATED TO AN ISSUE IN THIS APPEAL?  
( ) Yes ( ) No

IF YES, PROVIDE:

CASE NAME:

CITATION:

DOCKET NUMBER, IF UNREPORTED

COURT OR AGENCY

(4) WILL THIS APPEAL INVOLVE A CONFLICT OF LAW:

(A) WITHIN THE ELEVENTH CIRCUIT? ( ) Yes ( ) No

(B) AMONG CIRCUITS? ( ) Yes ( ) No

IF YES, EXPLAIN BRIEFLY:

ISSUES PROPOSED TO BE RAISED ON APPEAL, INCLUDING JURISDICTIONAL CHALLENGES:

THIS IS TO CERTIFY THAT THIS CIVIL APPEAL STATEMENT FORM WAS MAILED TO THE CLERK OF THE U. S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND A COPY THEREOF SERVED ON EACH PARTY OR THEIR COUNSEL OF RECORD, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
SIGNATURE OF COUNSEL

APPELLATE CONFERENCE OFFICE  
**UNITED STATES COURT OF APPEALS**  
ELEVENTH JUDICIAL CIRCUIT  
56 FORSYTH STREET, NW  
ATLANTA, GEORGIA 30303

STEPHEN O. KINNARD  
DIRECTOR AND SENIOR CONFERENCE ATTORNEY

TEL. 404-730-2820  
FAX 404-331-2663

MORI IRVINE  
CONFERENCE ATTORNEY

date ~

attorneys ~

Dear Counsel:

Re: Case number ~

Appellate Conference Notice

This appeal has been selected for an appellate conference, pursuant to Eleventh Circuit Rule 33-1. A conference will be held by telephone on day ~, date ~, 1996, at time ~ Eastern Time. The court will initiate the call and contact you at the telephone numbers listed on the Civil Appeal Statement form. Please allow two hours for this conference.

The purposes of the conference are (1) to prevent unnecessary motions or delay by attempting to resolve any procedural problems in the case, (2) to identify and clarify issues presented in the appeal, (3) to explore possibilities of settlement. More detail about appellate conferences is contained in the attached statement.

You have been identified by the court as the attorneys with primary responsibility for this case. You are expected to have authority to respond to settlement proposals that are consistent with your client's interests. If the purposes of the conference would be accomplished more effectively with different or additional attorneys or if this date presents an unavoidable conflict with a previously scheduled court appearance, please advise this office immediately so we can make other arrangements. If you have a brief due before the conference date and would like to discuss an extension, please read Eleventh Circuit Rule 33-1(e) and call this office. If you file a brief before the conference date, please send a copy to this office. If you wish, you may submit a short *confidential* settlement statement to me assessing the case. I will not share your statement with the other side, and it will not become part of the court file.

conference attorney ~

By: Jo Ann Knapp

Attachment

*The United States Court of Appeals  
for the Eleventh Circuit*

**APPELLATE CONFERENCES**

Appellate conferences are conducted pursuant to FRAP 33 and 11th Circuit Rule 33-1. The conferences are designed to address any matter that may aid in the disposition of civil appeals and to reduce the time and expense of the appeals. They are conducted by the Court's conference attorneys. These attorneys have extensive trial and appellate experience as well as significant training and experience in mediation. Judges may participate in the conferences, but rarely do so. These conferences address any procedural questions or problems that are raised by the parties. However, the primary purpose of these conferences is to offer participants a confidential, risk-free opportunity to explore all possibilities for the voluntary disposition of the appeal and the case.

**Case Selection**

The mere filing of a completed Civil Appeal Statement with the Court of Appeals does not mean the case will be automatically selected for a conference. The sheer number of eligible cases--all fully counseled civil cases except prisoner and habeas corpus cases--necessitates a preliminary evaluation by the Appellate Conference Office as to which cases are most suitable for conferences. As a result, if you have not been notified that your case has been selected for a conference and you believe a conference would be beneficial, you are encouraged to request one. Such requests are treated as confidential by the Court and are generally accepted in any fully counseled civil appeal. Cases may also be referred by hearing panels either before or after oral argument.

### Conference Scheduling and Format

Most initial conferences are scheduled before briefing. The lead attorneys will receive written notice of the conference from the Court two to three weeks before the conference date. If all counsel are located in the Atlanta area, the initial conference will be held in person. Otherwise, initial conferences are by telephone with the Court initiating the calls. At the conference attorney's discretion, conferences for cases outside the Atlanta area may be conducted in person. If all the parties agree that an in-person conference would be beneficial in a particular case, counsel is encouraged to contact the Appellate Conference Office to discuss the possibility of scheduling such a conference at a mutually agreeable location.

Conferences are conducted in a series of joint and separate sessions with the conference attorney initially talking with both sides together and then meeting with each side separately. Conferences generally begin with an inquiry as to any procedural questions or problems that can be resolved by agreement. These might include questions about the record excerpts or the need for a specially tailored briefing schedule. Discussion then moves quickly to an explanation by each party of the issues on appeal. The purpose of this discussion is not to decide the case or reach a conclusion about the issues, but to understand the issues and to evaluate the risks--to both sides--on appeal. In many cases a candid examination of the case is helpful in reaching a consensus on the settlement value of the case. This examination may be done in a joint session or with the conference attorney talking privately to each party.

Counsel should allow two hours for initial conferences. In some cases the discussions may go no further. In other cases proposals are generated that require further review. As a result, follow-up discussions may continue for days, weeks, or longer. If negotiations are productive and all parties and the conference attorney agree, briefing may

be postponed for a reasonable time until negotiations are completed. Follow-up telephone or in-person conferences may be scheduled to fully pursue all opportunities for negotiated settlements.

### **What Participants Can Expect**

Generally, participants can expect the conference attorney to lead a considered and sometimes detailed exploration of the merits of the case. The extent of the conference attorney's preparation varies with the amount of information available at the time of the conference. The conference attorney reads all materials submitted by the parties including the authorities cited in the completed Civil Appeal Statement. The conference attorney inquires about settlement and probes for each party's interests, often in private discussion with each side. Every effort is made to generate offers, counteroffers, and alternative settlement options until the parties either settle or know the case cannot be settled. Conferences are relatively informal; however, conferences are official proceedings of the Court.

### **What the Court Expects**

The Court attempts to identify lead counsel for all parties when scheduling these conferences. If a mistake is made, counsel is asked to promptly advise the Conference Office of the correct person to handle the conference. *Considerable time and effort are expended in preparing for and participating in these mediation conferences. This time and effort are wasted and opportunities for settlement lost when the attorneys attending the conference are not the attorneys on whose judgement the client relies when making decisions.* The perceived tactical advantage of sending to the conference an attorney with limited knowledge or authority is more than offset by the lost settlement opportunity.

Lead counsel should come prepared to articulate their views of the merits of the case as well as their clients' interests. Mediation is most productive when counsel are conversant with the pertinent facts and law in a case and are fully aware of their clients' needs. Sessions are not productive when counsel present extreme opening positions, maintain fixed positions, and engage in hard "bottom line" bargaining. Lead counsel should come to the session prepared to negotiate in good faith and should obtain advance authority from their clients to make such commitments as may reasonably be anticipated. In establishing this authority to settle, it is sometimes helpful to keep in mind the case's potential "worst case scenario." By planning for the worst, the attorney will have the authority to settle the case if the mediation results in a settlement opportunity that is more favorable to the client. The conference attorney does not necessarily expect counsel to have absolute settlement authority in every case. Experience has shown, however, that in most cases there is substantial movement from prior settlement positions. This change usually requires further consultation with clients. As a result, counsel may wish to have clients present or available by phone at the time of the conference. Clients will not be required to be present at most initial conferences; however, clients are encouraged to be actively involved in the mediation process. Therefore, they may wish to participate in their conferences.

#### **Mandatory Participation--Voluntary Settlement**

The Court requires the participation of all parties in these conferences. Usually the parties participate through their counsel. Sometimes settlement cannot be achieved without the involvement of individuals or groups who are not parties to the appeal. Such parties may be invited to participate. Because settlement is voluntary, no actions affecting the interest of any party are taken without the consent of all parties. No party shall be

bound by anything said or done at a mediation session unless a settlement is reached. If a settlement is reached, the agreement is reduced to writing and will be binding upon all parties to the agreement.

**Confidentiality**

The Court, by rule and verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the conference attorney, is disclosed to anyone on the Eleventh Circuit Court of Appeals or any other court that might address the merits of the case. This confidentiality rule applies in all cases including those referred for mediation by the Court. The Court *strictly enforces* this rule.

*Further information is available through the Appellate Conference Office, United States Court of Appeals, Eleventh Judicial Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303, telephone 404-730-2820.*

United States Court of Appeals  
for the Eleventh Circuit

**SOME CASE EVALUATION FACTORS**

- **Case Disposition Time Tables**
- **Notable Eleventh Circuit Procedural Decisions**
- **Illustrative Standards of Review in Civil Cases**

U.S. COURT OF APPEALS ELEVENTH CIRCUIT  
 MEDIAN TIME INTERVALS IN MONTHS FOR APPEALS TERMINATED ON THE MERITS AFTER HEARING OR SUBMISSION  
 FOR YEARS ENDING DECEMBER 31

YEAR	TOTAL MERITS TERMS*	FILING NOTICE OF APPEAL TO FILING LAST BRIEF		FILING LAST BRIEF TO HEARING OR SUBMISSION		HEARING TO FINAL DISPOSITION		SUBMISSION TO FINAL DISPOSITION		FILING NOTICE OF APPEAL TO FINAL DISPOSITION		FILING IN LOWER COURT TO FINAL DISPOSITION IN APPELLATE COURT	
		NUM+	INTV#	NUM+	INTV#	NUM+	INTV#	NUM+	INTV#	NUM+	INTV#	NUM+	INTV#
<u>ALL CASES</u>													
1994	2,987	2,551	7.9	2,622	4.3	1,065	2.4	1,922	1.6	2,860	14.8	2,880	29.5
1993	2,694	2,356	7.3	2,417	3.8	1,053	1.8	1,841	1.6	2,558	13.9	2,558	27.6
<u>PRISONER PETITIONS</u>													
1994	513	448	7.4	448	4.9	77	2.4	436	1.8	513	14.9	513	30.0
1993	465	409	6.9	409	3.5	60	1.5	405	1.7	465	12.8	465	27.8
<u>OTHER CIVIL</u>													
1994	989	860	5.8	860	4.3	472	2.3	517	1.6	989	12.5	989	30.9
1993	868	800	5.3	800	3.8	488	2.3	380	1.5	868	11.9	868	30.3
<u>CRIMINAL</u>													
1994	1,301	1,200	10.5	1,200	4.0	452	2.4	849	1.7	1,301	17.0	1,301	29.3
1993	1,182	1,110	9.4	1,110	3.8	440	1.2	742	1.7	1,182	16.1	1,182	26.2
<u>ADMINISTRATIVE AGENCY -</u>													
1994	78	-	-	70	4.2	34	0.7	44	1.6	-	-	-	-
1993	72	-	-	61	4.0	34	1.0	38	1.1	-	-	-	-
<u>BANKRUPTCY</u>													
1994	57	45	5.4	45	3.9	29	3.2	28	1.0	57	11.1	57	21.5
1993	41	37	5.3	37	3.9	30	1.1	11	1.7	41	11.4	41	22.5

\* TERMS. = Terminations. + NUM = Number of Merits Terminations. # INTV = Interval Expressed in Months.  
 SOURCE: AO Data - AO does not record date of filing in agency cases, therefore some time intervals are not available.

**Notable Eleventh Circuit Procedural Decisions**

(a) *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989): This case states the standards for supplementing the record on appeal.

(b) *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976): Motions under Fed.R.Civ.P. 60 (relief from judgments) should be filed in the district court even if the case is on appeal. The district court may either certify that it is inclined to grant the motion, or it may deny the motion. If the district court certifies that it is inclined to grant the motion, then the proper procedure is to file a motion for remand in this court.

(c) *Davidson v. City of Avon Park*, 848 F.2d 172, 174 n. 4 (11th Cir. 1988): This case states the proper procedure for filing an attorney's fee motion in this court. The attorney's fee motion must be filed within 14 days of the opinion.

Illustrative Standards of Review in Civil Cases

See Fed.R.App.P. 28(a)(5) (amendment effective 12/1/93) and 11th Cir. R. 28-2(h)(iii).

Appealed IssueStandard of Review

trial court's finding of fact

clearly erroneous: *Newell v. Prudential Insurance Co.*, 904 F.2d 644, 649 (11th Cir. 1990)

trial court's conclusions of law

*de novo* review: *Id.* and *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 1221-22 (1991)

ruling of civil contempt

clearly erroneous: *Therault v. Carlson*, 495 F.2d 390 (5th Cir.), *cert. denied*, 419 U.S. 1003 (1974)

assessment of compensatory damages

clearly erroneous: *Tillery v. Hull & Co.*, 876 F.2d 1517, 1520 (11th Cir. 1989)

assessment of punitive damages

plenary/*de novo* review: *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981) (question of law)

choice of law

plenary/*de novo* review: *American Family Life Assurance v. United States Fire Co.*, 885 F.2d 826, 830 (11th Cir. 1989)

dismissal for lack of personal jurisdiction

plenary/*de novo* review: *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990), and *Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912, 916 (11th Cir. 1989)

dismissal for lack of subject matter jurisdiction

plenary/*de novo* review: *Fitzgerald v. Seaboard System, R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985)

**Illustrative Standards of Review in Civil Cases**

- dismissal for failure to state a claim**                      plenary/*de novo* review: *Pataula Electric Membership Corp. v. Whitworth*, 951 F.2d 1238, 1240 (11th Cir. 1992)
- dismissal of state claim due to preemption**                      plenary/*de novo* review: *O'Reilly v. Ceuleers*, 912 F.2d 1383, 1385 (11th Cir. 1990)
- contract interpretation**                      plenary/*de novo* review: *Zaklama v. Mt. Sanai Medical Center*, 906 F.2d 650, 652 (11th Cir. 1990)
- statutory interpretation**                      plenary/*de novo* review: *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990)
- ambiguity of a contract**                      plenary/*de novo* review: *International Bhd. of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, 1561 (11th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989), and *Stewart v. KHD Deutz of America Corp.*, 908 F.2d 698, 701-702 (11th Cir. 1993)
- interpreting prior Court of Appeals decisions**                      plenary/*de novo* review: *Alabama ex. rel. Siegelman v. United States Environmental Protection Agency*, 925 F.2d 385, 387 (11th Cir. 1991)
- denial of motion for JNOV review**                      plenary/*de novo* review: *MacPherson v. University of Montevallo*, 922 F.2d 766, 770 (11th Cir. 1991), and *Hampton v. International Business and Mercantile Reassurance Co.*, 909 F.2d 1577, 1581 (11th Cir. 1990). Reversal is appropriate when evidence points so strongly in favor of one party that reasonable persons could not reach a contrary verdict. *Id.*
- grant of motion for JNOV**                      plenary/*de novo* review: *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). *See also McPherson*, *supra*.
- denial of motion for new trial**                      abuse of discretion: *Hessen v. Jaguar Cars*, 915 F.2d 641, 644-45 (11th Cir. 1990)

denial of motion for relief from final judgment

abuse of discretion: *High v. Zant*, 916 F.2d 1507, 1509 (11th Cir. 1990), *cert. denied*, 500 U.S. 938, 111 S.Ct. 2069 (1991)

granting of summary judgment

plenary/*de novo* review: *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1559 (11th Cir. 1990)

denial of summary judgment

abuse of discretion: *Griffin v. Air Products and Chemical, Inc.*, 883 F.2d 940, 943 (11th Cir. 1989)

denial of summary judgment on grounds of qualified immunity

plenary/*de novo* review: *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985)

denial of summary judgment based on state action immunity, title 15

plenary/*de novo* review: *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992)

transfer of venue

abuse of discretion: *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1248 (11th Cir. 1991)

class certification

abuse of discretion: *Ray v. United States Department of Justice*, 908 F.2d 1549, 1557 (11th Cir. 1990), *rev'd on other grounds*, 112 S.Ct. 541 (1991)

excluding witnesses

abuse of discretion: *Port Terminal and Warehousing v. John S. James Co.*, 695 F.2d 1328, 1334-35 (11th Cir. 1983)

admission or exclusion of expert testimony

abuse of discretion: *Increase Minority Participation by Affirmative Change Today, Inc. v. Firestone*, 893 F.2d 1189, 1195 (11th Cir.), *cert. denied*, *Secretary of Florida v. Walker*, 498 U.S. 847, 111 S.Ct. 133 (1990)

evidence rulings

abuse of discretion: *United States v. Cohen*, 888 F.2d 770, 774 (11th Cir. 1989), *U.S. v. Abel*, 469 U.S. 45 (1984), and *U.S. v. Penn*, 721 F.2d 762 (11th Cir. 1983)

enforcing or modifying a pretrial order

abuse of discretion: *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1019 (11th Cir. 1982)

denial of motion for leave to amend a complaint

abuse of discretion: *Rosen v. TRW, Inc.*, 979 F.2d 191, 194 (11th Cir. 1992), *Thomas V. Farmville Mfg. Co. Inc.*, 705 F.2d 1307 (11th Cir. 1983)

discovery rulings

abuse of discretion: *Landry v. Air Line Pilots Ass'n Int'l*, 892 F.2d 1238, 1270 n. 114 (5th Cir. 1990)

interpretation of consent decree

plenary/*de novo* review: *Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992)

denial of request for modification of a consent decree

abuse of discretion: *Id.*

grant of preliminary injunction

abuse of discretion: *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992)

denial of preliminary injunction

abuse of discretion: *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989)

imposition of Rule 11 sanctions

abuse of discretion: *Donaldson v. Clark*, 819 F.2d 1551, 1556 (1987)

district court review of bankruptcy court rulings of law

plenary/*de novo* review: *In Re Ebblar Furniture & Appliances, Inc.*, 804 F.2d 87, 89 (7th Cir. 1986)

challenge to jury instructions

Do the instructions create a substantial and ineradicable doubt that the jury may have been misled in its deliberations? Reversal is indicated when the charge is erroneous and prejudicial. *Wood v. President & Trustees of Spring Hill College*, Slip No. 91-7762 (11th Cir. 1992). *Natl. Indep. Theatre Exhibitors, Inc. v. Charter Fi. Group, Inc.*, 747 F.2d 1396, 1402-03 (11th Cir. 1984)

agency appeals generally

great deference to agency interpreting its own regulations: *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 801 (1965), and *McKee v. Sullivan*, 903 F.2d 1533, 1538 (11th Cir. 1990)

social security appeals

assuring that final decisions followed the proper legal standards and are supported by substantial evidence: *Id.*

N.E.P.A. actions

arbitrary and capricious: *North Buckhead Civic Assoc. v. Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990)

award of attorney fees

abuse of discretion: *Matter of Trinity Industries, Inc.*, 876 F.2d 1485 (11th Cir. 1989)

denial of motion to alter or amend judgment

abuse of discretion: *Thomas v. Farmville Manufacturing Co., Inc.*, 705 F.2d 1307 (11th Cir. 1983)

damages award

clearly erroneous: *Meader By and Through Long v. U.S.*, 881 F.2d 1056 (11th Cir. 1989)

grant of permanent injunction

abuse of discretion: *Centel Cable Television Company of Florida v. Thos. J. White Development Corp.*, 902 F.2d 905 (11th Cir. 1990)

Definitions of Common Standards of Review\*

(\*taken from Black's Law Dictionary, Sixth Edition, 1990)

<b>plenary</b>	Full, entire, complete, absolute, perfect, unqualified.
<b>de novo</b>	Anew, afresh, a second time.
<b>abuse of discretion</b>	<p>The clearly erroneous conclusion and judgment--one that is clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; an error of law . . . . A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unreasonable departure from considered precedents and settled judicial custom, constituting error of law . . . .</p> <p>A judgment or decision by an administrative agency or judge that has no foundation in fact or law. "Abuse of discretion" by a trial court is any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to matter submitted . . . .</p>
<b>clearly erroneous</b>	Findings when based upon substantial error in proceedings or misapplication of law . . . or when unsupported by substantial evidence, or contrary to clear weight of evidence or induced by erroneous view of the law. As a basis for appellate review, a finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed . . . .
<b>plain error</b>	. . . error affecting substantial rights maybe considered on motion for new trial or an appeal though not raised in trial court if manifest injustice or miscarriage of justice has resulted . . . but there must be a sound, substantial manifestation, a strong, clear showing, that injustice or miscarriage of justice will result if the rule is not invoked . . . .

Illustrative Standards of Review in Civil Cases

See also United States v. Hope, 901 F.2d 1013, 1020 (11th Cir. 1990) ("Plain errors are obvious and substantial errors which seriously affect the fairness, integrity or public reputation of judicial proceedings.").

**substantial evidence**

Such evidence that a reasonable mind might accept as adequate to support a conclusion . . . .  
Evidence that a reasonable mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance . . . .

**arbitrary and capricious**

Willful and unreasonable action without consideration or in disregard of facts of law without determining principle.

APPELLATE CONFERENCE OFFICE

UNITED STATES COURT OF APPEALS

ELEVENTH JUDICIAL CIRCUIT

56 FORSYTH STREET, NW

ATLANTA, GEORGIA 30303

STEPHEN O. KINNARD  
DIRECTOR AND SENIOR CONFERENCE ATTORNEY

TEL. 404-730-2820  
FAX 404-331-2663

MORI IRVINE  
CONFERENCE ATTORNEY

date ~

attorneys ~

Dear Counsel:

Re: Case number ~

Notice of Post-Settlement Dismissal Procedures

Counsel has informed me that the parties have reached a settlement in this matter. Once all parties agree on the terms of settlement, they should then file a joint (or agreed) motion to dismiss, pursuant to Fed.R.App.P. 42(b) and 11th Cir.R. 42-1(a). This motion should address the following:

1. Whether the dismissal pertains to all parties and claims on appeal;
2. Whether the appeal is to be dismissed without prejudice (which may be granted by the Clerk) or with prejudice (which must be ruled upon by a panel of three judges);
3. Whether the parties are to bear their own costs or another agreed apportionment.

The motion to dismiss either should be signed by all parties or, if submitted by one party, should contain an explicit statement that all other parties to the settlement agreement consent. If submitted by only one party, the motion should be submitted by the appellant. All motions must be accompanied by a certificate of service and a certificate of interested parties. See 11th Cir.R. 27-1(a)(1).

Settlement does *not* automatically stay any of the actions required under the rules to be timely performed, including ordering necessary transcripts and briefing. If some action on behalf of your client will be due prior to a motion to dismiss being *presented and decided*, as discussed above, you should also file a separate motion for an extension of time to complete that action or file a motion to stay proceedings on appeal (not to exceed 90 days) pending completion of settlement. If you need an extension or stay of the briefing schedule, you should send your request directly to me.

If you have any questions concerning this process, please call Sharon Evans (Case Initiation Section Supervisor) at 404-331-0758 if the briefing schedule in your case *has not* issued, or Brenda McConnell (Case Closing Section Supervisor) at 404-331-3836 if the briefing schedule in your case *has* issued.

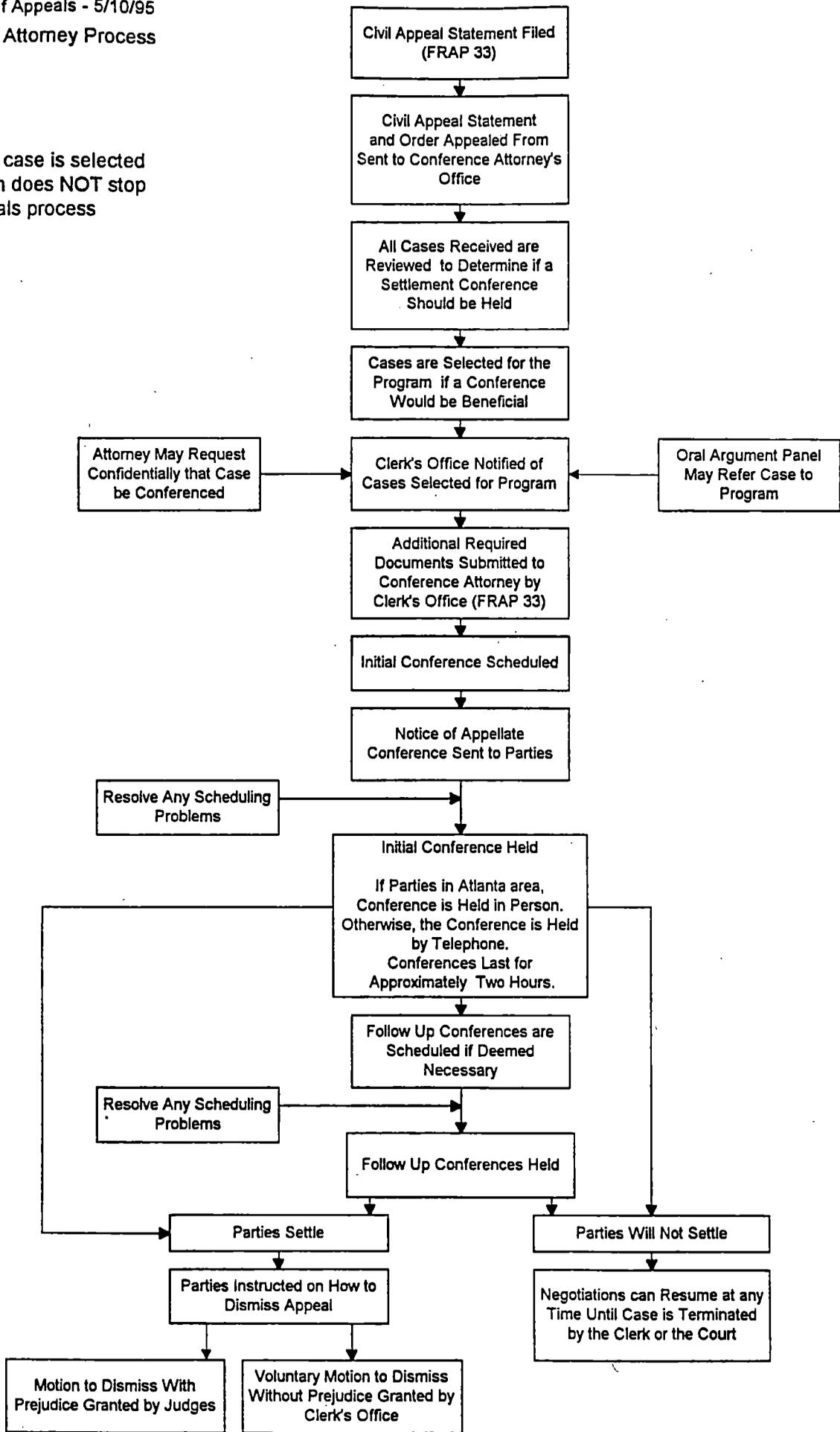
conference attorney ~

By: Jo Ann Knapp

c: Circuit Clerk

U.S. Court of Appeals - 5/10/95  
 Conference Attorney Process

The fact that a case is selected for the program does NOT stop the appeals process



# COURT OF APPEALS

## MEMORANDUM

---

**TO: ALL JUDGES**  
**FROM: ED JOHNSON**  
**SUBJ: APPELLATE SETTLEMENT CONFERENCE**  
**DATE: SEPTEMBER 29, 1993**

---

As you will recall, the State Bar of Georgia, acting in our behalf, was kind enough to conduct a survey of trial lawyers regarding the Appellate Settlement Conference. At the same time, we conducted our own survey of the appellate courts in the other 49 states to see what they are doing in this area. I have done a compilation of the results of both surveys so that you could see them for yourself. Your copies are attached. I have the raw data available in my office should you wish to look through it.

In early November, Judge Birdsong, Judge Pope and I will meet with the four former judges (Shulman, Deen, Sognier, and Undercoffler) who have done so much work for the settlement conference to get their ideas in our effort to determine what changes, if any, are necessary to make the program successful. It goes without saying that you are welcome to take part in these discussions if you are interested. I will give you the date when it is set.

Please take a moment to read the survey results and give us the benefit of your thoughts and suggestions.

APPELLATE SETTLEMENT PROGRAM SURVEY

Active Program

SUPREME CT    APPEALS CT    AUTOMATED    MANDATORY  
DOCKETING

Alabama, Montgomery	Yes	No		No
Alaska, Anchorage	No		Yes	
Arizona, Phoenix	No	No	Yes/-	
Arkansas, Little Rock		No	No	
California	No	Yes	-/Yes	No
Canada	No response			
Colorado, Denver	No	*No	Yes	
Connecticut	Yes	Yes	Yes/Yes	Yes/Yes
Delaware, Wilmington	No			
District of Columbia, Wash.	No			Yes
Florida		*No		
Hawaii	No			
Idaho	Yes		Yes	No
Illinois, Chicago	No	No	-/Yes	
Indiana, Indianapolis		No		
Iowa, Des Moines	No	No	No/No	
Kansas, Topeka	No	No		
Kentucky	Yes	Yes	Yes/No	Yes/Yes
Louisiana, New Orleans	No	No		
Maine, Augusta	No	No		
Maryland		Yes	-/Yes	
Massachusetts, Boston	No	Yes	Yes/No	-/Yes
Michigan, Southfield	No			
Minnesota	No response			
Mississippi, Jackson	No			
Missouri	No	Yes	No/No	No
Montana	No response			
Nebraska, Lincoln	*No	No	Yes	
Nevada	Yes		No	No
New Hampshire, Concord	No response			
New Jersey		Yes	Yes	Yes and No
New Mexico		Yes	No	Yes and No
New York		Yes	Yes	Yes
North Carolina, Charleston	No	*No	Yes	
North Dakota	No			
Ohio	No	Yes	No	Yes
Oklahoma, Oklahoma	No		No	
Oregon, Salem		No	Yes	
Pennsylvania	No response			
Puerto Rico	No response			
Rhode Island	Yes and no		Yes	Yes
South Carolina, Columbia	No		No	
South DeKota	Yes		Yes	No
Tennessee, Nashville	No	No	No	
Texas	No		Yes	
Utah	*No	No	No	
Vermont	No response			
Virgin Islands	No response			
Virginia, Richmond	No			
Virginia, West	No response			
Washington, Tacoma	No		Yes	
Wisconsin, Madison	*No	No		
Wyoming, Cheyenne	No		No	

\*=discontinued program

APPELLATE SETTLEMENT CONFERENCE SURVEY

1. In your law practice, do you handle civil trials and appeals?

Yes (1018) No (58)

2. Are you aware of the settlement conference program in the Court of Appeals?

Yes (727) No (317)

3. Have you used the settlement conference program?

Yes (189) No (913)

4. If yes, what was the outcome of the settlement conference in your case.

Settled (61) Not settled (120)

5. If no, why did you decide not to take advantage of the settlement conference Program?

(see attached survey)

6. Please give your general comments regarding the settlement conference program.

(see attached survey)

7. Specifically, in what ways could the program be improved?

(see attached survey)

8. Should participation in the Appellate Settlement Conference be required in all cases docketed in the Court of Appeals as part of the normal appellate process (yes or No) Why?

Yes 237

No 572

No Opinion 337

(see attached survey)

Judge Johnson



*The Court of Appeals  
of the  
State of Georgia  
Atlanta, Georgia 30334*

CHAMBERS OF  
CHIEF JUDGE DOROTHY TOTH BEASLEY

PHONE (404) 656-3457  
FAX (404) 651-6187

May 30, 1996

Stephen O. Kinnard, Esq.  
Director and Senior Conference Attorney  
Appellate Conference Office  
United States Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

Dear Steve:

It was so generous of you and Mori to come and explain to us the successful Appellate Mediation Program which you have instituted and developed in the Eleventh Circuit. We appreciate very much your taking the time to organize the presentation for us and to bring many helpful materials so we could become acquainted with your program. We are grateful for your willingness to work with this Court to develop such a program, if it is feasible.

Thank you, too, for immediately providing the information we asked for about costs. That, of course, will be one of the factors we must be concerned with. We found that our Appellate Settlement Program was too expensive for the results we were achieving.

I have asked Judge Edward Johnson to serve with Presiding Judge Birdsong and our Court Administrator, Bill Martin, as a committee to investigate this subject further and explore the possibility of our inaugurating such a program to better serve the public in the resolution of the appeals which are brought here. Judge Johnson has agreed, and has actually had experience as a mediator and is trained in the process. Presiding Judge Birdsong will chair the committee. Although there will be some delay due to summer activities and the Olympics, I expect they will be able to focus on this project shortly thereafter.

Thank you for your offer to be of assistance as we press forward.

Sincerely,

Handwritten signature of Dorothy Toth Beasley in cursive script.

DOROTHY TOTH BEASLEY

cc: Presiding Judge A. W. Birdsong, Jr.  
✓ Judge Edward H. Johnson  
Mr. William L. Martin III

<sup>3</sup>The Operation and Maintenance Expense category does not include costs associated with [redacted] and Line Lease (DCN), as set forth in the A.O. estimate, because [redacted] were unable to obtain a breakdown of what those expenses would be for a chambers and a settlement office. We assume those charges would be comparable for a chambers and a settlement office but have not included them in the cost comparison because we were not able to verify our assumption. In any event, the chambers cost estimate is \$3,069 less than the A.O. estimate because of the elimination of FTS and Line Lease charges.

<sup>4</sup>The total here is actually \$3,069 less than the A.O. estimate because of the elimination of FTS and Line Lease charges from the Operation and Maintenance Expense category. See note 3, *supra*.

<sup>5</sup>Clerk's Office expenditures allocable to providing support services to a chambers were calculated by taking our Clerk's total FY 1994 obligations and dividing by a weighted average of active and senior judgeships in the Tenth Circuit.

<sup>6</sup>Staff Attorney expenditures allocable to providing support services to a chambers were calculated by taking our Staff Attorney's total FY 1994 obligations and dividing by a weighted average of active and senior judgeships in the Tenth Circuit.

<sup>7</sup>Library expenditures associated with providing service to a chambers were calculated by taking total Library expenditures for FY 1994, less amounts attributable to lawbook renewals for judges and the Settlement Conference Office, and dividing by the number of judicial officers in the Tenth Circuit.

<sup>8</sup>Circuit Executive expenditures associated with providing service to a chambers were calculated by taking our Circuit Executive's total expenditures for FY 1994, less the amount of Settlement Conference Office expenditures included in the Circuit Executive's budget, and dividing by the number of judicial officers in the Tenth Circuit.

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001-2866

HARRY T. EDWARDS  
CHIEF JUDGE

TELEPHONE (202) 273-0380  
FACSIMILE (202) 273-0119

Dear Attorney:

In May 1987, the United States Court of Appeals for the District of Columbia Circuit initiated an Appellate Mediation Program to encourage settlement of cases or discrete issues in cases, and to simplify briefing and reduce motions activity. The Court also intended that mediation would assist parties by curtailing the expense of protracted appeals and by encouraging the development of creative resolution options that would not otherwise be put forward for consideration and could not be ordered by the Court.

The program has now been in operation for several years and, although it is not used in all cases, is an established part of the appellate process in this circuit. Cases are selected for the program by the Chief Staff Counsel's Office, in collaboration with the Director of Dispute Resolution in the Circuit Executive's Office. Your case has been reviewed, and it has been decided that mediation should be attempted.

The Court requires an attorney or another person with settlement authority for each side to attend all sessions scheduled by the mediator and urges all parties to attend as well. In cases involving the United States or District of Columbia government, senior attorneys on either side of the case may attend mediation sessions so long as attorneys with settlement authority can be easily reached during conference sessions. However, when settlement authority for the United States government rests with an official at the rank of Assistant Attorney General, its equivalent or higher, or with members of an independent agency, or when settlement authority for the District of Columbia government rests with officials above the rank of Corporation Counsel, the requirement that officials be reachable during mediation is waived unless the mediator, after reviewing the mediation papers, so provides in writing. The Court has also approved the issuance of sanctions for failure to attend mediation sessions.

Prior to your first scheduled mediation session, I urge you to talk with your client about the advantages of settlement early in the appellate process. I further request that you and your client seek to develop options for settlement that are consistent with your client's interests and that you enter mediation willing to consider and respond to new options that may be put forward by the other side.

APPELLATE CONFERENCE OFFICE

UNITED STATES COURT OF APPEALS

ELEVENTH JUDICIAL CIRCUIT  
56 FORSYTH STREET, NW  
ATLANTA, GEORGIA 30303

STEPHEN O. KINNARD  
DIRECTOR AND SENIOR CONFERENCE ATTORNEY

TEL. 404-730-2820  
FAX 404-331-2663

MORI IRVINE  
CONFERENCE ATTORNEY

May 14, 1996

The Honorable Dorothy Toth Beasley  
Chief Judge  
The Court of Appeals, State of Georgia  
Atlanta, GA 30334

Dear Chief Judge Beasley:

Re: Appellate Mediation Program

Mori and I greatly appreciated the opportunity to meet with you, Judge Birdsong, and Bill Martin recently to discuss our mediation program.

As I mentioned during our meeting, we would be happy to assist you in any way in either the creation or implementation of an appellate mediation program for your court. We have worked with other courts in this regard and would also be willing to help train any appellate mediators.

I have enclosed for your information a cost comparison of one circuit judgeship with a mediation office comprised of two mediators and one support person. This comparison was developed by the mediation office in the Tenth Circuit U.S. Court of Appeals in Denver, Colorado. This cost comparison is the most recent and the most accurate work that has been done in this area. Since our appellate mediation program is presently comprised of two mediators and one support person, the cost comparison is relatively accurate. The only difference is that our salaries total (\$236,310) is a little higher than their salaries total (\$218,736). I also believe I mentioned in our meeting that the median salary for federal circuit mediators today is \$59,900. The median salary does not include the salaries of the chief circuit mediators, which are considerably higher. I believe if you added the chief circuit mediator salaries to the circuit mediator average, it would probably be closer to \$80,000.

Please contact me if you need any additional information or if we can be of any additional assistance.

Sincerely,



Stephen O. Kinnard

jak  
Enclosure

**COST COMPARISON OF  
CIRCUIT JUDGESHIP AND SETTLEMENT OFFICE<sup>1</sup>**

JUDGESHIP

SETTLEMENT OFFICE

Salaries

Judge	\$141,700
Agency contribution for life insurance, health benefits, Medicare, and Social Security	9,121

Law Clerk, Grade JSP-12/6	48,875
Law Clerk, Grade JSP-12/6	48,875
Law Clerk, Grade JSP-12/6	48,875
Secretary, Grade JSP-11/1	34,954
Assistant Secretary, Grade JSP-10/1	31,815
Agency contribution for F.E.R.S., life insurance, health benefits, Medicare, and Social Security	41,814

Senior Conference Attorney, Grade JSP-16/5	\$ 95,501
Conference Attorney, Grade JSP-16/1	84,266
Secretary, Grade JSP-9/10	38,969

\$ 218,736

Agency contribution for F.E.R.S., life insurance, health benefits, Medicare and Social Security <sup>2</sup>	42,861
--	--------

**SALARIES TOTAL** \$406,029

\$261,597

Operation and Maintenance Expenses

Travel, Judge and staff	25,262
Local Telephone	4,860
Long Distance	900
Postage - Metered/Stamps	9,398
Printing & reproduction	2,615
Printing of opinions	14,935
Maintenance &/or moving of phones	756
Repair & maintenance of office equipment	600
Repair of furniture	3,320
Health services	600
General office supplies	2,500
General office equipment	2,569
Replacement/upgrade of telephones	310
Library	6,667
Furniture and furnishings	3,320

Travel, Mediation Office	848
Local Telephone	3,360
Long Distance	106
Postage - Metered/Stamps	933
Printing & reproduction	245
	0
Maintenance/moving of phones	113
Repair & maintenance of equipment	322
Repair of furniture	100
Health services	300
General office supplies	410
General office equipment	41
Replacement/upgrade of telephones	0
Library	1,725
Furniture and furnishings	0

**O & M EXPENSES TOTAL<sup>3</sup>** \$78,612

\$8,503

Space and Utilities

Rental of space 208,600  
Recurring alterations 8,000

Rental of space (1400 sq.ft. @ \$14/sq.ft.) 19,600

Court Security

Court Security Officer 39,964  
Equipment 1,803

Administrative Office

Salaries and expenses of  
one staff position to support  
every two judgeships 14,607

A.O. ESTIMATE TOTAL<sup>4</sup> \$757,615

\$289,700

Associated Court Costs

Clerk's Office<sup>5</sup> \$145,358  
Staff Attorney<sup>6</sup> 107,602  
Library<sup>7</sup> 8,850  
Circuit Executive<sup>8</sup> 8,895

TOTAL \$1,028,320

\$289,700

PERCENTAGE COMPARISON: OF A.O. ESTIMATE - 38% (\$289,700 ÷ \$757,615)

OF A.O. ESTIMATE &  
ASSOCIATED COURT COSTS - 28% (\$289,700 ÷ \$1,028,320)

---

<sup>4</sup>The annual recurring expenses for a circuit judgeship are based on a February 14, 1995 estimate prepared by the Administrative Office. The estimate for a settlement office is based on the current salaries and the average of the last three years' actual operating expenses in the Tenth Circuit's Settlement Conference Office.

<sup>2</sup>The Operation and Maintenance Expense category does not include costs associated with [redacted] and Line Lease (DCN), as set forth in the A.O. estimate, because [redacted] were unable to obtain a breakdown of what those expenses would be for a chambers and a settlement office. [redacted] assume those charges would be comparable for a chambers and a settlement office but have not included them in the cost comparison because we were not able to verify our assumption. In any event, the chambers cost estimate is \$3,069 less than the A.O. estimate because of the elimination of FTS and Line Lease charges.

<sup>4</sup>The total here is actually \$3,069 less than the A.O. estimate because of the elimination of FTS and Line Lease charges from the Operation and Maintenance Expense category. See note 3, *supra*.

<sup>5</sup>Clerk's Office expenditures allocable to providing support services to a chambers were calculated by taking our Clerk's total FY 1994 obligations and dividing by a weighted average of active and senior judgeships in the Tenth Circuit.

<sup>6</sup>Staff Attorney expenditures allocable to providing support services to a chambers were calculated by taking our Staff Attorney's total FY 1994 obligations and dividing by a weighted average of active and senior judgeships in the Tenth Circuit.

<sup>7</sup>Library expenditures associated with providing service to a chambers were calculated by taking total Library expenditures for FY 1994, less amounts attributable to lawbook renewals for judges and the Settlement Conference Office, and dividing by the number of judicial officers in the Tenth Circuit.

<sup>8</sup>Circuit Executive expenditures associated with providing service to a chambers were calculated by taking our Circuit Executive's total expenditures for FY 1994, less the amount of Settlement Conference Office expenditures included in the Circuit Executive's budget, and dividing by the number of judicial officers in the Tenth Circuit.

## GLOSSARY

**"Program Cases."** These are civil cases that have been selected and scheduled for an appellate conference. Counsel with primary responsibility for each case receive notice of the scheduled conference and details about the purposes of appellate conferences. The notice advises them to come to the conference prepared to articulate their view of the merits of the case as well as their clients' interests and to come with authority to respond to settlement proposals. Thus the parties and their counsel are required to engage in substantial preparation before the conference.

**"Settled Cases."** Although there may be numerous cases that are resolved before or after conference insofar as this program is concerned (counted in paragraphs D and E), for purposes of this report cases counted as "settled" (paragraph D) are only those cases in which a disposition order has been entered that terminates the appeal.

**"Not Settled Cases."** These are program cases that have been terminated by a decision of the court.

- A. Cases in negotiation as of end of last month. These are program cases that have been conferenced and are still in active settlement discussion with the conference attorney.
- B. Cases reviewed but not scheduled for conference. On a monthly basis the two conference attorneys review the eligible civil cases submitted to the Appellate Conference Program by the Clerk's Office and select approximately 20-25 new cases each to be scheduled for initial conferences on their next month's calendar ("program cases"). The cases they review but do not select are counted here.
- C. New cases conferenced. This is the number of initial conferences held for new cases during this period.
- D. Cases terminated from program. This is the number of program cases terminated during this period either by settlement or by decision of the court. The cases that were terminated by settlement are broken down as to the number settled before a scheduled initial conference is held and the number settled after conference. The number settled after conference is also broken down to show how many cases are conferenced and settled in the same month. The cases terminated by decision of the court are counted as "not settled" terminations.
- E. Cases resolved but pending court's termination order. The parties in these cases have informed the conference attorney that they have agreed to resolve their differences and dismiss the appeal; however, as of the reported period a termination order has not yet been entered by the court.
- F. Cases in negotiation as of end of this month. (See A.)
- G. Settlement rate for [current year]. This is the percent of program cases settled or not settled of the total program cases terminated.
- H. Related trial court cases settled. This is the number of related trial court cases settled as a result of the mediation effort and our estimate of jury and nonjury trial court days that were saved.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
FY 1994 BUDGET PROPOSAL TO FUND SETTLEMENT PROGRAM POSITIONS  
AND DISCUSSION PAPER

This proposal seeks funding for attorney and support staff positions for the Ninth Circuit's settlement program.

At the August 1991 court meeting, the judges of the Ninth Circuit approved redesigning the court's existing Conference Program to emphasize settlement,<sup>1</sup> thereby establishing a mediation program in the Ninth Circuit modelled after the programs in the Sixth and Tenth Circuits.<sup>2</sup> The court adopted a goal that settlement be explored at the earliest stages of appellate

---

<sup>1</sup> The court established the original conference program in 1981. The program was explicitly not a settlement program but rather was assigned responsibility for conducting conferences in certain civil cases for purposes of issue simplification and case management. Due to the court's rapidly growing caseload, the program's focus shifted gradually toward settlement.

When the program was created, it was staffed by borrowing staff attorney positions. Four experienced attorneys in the civil motions unit performed conference attorney functions part-time. In 1988, the Conference Program was separated from the civil motions unit and was allocated three full-time staff attorney positions and one support staff position. In 1990, the staff director allocated an additional support staff position to the program.

A full description of the program and its operation as envisioned by the court following the August 1991 court meeting can be found in the Program Description and Operating Procedures submitted with this proposal.

<sup>2</sup> For the short term, the conference attorneys continue to handle case management problems in procedurally complex appeals. As soon as possible, this function will be assigned to an attorney in another court unit. Following this change, the conference attorneys will devote their energies exclusively to mediating settlements. They will handle procedural matters only when they are uncontested and ancillary to their settlement work.

proceedings in as many civil counseled cases as staffing permits.<sup>3</sup> If a case does not settle, conference attorneys will address any jurisdictional problems and, through consensus, develop the most efficient and expeditious plan for disposition of the case.

To maintain continuity in the program and encourage development of mediation skills and expertise, the conference attorneys were exempted from the limited tenure policy applicable to staff attorneys. In addition, the program will be structured to insulate it from other units in the court to ensure confidentiality in the settlement process. Finally, upon the funding of additional positions, the court will be able to decentralize the program and locate conference attorneys in each of the court's three administrative units to provide the program with a local presence and to facilitate more face-to-face settlement conferences.

The court's three current conference attorneys, who remain on

---

<sup>3</sup> An amendment to Ninth Cir. R. 33-1 reflecting these changes has been submitted to the Circuit Rules Committee and is expected to be published this summer. The text of proposed Ninth Cir. R. 33-1 and advisory committee notes and the new Civil Appeals Docketing Statement form are attached to the Conference Program Description and Operating Procedures submitted with this proposal.

When the program was redesigned in August 1991, the court established a unique requirement -- the Civil Appeals Docketing Statement must be filed with the notice of appeal. This will allow the program to make an assessment of settlement potential at the inception of an appeal before any significant resources have been expended in preparation for briefing. The court has instructed the program to schedule conferences within 35 days of the docketing of the appeal. If appellant's brief is filed or no conference scheduling order is entered within 59 days of the docketing of the appeal, a case is presumed released from the program, although requests for conferences will be accommodated when possible.

staff attorney lines, were hired by the court because of their mediation experience. The senior conference attorney has 14 years legal experience and has worked for the court since 1988. The two conference attorneys, who have nine and six years legal experience, have worked for the court since 1989.

In 1990, the Conference Program reported 194 dispositions. In 1991, as a result of the court's support for its settlement efforts, the program increased the number of its dispositions by 50% to 321 dismissals out of 785 cases.<sup>4</sup> Using the standard of 85 appeals per active judge applied by the FJC in its 1985-86 study of the Sixth Circuit Conference Program,<sup>5</sup> and subtracting an expected attrition of 30%, the Ninth Circuit program is producing dispositions at the rate of 2.65 active judges.

The Ninth Circuit is the largest federal court of appeals, in both geographical size and caseload. In calendar year 1991,

---

<sup>4</sup> Included in the 785 cases the program worked on in 1991 are 299 matters selected not for settlement but for complex case management. The program disposed of 45 docket numbers in the case management category. At the end of 1991, 85 cases were pending with settlement discussions ongoing. Subtracting case management cases and dispositions, and pending cases, the program's settlement rate in 1991 was 69%. The program's overall disposition rate in 1991 (including complex case management matters but excluding pending cases) was 46%. These disposition figures compare favorably with the settlement rates reported in 1990 by the Second Circuit (50%) and the Sixth Circuit (43-49%). In its FY 1992 application for funding of a fourth settlement attorney position, the Sixth Circuit reported 330 settlements in 776 cases, for a disposition rate in calendar year 1989 of 42.5%.

<sup>5</sup> J. Eaglin, The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals (Federal Judicial Center 1990), p. 6.

In 1991, the Ninth Circuit terminated 7006 cases. Approximately 56% of the terminations were on the merits, for an actual caseload of 140 cases per active judge. In FY 1990-90, each active judge participated in 340 cases on the merits.

the court's caseload increased by 15% to 7,582 filings, including a 13% increase in civil cases, leaving a pending caseload at the end of 1991 of 8,740 appeals. The court's 1991 statistics indicate that 2,946 docket numbers were opened in the civil counseled category, including agency, tax and bankruptcy cases. The court believes that settlement potential can best be exploited by the exploration of settlement in as many civil counseled cases as the program can handle.<sup>6</sup>

This proposal requests funding for: (1) one senior conference attorney (JSP 16); (2) a maximum of seven conference attorneys (JSP 14); (3) one administrative assistant to the senior conference attorney (JSP 9); and two additional support staff (JSP 7).

We understand that the AO is developing a staffing methodology for the funding of conference attorney positions in all circuits, but that a formal proposal may not be considered and approved by the Committee for some time. In assessing the staffing needs for circuit conference programs, the Committee undoubtedly will consider information regarding the number of cases handled by the individual attorneys in each circuit.

The available data suggests that there is significant variation among the circuits in conference attorney caseload. In

---

<sup>6</sup> In cases that do not settle, the conference attorneys will address jurisdictional issues and work with counsel to develop the most efficient and expeditious plan for disposition of the case. This may include limiting the issues, limiting briefing and defining the record on appeal, or staying the appeal pending some contingency, such as disposition of a related case. Thus, the court derives benefits from the conference attorney's involvement in a case even when settlement does not result.

1990, for example, the Eighth Circuit's Conference Program, which has one attorney, reported working on 139 cases. The Sixth Circuit's Conference Program reported handling 762 cases during the same period, for a per attorney load of 254. At the other end of the spectrum, the Second Circuit reported handling 544 cases per attorney in 1990. The differences in per attorney workload among the circuits can be explained by the different settlement features and formats that distinguish each program.

The Eighth Circuit's program is unique in that participation in a settlement conference is entirely voluntary. Because of the size of the circuit, most conferences are conducted by telephone. By contrast, the Second Circuit orders counsel to appear in person for a settlement conference in conference-eligible cases. Moreover, the conference attorneys in the Second Circuit utilize a quasi-judicial model in conducting settlement conferences in that they are expected to offer their views on the merits of the case. Consequently, the overwhelming number of the program's reported 50% disposition rate results from initial conferences. The Sixth Circuit, on the other hand, is reported to dispose of only 6% of its cases at the initial conference. Like the Second Circuit, the Sixth Circuit orders counsel to appear at settlement conferences, but like the Eighth Circuit, it conducts most conferences by telephone.<sup>7</sup>

---

<sup>7</sup> A description of the conference programs in all of the circuits that have or have had such programs is attached to this proposal. This description was taken from the First Circuit's 1989 application to the Committee for positions for its conference program.

The Ninth Circuit's redesigned program was modelled after the Sixth Circuit's Conference Program. In 1991, the Ninth Circuit's per conference attorney caseload was 262. If the program is allocated sufficient staffing to decentralize, it will use a combination of the other circuits' formats, holding initial mediations in person when it is convenient for counsel, with the remainder of the conferences conducted by telephone. With this approach, the court anticipates that its conference attorneys each can handle at least 300 cases per year.

The court believes that its settlement program can accomplish the goals defined for it with eight attorneys. Using the base of 2,946 program-eligible cases for 1991, and subtracting an estimate of 300 complex civil appeals each year, the per attorney caseload for each of the eight conference attorneys is 330. If the number of attorneys allocated to the program is sufficient to make decentralization feasible,<sup>8</sup> three attorneys and one support staff member will be located in San Francisco to cover the middle administrative unit, the same number will be assigned to Pasadena to cover the southern unit, and two attorneys and one support staff member will be located in Seattle for the northern unit.

The court is sensitive to the significant demands on the limited resources the Committee must allocate. Although the court

---

<sup>8</sup> Because the primary rationale for decentralization is to permit the program to conduct more initial in-person conferences, unless enough attorneys can be assigned to a unit to cover a significant percentage of that unit's caseload, it makes more sense to maintain the program as a centralized unit to conduct initial conferences by telephone. In addition, once the program is subdivided into discrete units, assigning multiple attorneys to each unit will provide back-up.

would like to establish its full settlement program as soon as possible, if resources are not immediately available to fund all positions requested, the court asks that the Committee consider providing sufficient staffing so that various components of the program can be phased in. For example, if the Committee approves six attorney positions for the program, the court can decentralize the program by locating two attorneys in each of the three administrative units. If the Committee approves five attorney positions for the program, the first decentralized unit can be established, with the last unit and full staffing for all units added when resources become available.

The minimum positions required to maintain the program at its current operational level are one senior conference attorney and two conference attorney positions and two support staff positions. If funding for positions to staff the core conference program is not approved, the court will be faced with a difficult resource allocation decision. Because of the competing demands on use of staff attorney lines, one alternative the court must consider is disbanding the Conference Program and reassigning these positions for staff attorney functions.

Excluding the conference attorneys, the staff director and assistant staff director, the Ninth Circuit currently has 28 staff attorney lines, with three additional attorney lines assigned to the Clerk's office to perform inventory functions. Of the 28 staff attorney lines, 13 lines are assigned to the two motions

units, leaving 15 attorneys to work on the merits of lower-weighted appeals which are designated as screening cases.<sup>9</sup> In the past decade, the court has experienced an explosion in its overall caseload, with a marked increase in the screening category.<sup>10</sup>

The court has established a goal that all screening cases be assigned to staff attorneys to prepare for submission to screening panels. The case management attorneys currently are inventorying between 100-140 screening cases per month, while the 15 research attorneys now are processing approximately 60 screening cases each month.<sup>11</sup> As of March 1, 1992, there were 321 inventoried screening cases not yet assigned to the research attorneys, with 201 screening cases assigned to research attorneys awaiting processing, for a total backlog of 522 cases. The backlog in screening cases is increasing each month.

The court has taken measures to address the screening backlog. First, approximately 30 cases each month are sprinkled onto argument calendars to be processed by merits panels without the assistance of staff attorneys. Second, several of the additional attorney positions recently allocated to the court will

---

<sup>9</sup> The court weights cases according to the complexity and number of factual and legal issues. Cases involving settled law in the circuit that do not present complex factual issues are given the lowest weight and typically are submitted without oral argument. Cases in this category are screening cases.

<sup>10</sup> In calendar year 1991, the percentage of low-weighted cases increased from 31% to 37% of all Ninth Circuit cases.

<sup>11</sup> The research attorneys draft proposed dispositions and prepare supplemental memoranda in petitions for rehearing in the screening cases they work on. In addition to their work on screening cases, the research attorneys prepare bench memoranda in certain argument cases.

be assigned screening functions. Finally, the staff director has developed and is implementing policies to enhance productivity in screening cases. Notwithstanding these measures, the Office of Staff Attorneys will continue to be hard pressed to meet the court's goals of having research attorneys process all screening cases and eliminating the screening backlog.

The screening program and the conference program are the only mechanisms available to the court to manage its caseload and save judge time. As long as the conference attorneys remain on staff attorney lines, the court's needs with respect to processing of screening cases conflict with its desire to resolve cases through settlement.

Because the conference program has been successful in terminating most of its settlement cases at a preliminary stage in the appellate process, the loss of the program would impact not only the judges who must decide the numerous appeals that will not be dismissed absent the program's settlement efforts, but also the remainder of the court's staff who must process these cases for submission to panels. If the Ninth Circuit's Conference Program can remain in existence with the Committee's approval of the program's three core positions, and is permitted to expand with the funding of additional attorney positions, the considerable savings in judge and staff time derived from the program's settlement efforts can be devoted to the court's other pressing business.

## CONCLUSION

The Ninth Circuit's Conference Program has been redesigned and is now functioning and performing like similar programs in other circuits. The court requests that the Committee approve positions to staff its conference program so that it can accomplish the mission the court has defined for it -- that is, the early resolution through settlement of a significant number of civil counseled appeals. The Committee has approved similar programs in other circuits. We only request like treatment.

The court appreciates the Committee's consideration of this proposal.

## PROGRAMS IN OTHER CIRCUITS<sup>1/</sup>

Seven other circuit courts of appeals have, or have had, settlement programs. Those Circuits with active programs are the District of Columbia, the Second, the Sixth, the Eighth, the Ninth and the Tenth. The Seventh Circuit had a program that was a one-year pilot project, but it was not formally continued. Also, the Eleventh Circuit is considering implementing a settlement program.

The District of Columbia Circuit's Mediation Program uses volunteer mediators from the bar, rather than attorneys on the court payroll. Although the use of volunteer mediators and arbitrators is quite common in trial courts, it is unique to this program among the circuit courts of appeals. The cases are selected for mediation by the chief staff counsel, based on a determination of which cases are likely to settle. Participation is mandatory. There is a director of the mediation program who is a court staff member, and 28 part-time volunteer mediators, chosen by the judges of the court. Parties to the litigation are strongly encouraged to attend the conference and the attorneys attending must have authority to settle the case. The focus is on "mediating" rather than "settling." The District of Columbia Circuit's program was initiated three years ago and substantially revised after one year. There is no published report yet available regarding the quantitative success of the program. Personal communications with the staff of the mediation program indicate that they consider it to be a success.

The Second Circuit's Civil Appeals Management Plan ("CAMP") is the progenitor of these programs in the courts of appeals. It was started in 1974 and continues to this day. It uses two staff counsel, who also issue scheduling orders. They conduct all conferences, most of which are in person. Almost all types of civil cases are automatically referred for a conference. The focus is on settling cases with clarification of issues and resolution of procedural problems as byproducts. There is a substantial amount of published information about this program.

The Sixth Circuit's Pre-argument Conference Program was established in 1982. It uses attorneys on the court's payroll who select the cases that they think will benefit from a conference. Also, an attorney may request a conference if not otherwise chosen. The main thrust of the conference is settlement.

---

<sup>1/</sup> This discussion is taken verbatim from the "Discussion Paper" submitted by the U.S. Court of Appeals for the First Circuit in its 1989 proposal for funding of a conference attorney position. The section on the Ninth Circuit's Conference Program was deleted because it is no longer accurate. We understand that the First Circuit's settlement program is modelled after the CAMP program in the Second Circuit and is now staffed with one settlement attorney.

According to the Director of the program, it is important that this goal be honestly set forth. Almost all (93%) of the conferences are conducted by telephone conference call, rather than in person, in part because of the geographical size of the circuit. There are published reports of the results and they indicate that this program is successful.

The Seventh Circuit's Preappeal Program was a brief experiment in 1978 and 1979. Its focus was not directed toward settlement, other than by providing a neutral ground for the attorneys and parties to meet. It was an attempt to reduce the quantity and size of submissions to the court and reduce the time from docketing to disposition. Although it was not formally continued as a distinct program, some elements that were first introduced in the program continue to be utilized by the Seventh Circuit today. These include the use of conferences (called docketing conferences) to resolve procedural issues in complex cases, and the use of scheduling orders by staff attorneys. While the program was discontinued, it was perceived by the senior staff attorney at the time (who is now the Circuit Executive) to be successful. For example, it was perceived to have cut back on both procedural and substantive motions. Consequently, the Seventh Circuit is considering using staff attorneys to issue show cause orders on the merits of cases (as opposed to procedural show cause orders which they issue already), in order to narrow the issues further.

The Eighth Circuit's Civil Appeal Mediation Plan (a variant on the CAMP name) was established in 1981. Its unusual feature is that it is entirely voluntary. A director of the pre-hearing conference program, who holds a staff attorney position, conducts most conferences, although a senior district judge is sometimes assigned to the conference by the chief judge. Most conferences are by telephone due to the geographic breadth of the circuit, but the preference is for in-person conferences. The focus is on settlement, and the clients are urged to attend the conference.

The Tenth Circuit's Settlement Conference Program has just commenced as of April 1, 1991. It will be modeled mainly on the Sixth Circuit program, and directed by the former assistant director of the Sixth Circuit program.

The Eleventh Circuit decided in principle to create a settlement conference program in December of 1989. However, the assassination of Judge Vance delayed this project from getting started. It is now likely that the Eleventh Circuit will adopt such a program.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CIVIL APPEALS MEDIATION PROGRAM

PROGRAM DESCRIPTION AND

OPERATING PROCEDURES

OBJECTIVES

At the August 1991 court meeting, the judges of the Ninth Circuit formally approved a proposal to restructure its conference program to emphasize settlement. The Conference Program will provide an alternative means for disposition of civil counseled appeals by facilitating the voluntary resolution of cases which otherwise would receive full consideration by a panel of three judges.

In cases in which settlement is not reached, the conference attorneys will assist counsel in (1) simplifying, clarifying and, where possible, reducing the issues raised on appeal; (2) addressing jurisdictional issues and discussing the appropriate means for resolution of these questions; (3) reducing unnecessary motions; (4) where appropriate, staying an appeal pending a contingency such as the disposition of a related case; and (5) with the consent of counsel, establishing a briefing plan, with suggested briefing limits, that will result in the most efficient management and expeditious disposition of the appeal, including reducing the size of the record on appeal. The conference attorneys will also serve as a resource to counsel on the court's rules, policies and internal operations.

## ORGANIZATION WITHIN THE COURT

The Ninth Circuit's Prebriefing Conference Program will be established as an independent unit within the court. The Senior Conference Attorney reports to the Chief Judge, or his designate, on all policy matters concerning the program. The conference attorneys have no role in advising the court on the merits of any case or substantive motion.

## STAFFING

The present program is staffed with one senior conference attorney (JSP 16), two conference attorneys (JSP 14) and two support staff (JSP 9 and 7, respectively); all lines have been borrowed from the Office of Staff Attorneys. Additional conference attorney positions approved by the Judicial Resources Committee shall be targeted at JSP 14. Additional support staff positions shall be targeted at JSP 7. All program positions are entitled to full government benefits.

Conference attorneys serve at the pleasure of the court but are exempted from the court's limited tenure policy applicable to staff attorneys.

The senior conference attorney is responsible for implementing the policies of the Chief Judge and the court; developing and implementing policies, plans and practices to meet the goals defined for the program; establishing internal operating procedures; interviewing for professional staff positions and making recommendations for hiring to the court; hiring support staff; supervising training for all staff; establishing

performance standards, evaluating personnel and recommending personnel actions for all staff; and, coordinating with other units in the court.

Conference attorneys must be graduates of ABA-approved law schools, be a member of the bar of any state and have a minimum of five years practice or equivalent experience. Mediation ~~experience or training, or experience in other alternative dispute resolution techniques,~~ is highly recommended. Litigation experience and experience in and knowledge of federal procedural law, including the Federal Rules of Civil and Appellate Procedure, are highly desirable.<sup>1</sup> The senior conference attorney, in addition, should have management or supervisory experience and demonstrate through past employment or related experience the qualities of leadership, initiative and diplomacy.

The program's support staff handle the high volume of administrative work generated by the program such as typing, filing and answering the phone; assisting counsel with procedural questions; scheduling conferences and updating information on conference participants; making certain that orders are entered; making travel arrangements and processing vouchers; and, maintaining the program's computer logs and statistical reports.

#### PROGRAM-ELIGIBLE CASES

The Conference Program will conduct settlement conferences in as many civil counseled appeals, not otherwise excluded by Ninth

---

<sup>1</sup> The curricula vitae of the current conference attorneys are attached as Appendix 1.

Circuit Rule 33-1,<sup>2</sup> as staffing for the program permits. With sufficient staffing, prebriefing conferences shall be scheduled in most every civil counseled case.

~~CIVIL APPEALS DOCKETING STATEMENT~~<sup>3</sup>

Except in cases exempted from the requirement by Ninth Cir. R. 33-1, at the time of filing of a notice of appeal or petition for review, counsel will file an original and one copy of the Civil Appeals Docketing Statement and attach copies of the order(s) from which the appeal or petition is taken. The Civil Appeals Docketing Statement form is included in the Appendix of Forms to the local rules. Additional copies of the form will be distributed to the district courts and will be included in the package of materials distributed by the district court when a notice of appeal is filed. The form also will be available upon request from the Office of the Clerk of the Ninth Circuit.

Pursuant to Ninth Cir. R. 33-1, an appellee/respondent may

---

<sup>2</sup> All civil appeals are eligible for inclusion in the program except: (1) appeals or petitions in which the appellant/petitioner is proceeding without the assistance of counsel or in which the appellant/petitioner is incarcerated; (2) appeals from actions filed under 28 USC §§ 2241, 2254 and 2255; (3) appeals permitted by the court under 28 USC § 1292(b); (4) petitions for a writ under 28 USC § 1651 (habeas corpus); (5) petitions for review of Board of Immigration Appeals decisions under 8 USC § 1105(a); and (6) petitions for review and applications for enforcement of National Labor Relations Board decisions under 29 USC § 160(e).

The text of proposed new Ninth Cir. R. 33-1 and the Advisory Committee notes are attached as Appendix 2. The proposed rule was submitted to the Circuit Rules Committee and is expected to be published this summer.

<sup>3</sup> The new Civil Appeals Docketing Statement form is attached as Appendix 3.

file a response to the Civil Appeals Docketing Statement within seven days of service. Parties are required to serve copies of the docketing statement and any response on all parties to the proceedings below. Failure to comply with the requirements of Ninth Cir. R. 33-1 may result in dismissal of an appeal or petition.

#### DOCKETING OF THE APPEAL AND REFERRAL TO CONFERENCE PROGRAM

Upon receipt by the Clerk of the notice of appeal and related materials, the appeal is docketed and a presumptive briefing schedule entered. The Clerk's office forwards the Civil Appeals Docketing Statement to the Conference Program. The presumptive schedule established by the Clerk when the appeal is docketed remains in effect unless adjusted by a conference attorney to facilitate settlement, or by the Clerk's office pursuant to motion of the parties under Ninth Cir. R. 31-2, 3.

#### CASE SELECTION

The Advisory Committee notes to new Ninth Cir. R. 33-1 provide that the court "may direct that a settlement conference be held, in-person or over the telephone, with counsel, or with counsel and the parties or key personnel, including insurance representatives. The court may direct that the conference be conducted by a judge, magistrate judge or mediator designated as a prebriefing conference attorney."

With adequate staffing, the conference program will conduct conferences in almost every civil counseled appeal to explore

settlement potential. Procedurally complex appeals may be referred to an attorney in another court unit who will be responsible for conducting telephone conferences for complex case management purposes.

If sufficient staffing is approved for the program, the court can decentralize the program and locate attorneys in the principal courthouses of the court's three administrative units in San Francisco, Pasadena and Seattle. The primary goal of decentralization is to make possible more face-to-face settlement conferences. In addition, decentralization will provide the program with more of a local presence, which should enhance the program's reputation with local bar associations.

Absent staff to conduct settlement conferences in most program-eligible cases, the conference attorneys will review the Civil Appeals Docketing Statements to determine whether a case is suitable for a settlement conference, and will select randomly among appropriate cases. Based on a review of the Civil Appeals Docketing Statements, the conference attorneys will refer to the civil motions unit cases with apparent jurisdictional defects in which no conference will be scheduled.

#### REFERRALS TO JUDGES FOR SETTLEMENTS CONFERENCES

When appropriate, due to the nature of the issues or the number of settlement conferences required, the conference attorneys may refer matters for settlement discussions to senior district court judges or magistrate judges who volunteer to conduct settlement conferences for the court. The conference

attorneys also may request that the Chief Judge refer a case for a settlement conference to a senior judge of the court of appeals.

#### CONFERENCE SCHEDULING

The court has directed the Conference Program to schedule conferences within 35 days of the docketing of the appeal.<sup>4</sup> If the appellant's brief is filed or a conference scheduling order has not been entered within 59 days of the docketing of the appeal, a case is presumed released from the Conference Program, although requests for conferences will be accommodated whenever possible.

The scheduling order will notify counsel listed on the court's docket of the date and time of the conference and whether the conference will be in person or by telephone. Counsel will be directed to discuss settlement with their principals prior to the conference and attend the conference with authority to settle.

#### CONFIDENTIALITY

Both the Advisory Committee notes to Ninth Cir. R. 33-1 and the scheduling order will inform counsel and the principals that all settlement conferences with a court official are confidential. The statements and comments made during a settlement conference shall not be disclosed to anyone, other than Conference Program staff, by the court official who conducted the conference nor by counsel in briefs or arguments. If a judge conducts a settlement

---

<sup>4</sup> A copy of the scheduling order the program will use for telephone conferences is attached as Appendix 4.

conference upon referral from the Conference Program, the judge will not participate in the decision on any aspect of the case.

The conference program's files are confidential and are maintained separately from the court's casefiles.

#### ~~CONFIDENTIAL~~ SETTLEMENT CONFERENCE LOGISTICS ~~CONFIDENTIAL~~

As the program is currently staffed, all initial conferences must be conducted by telephone. The conference attorneys conduct follow-up conferences by telephone or in person, as appropriate.<sup>5</sup>

If the program is decentralized, initial in-person conferences may be scheduled in cases in which all counsel are located within a 60-mile radius of the relevant unit's courthouse.<sup>6</sup> For one week each month, the conference attorneys may hold in-person conferences in other cities in the circuit. Initial conferences in all other cases will be conducted by telephone.

#### MEDIATED SETTLEMENT DISCUSSIONS

Conference attorneys have been directed by the court to use a

---

<sup>5</sup> A conference attorney normally settles a case after one telephone and one in-person conference, or anywhere from three to ten telephone conferences that may span several weeks, or even months. Although in-person conferences are more efficient and effective, as the program is currently structured and staffed, it can conduct them in only a minority of cases. In 1991, the program held 30 in-person conferences in locations throughout the circuit.

<sup>6</sup> The conference attorney may initiate preliminary telephone contact with all counsel to discuss the value and logistics of an initial in-person conference, and whether principals or key personnel should attend or be available by telephone.

conference upon referral from the Conference Program, the judge will not participate in the decision on any aspect of the case.

The conference program's files are confidential and are maintained separately from the court's casefiles.

#### ~~SETTLEMENT CONFERENCE LOGISTICS~~

As the program is currently staffed, all initial conferences must be conducted by telephone. The conference attorneys conduct follow-up conferences by telephone or in person, as appropriate.<sup>5</sup>

If the program is decentralized, initial in-person conferences may be scheduled in cases in which all counsel are located within a 60-mile radius of the relevant unit's courthouse.<sup>6</sup> For one week each month, the conference attorneys may hold in-person conferences in other cities in the circuit. Initial conferences in all other cases will be conducted by telephone.

#### MEDIATED SETTLEMENT DISCUSSIONS

Conference attorneys have been directed by the court to use a

---

<sup>5</sup> A conference attorney normally settles a case after one telephone and one in-person conference, or anywhere from three to ten telephone conferences that may span several weeks, or even months. Although in-person conferences are more efficient and effective, as the program is currently structured and staffed, it can conduct them in only a minority of cases. In 1991, the program held 30 in-person conferences in locations throughout the circuit.

<sup>6</sup> The conference attorney may initiate preliminary telephone contact with all counsel to discuss the value and logistics of an initial in-person conference, and whether principals or key personnel should attend or be available by telephone.

consensus-building style of mediation in conducting settlement conferences for the court. The conference attorneys begin each conference by explaining the goals of the conference, the conference attorney's role as mediator, the mechanics of the process, including the possibility for private caucuses with each counsel and the principals, and the confidentiality of the process. The conference attorney reminds the participants that, although the mediator will guide the process, counsel and the parties retain control over the result.

Following the introductory remarks, the conference attorney asks each counsel to provide background on the dispute, to discuss briefly the issues on appeal, and to recount the settlement history. The purpose of the initial joint session is to build rapport with the participants, to create a level of comfort with the process, and to provide the conference attorney with relevant information. Discussion proceeds in joint session as long as it is productive, or until the conference attorney finds it appropriate to begin private sessions. In private sessions, the conference attorney works with counsel to develop a nonpartisan evaluation of the merits of each side's legal and settlement positions, and an assessment of the potential benefits, risks and costs of various options.

The conference attorney then will initiate the negotiations, often proceeding with the discussions through "shuttle diplomacy". The conference attorney informs counsel at the conclusion of each session when to expect the next contact and what information the conference attorney will need. The process continues until a

settlement is reached or an impasse develops that cannot be circumvented.

If settlement seems likely, the conference attorney may stay or adjust the briefing schedule. In making the decision to do so, the conference attorney balances the likelihood of settlement against the risk of inordinate delay.

The conference attorney will enter an order following a settlement conference which recounts the status of the matter and, when appropriate, directs counsel to take certain actions such as dismissing the appeal voluntarily following a settlement or contacting the conference program following expiration of a stay.

#### RESPONSIBILITIES OF CONFERENCE ATTORNEYS

##### IF SETTLEMENT NOT FEASIBLE

If settlement is not feasible, the conference attorney will explore jurisdictional issues and work with counsel to develop the most efficient and expeditious briefing plan, including limiting the issues and record on appeal. The conference attorney will assist counsel with procedural questions and problems. If the conference attorney is unable to resolve a procedural issue with counsel by consensus, counsel will be directed to file a motion with the Clerk's office.

At the conclusion of the conference process, the conference attorney will enter a final order either establishing a briefing plan or directing counsel to file a motion with the Clerk to resolve contested procedural issues. In the final order, the conference attorney will release the case from the prebriefing

conference program. The conference program's involvement in the case is terminated upon the matter's release from the program, unless a motion is filed and granted for the program to resume jurisdiction over the case.

#### QUESTIONNAIRES

At the conclusion of the conference process, the conference program will send all counsel a questionnaire seeking their views on and suggestions for improving the program. Counsel will be asked to return the questionnaire to the Clerk of Court, who will keep them on file. Responses to the questionnaires will be reviewed periodically by the Chief Judge, the Clerk of Court and the Senior Conference Attorney.<sup>7</sup>

#### STATISTICS AND REPORTS

The conference program maintains confidential files and a computer log for all cases in the conference program. The program reports regularly to the court on the status of cases in the program, the number of dispositions and the settlement rate.

---

<sup>7</sup> A copy of the questionnaire the court will use is attached as Appendix 5.

MARGARET M. GERRITY  
335 Warwick Ave.  
Oakland, CA 94610  
H: 510-452-1441  
W: 415-744-9900

**EXPERIENCE:**

August 1989-present: Conference Attorney/Equal Employment Opportunity Coordinator, U.S. Court of Appeals for the Ninth Circuit, San Francisco, CA. Conduct telephonic and in-person prebriefing conferences on the topics of settlement, case management and jurisdiction. Review Civil Appeals Docketing Statements, issue orders to show cause, and handle procedural motions. Supervise EEO Counselors in resolving complaints, collect and analyze statistical data for annual EEO Report.

October 1987-August 1989: District Counsel/Associate Claims Counsel, Ticor Title Insurance Company, Walnut Creek, CA. Settled title and escrow claims against the company. Supervised claims attorneys and outside counsel. Acted as liaison with branch offices. Promoted to District Counsel in April 1989.

October 1985-October 1987: Temporary Attorney, Feldman, Waldman & Kline, San Francisco, CA; Ropers, Majeski, Kohn, Bentley, Wagner & Kane, Redwood City, CA; Kinder & Wuerfel, San Francisco, CA; Alborg, Bothel & Dictor, Oakland, CA; U.S. Court of Appeals for the Ninth Circuit, San Francisco, CA.

September 1983-June 1985: Associate, Severson, Werson, Berke & Melchior, San Francisco, CA. Handled all aspects of commercial litigation, including court appearances, depositions, trial preparation and settlement negotiations.

June 1978-May 1980: Media Supervisor/Media Estimator, Air Time, Inc., New York, NY. Coordinated advertising schedules, supervised Media Estimators. Promoted to Media Supervisor in November 1979.

**EDUCATION:**

J.D., May 1983: New York University School of Law, New York, NY. Moot Court Board, 1981-82. Moot Court Advocacy Award, 1981. Trained and supervised first year students in written and oral moot court advocacy.

B.A., cum laude, December 1977: University of South Carolina, Columbia, SC. Dean's List, Kappa Tau Alpha. President, Public Relations Student Society of America, USC Chapter. Major in journalism with emphasis in public relations. Graduate courses, spring 1978.

**AWARDS AND ACTIVITIES:**

October 1988: Certification of Competency to Practice Collaborative Negotiations and Mediation, National Center for Collaborative Planning and Community Services, Tacoma, WA.

May 1988-present: Mediator, Conciliation Forums of Oakland, CA.

**PUBLICATION:**

October 1984, "Volunteers in Parole: A Foot in the Revolving Door," San Francisco Attorney.

**BAR MEMBERSHIP:**

State Bar of California  
U.S. Court of Appeals for the Ninth Circuit

**REFERENCES:**

Kathleen W. Marcel  
Senior Conference Attorney  
U.S. Court of Appeals for  
the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939  
415-744-9900

George K.H. Schell  
Deputy City Attorney  
City Attorney's Office  
1390 Market Street  
Sixth Floor  
San Francisco, CA 94102  
415-554-3932

Laura Lowe  
District Counsel  
Ticor Title Insurance Co.  
2121 No. California Blvd.  
Walnut Creek, CA 94596  
415-947-0211

Michael J. Bertinetti  
Severson & Werson  
One Embarcadero Center  
26th Floor  
San Francisco, CA 94111  
415-398-3344

KATHLEEN W. MARCEL

CURRICULA VITAE

United States Court of Appeals (415) 744-9907 (W)  
for the Ninth Circuit (415) 479-9720 (H)  
P. O. Box 193939  
San Francisco, California 94119-3939 DOB: 9/27/52

Education and Professional Affiliations

Degrees LL.M., Columbia University School of Law, 1982  
J.D., Louisiana State University Law Center,  
December, 1977 (top 10%)

Undergraduate Louisiana State University, majoring in  
English Literature, completed 96 hours  
with 3.5 average (early admission to  
law school)

Bar Membership Louisiana Bar Association  
U.S. Court of Appeals for the Ninth Circuit

Other Order of the Coif  
Phi Kappa Phi  
Arbitrator, American Arbitration Association  
Arbitrator, Fulton County (Georgia)  
Superior Court Civil Arbitration Program  
★ Mediator, Neighborhood Justice Center of  
Atlanta  
Panelist, Calif. Education for the Bar and  
Federal Practice Institute, Federal  
Appellate Procedure (June 1990)  
Advanced Mediation Training, Center for  
Dispute Settlement, Washington, DC  
(May 1991)  
Guest Speaker, California Bar ADR Committee  
(December 1991)  
Bates Edwards Group, Commercial Mediation  
Training (February 1992)

Employment and Related Experience

1990 - present Senior Conference Attorney  
 1988 - 1990 Senior Civil Motions/Conference Attorney  
 United States Court of Appeals for the  
 Ninth Circuit

As the director of the Conference Program and a conference attorney, I supervise an office of 5 people and conduct prebriefing conferences to facilitate settlement. As the senior civil motions attorney, I supervised an office of 9 attorneys and 3 secretaries. Attorneys in the civil motions unit assist judges in processing preliminary substantive motions on appeal. Typical motions include petitions for writs and for interlocutory review, motions to dismiss and for injunctive relief pending appeal.

1983 - 1984 Assistant Professor  
 1985 - 1988 Associate Professor  
 Georgia State University College of Law  
 Atlanta, Georgia  
 Courses: Civil Procedure, Administrative Law,  
 Alternative Dispute Resolution,  
 Georgia Practice and Procedure  
 Seminar

Of Counsel  
 Watkins and Walker (General practice)  
 Houma, Louisiana  
 (In my work with the firm, I prepared numerous  
 briefs and memoranda.)

Summer, 1982 Fellow, National Endowment for the Humanities  
 Stanford University College of Law  
 Palo Alto, California

1981 - 1983 Assistant Professor  
 University of Tulsa College of Law  
 Tulsa, Oklahoma  
 Courses: Civil Procedure, Domestic Relations,  
 Land Use Planning Seminar, Legal  
 Negotiations, Legal History

1980 - 1981 Instructor  
 Columbia University College of Law  
 New York, New York  
 Courses: Legal Research and Writing

Winter, 1980                    Visiting Assistant Professor  
University of North Dakota College of Law  
Grand Forks, North Dakota  
Courses: Environmental Law, Comparative Law

1978 - 1979                    Staff Attorney  
Sea Grant Legal Program  
Louisiana State University Law Center  
Baton Rouge, Louisiana

                                  Instructor (part-time)  
Louisiana State University Law Center  
Baton Rouge, Louisiana  
Courses: Legal Research and Writing

1978 - 1979                    Associate (part-time)  
1976 - 1977                    Law Clerk  
Arthur Cobb  
Attorney at Law (Personal Injury/Maritime)  
Baton Rouge, Louisiana

Publications

"The Georgia Court System" and "Jurisdiction and Venue in Georgia", Georgia Methods of Practice (West 1989)

✓ Why We Teach Law Students to Mediate (with P. Wiseman), 1987 Mo. Journal of Disp. Res. 77

The Role of the Courts in a Legislative and Administrative Legal System - The Use of Hard Look Review in Federal Environmental Litigation, 62 Ore. L. Rev. 403 (1983)

Closed-Cycle Mariculture and the Food, Drug, and Cosmetic Act (with J. Bockrath), 18 Hous. L. Rev. 43 (1980)

Regional Governments and Coastal Zone Management in Louisiana (with J. Bockrath), 40 La. L. Rev. 887 (1980)

CLAUDIA L. BERNARD  
United States Court of Appeals  
P.O. Box 193939  
San Francisco, CA. 94119-3939  
(415) 744-9908

Bar Membership: California

Education

J.D., 1986 Hastings College of the Law  
Associate Editor COMM/ENT Law Journal  
Teaching Assistant: Criminal Law & Torts

A.B., 1975 University of California, Berkeley  
Major: Criminology  
Phi Beta Kappa, Highest Honors

Experience

1989 to present  
Conference Attorney, U.S. Court of Appeals for the Ninth  
Circuit; Host settlement and case management  
conferences for the court.

1987 to 1989  
Associate Attorney, Lieff, Cabraser & Heimann, San  
Francisco  
Plaintiffs' class action practice.

1986 to 1987  
Law Clerk, Magistrate Judge Wayne D. Brazil, U.S.  
District Court, Northern District of California

Fall, 1985  
Judicial Extern, Judge Robert P. Aguilar, U.S. District  
Court, Northern District of California

Summer, 1985  
Law Clerk, Mission Community Legal Defense, San  
Francisco  
Federally funded criminal defense practice.

Summer, 1984  
Law Clerk, Rabinowitz, Boudin, Krinsky, Standard &  
Lieberman, New York, N.Y.  
Constitutional litigation practice.

1975 to 1983 Paralegal  
Lillick, McHose & Charles, San Francisco  
San Francisco Neighborhood Legal Assistance Foundation  
Contra Costa Legal Services Foundation

Professional Activities

Postgraduate Training:

- \*Center for Mediation in Law, Beginning, Intermediate & Advanced Courses
- \*Society of Professionals in Dispute Resolution, Advanced Mediation Training
- \*P.L.I., Negotiation & Settlement Seminar
- \*Center for State Court Management, Alternative Dispute Resolution in the Courts
- \*U.S. District Court, Northern District of California, Negotiation & Settlement Skills Seminar
- \*San Francisco Community Boards, Comprehensive Mediation Training

Lecturer: Continuing Education of the Bar, Federal Practice Institute

Guest Lecturer: Stanford University, New College School of Law, S.F. State University, Sonoma State University, numerous Bay Area High Schools

Formerly, Volunteer Mediator: S.F. Community Boards, Bar Association of San Francisco, Bay Area Lawyers for the Arts

Professional Organizations:

- \*American Bar Association
- \*Bar Association of San Francisco, Alternative Dispute Resolution Committee
- \*Society of Professionals in Dispute Resolution
- \*California Women Lawyers

## Appendix 2

## PROPOSED NEW CIRCUIT RULE 33-1

CIVIL APPEALS DOCKETING STATEMENT;  
PREBRIEFING SETTLEMENT CONFERENCES;  
PREBRIEFING CASE MANAGEMENT CONFERENCES

(a) Civil Appeals Docketing Statement. Except as provided in section (b) below, the appellant/petitioner in each civil case shall complete and submit to the district court upon the filing of the notice of appeal, or to this court upon the filing of a petition for review, an original and one copy of the Civil Appeals Docketing Statement on the form provided as Form 6 in the Appendix of Forms.\* Within 7 days of the service of the Civil Appeals Docketing Statement, appellee/respondent may file a response with this court. Parties shall serve copies of the Civil Appeals Docketing Statement and any response on all parties to the proceedings below. Appellant/Petitioner shall attach to all copies of the Civil Appeals Docketing Statement a copy of the order from which the appeal is taken. Failure to comply with this rule may result in dismissal of an appeal or petition in accordance with Cir. R. 42-1.

(b) Cases in which Civil Appeals Docketing Statement Not Required. The requirement for filing a Civil Appeals Docketing Statement shall not apply to: (1) appeals or petitions in which the appellant/petitioner is proceeding without the assistance of counsel or in which the appellant/petitioner is incarcerated; (2)

---

\* Copies of the Civil Appeals Docketing Statement form are available in the Clerk's office of each district court and can be obtained by request from the Ninth Circuit.

appeals from actions filed under 28 USC §§ 2241, 2254 and 2255; (3) appeals permitted by the court under 28 USC § 1292(b); (4) petitions for a writ under 28 USC § 1651; (5) petitions for review of Board of Immigration Appeals decisions under 8 USC § 1105(a); and (6) petitions for review and applications for enforcement of National Labor Relations Board decision under 29 USC § 160(e).

Cross Reference: Form 6, Appendix of Forms.

CIRCUIT ADVISORY COMMITTEE NOTE  
TO CIRCUIT RULE 33-1

(a) Prebriefing Settlement Conferences. The court has established a prebriefing conference program for the purpose of conducting settlement conferences in civil cases in which the parties are represented by counsel. The prebriefing conference program is staffed with experienced settlement attorneys and is an independent unit in the court, reporting to the Chief Judge on all matters of policy.

In any civil case in which a civil appeals docketing statement must be filed, the court may direct that a settlement conference be held, in-person or over the telephone, with counsel, or with counsel and the parties or key personnel, including insurance representatives. The court may direct that the conference be conducted by a judge, magistrate judge or mediator designated as a prebriefing conference attorney.

If a case is selected for a settlement conference, counsel shall be notified, by order entered within 35 days of the docketing of the appeal or petition, of the date and time of the conference, and whether the conference will be in person or by

telephone. The initial conference normally shall be held within 59 days of the docketing of the appeal. A case is presumed released from the Conference Program if an order scheduling a settlement conference has not been entered within 59 days of the docketing of the appeal or petition. Requests by counsel for a settlement conference will be accommodated whenever possible.

The briefing schedule established by the Clerk's office at the time the appeal is docketed remains in effect unless adjusted by a conference attorney to facilitate settlement, or by the Clerk's office pursuant to Cir. R. 31-2.3.

Prior to a conference scheduled under this rule, counsel should discuss settlement with their principals and attend the conference with authority to settle. The statements and comments made during a settlement conference held pursuant to this rule are confidential and shall not be disclosed by the court official who conducted the settlement conference nor by counsel in briefs or argument. A judge who conducts a settlement conference pursuant to this rule will not participate in the decision on any aspect of the case, except that he or she may vote on whether to take a case en banc.

(b) Prebriefing Case Management Conference. In any civil case in which a civil appeals docketing statement must be filed, the court may direct that a telephone case management conference be held before a senior staff member in the Clerk's office, or, at the request of the Clerk's office, before a conference attorney. The purpose of a case management conference is to develop the most efficient briefing plan for complex appeals. If a case is

selected for a case management conference, counsel shall be notified by order of the date and time of the conference.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CIVIL APPEALS DOCKETING STATEMENT**

INTERNAL USE ONLY

PLEASE TYPE OR PRINT. ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:	DISTRICT	JUDGE
	DATE COMPLAINT FILED / /	DISTRICT COURT DOCKET NUMBER
	DATE NOTICE OF APPEAL FILED / /	IS THIS A CROSS APPEAL? <input type="checkbox"/> YES <input type="checkbox"/> NO
	HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? <input type="checkbox"/> YES <input type="checkbox"/> NO IF YES, STATE:	
CASE NAME:		DOCKET NUMBER:
CITATION:		

CHECK AS MANY AS APPLY			DISTRICT COURT DISPOSITION		
JURISDICTION		1. STAGE OF PROCEEDINGS	2. TYPE OF JUDGMENT/ORDER APPEALED		3. RELIEF
1. FEDERAL	2. APPELLATE				
<input type="checkbox"/> FEDERAL QUESTION <input type="checkbox"/> DIVERSITY <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> FINAL DECISION OF DISTRICT COURT <input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY) <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> PRE-TRIAL <input type="checkbox"/> DURING TRIAL <input type="checkbox"/> AFTER TRIAL	<input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL/JURISDICTION <input type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> OTHER (SPECIFY)	<input type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> JUDGMENT NOV <input type="checkbox"/> DIRECTED VERDICT	<input type="checkbox"/> DAMAGES. AMOUNT SOUGHT: \$ _____ AMOUNT ( <input type="checkbox"/> GRANTED: _____ ( <input type="checkbox"/> DENIED: \$ _____  <input type="checkbox"/> INJUNCTIONS. <input type="checkbox"/> PRELIMINARY OR ( <input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED OR ( <input type="checkbox"/> DENIED

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

ISSUES PROPOSED TO BE RAISED ON APPEAL:

[telephone conf. sched. order]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

	[CASE NUMBER]
[CAPTION]	ORDER SETTING PREBRIEFING CONFERENCE
	DATE: [                    ]
	TIME: [                    ]

---

This appeal has been selected for inclusion in the Prebriefing Conference Program, pursuant to Fed. R. App. P. 33 and Ninth Cir. R. 33-1. The conference will be held by telephone on [date] at [time] PACIFIC TIME.

The court will initiate the telephone call and contact each participant at the telephone numbers listed below under "CONFERENCE PARTICIPANTS." Check the information shown below for completeness and accuracy. If any changes need to be made, contact the Office of Conference Attorneys at (415) 744-9900 in advance of the conference.

**PURPOSE AND PROCEDURES**

The primary purpose of the conference is to explore settlement. Counsel should discuss settlement with their principals before the conference and appear with authority to make and respond to settlement proposals, and to discuss the feasibility of various settlement processes.

The content of settlement discussions before the Ninth Circuit Court of Appeals shall remain confidential and shall not be disclosed by the court official who conducts the conference nor by counsel in briefs or arguments.

If settlement is not reached, the conference attorney will address any jurisdictional issues and work with counsel to develop the most efficient and expeditious plan for disposition of the case. This may include limiting the issues, limiting briefing and defining the record on appeal, or staying the appeal pending some contingency, such as disposition of a related case. The conference attorney will assist counsel with procedural questions and problems. If the conference attorney is unable to resolve a procedural issue with counsel by consensus, counsel will be directed to file a motion with the Clerk.

At the conclusion of the last conference, the conference attorney will issue an order releasing the case from the Prebriefing Conference Program. After that point, counsel shall direct all inquiries and filings to the Clerk's office.

#### WHO SHOULD ATTEND

All counsel intending to file briefs in this appeal shall attend the conference. If more than one attorney is representing a party, then the attorney with the most direct relationship with the client for the purpose of settlement discussions must attend. Co-counsel and other attorneys in principal counsel's firm may attend if their presence would be beneficial.

The counsel designated below are understood to be the lawyers with primary responsibility for the case. If different or additional attorneys should be on the list, call the Office of Conference Attorneys at (415) 744-9900 in advance of the conference.

#### BRIEFING SCHEDULE

The TIME SCHEDULE ORDER entered by the Clerk when the appeal or petition was docketed remains in effect, although requests to alter the briefing schedule will be entertained at the conference. If substantial work on the opening brief will occur before the scheduled conference date, you may request by telephone that the conference be held on an earlier date or that the briefing schedule be vacated in advance of the conference.

#### REQUESTS TO RESCHEDULE THE CONFERENCE

Except as set forth above, unless counsel has a directly conflicting court date, a request to alter the date of the conference will be disfavored. Any questions or concerns about the conference should be directed to Beatriz L. Smith, Conference Secretary/Deputy Clerk, at (415) 744-9900.

FOR THE COURT:

---

Beatriz L. Smith  
Conference Secretary/  
Deputy Clerk

#### CONFERENCE PARTICIPANTS

[List names, addresses and telephone numbers of counsel]

Appendix 5

[Chief Judge's letterhead]

Dear Counsel:

Our records show that you recently participated in prebriefing conference procedures pursuant to Ninth Circuit Rule 33-1. The goal of the conference program is to settle or streamline civil appeals by voluntary agreement of the parties whenever possible.

Candid feedback from the bar is very helpful to the court in evaluating the effectiveness of the conference program. I would appreciate your assistance by taking a few minutes of your time to complete the brief questionnaire attached. You may choose to submit the form anonymously.

A stamped envelope addressed to the Clerk of Court is enclosed for your convenience. Thank you in advance for your assistance.

Sincerely,

J. Clifford Wallace  
Chief Judge

PREBRIEFING CONFERENCE PROGRAM  
QUESTIONNAIRE

Counsel: Attach an additional sheet if necessary.

FOR CASES THAT SETTLED:

1. What do you think the chances are (approximate) that this case would have settled before oral argument if the Court had not become involved in settlement discussions?

\_\_\_\_\_ % (write in any number from 0 to 100)

0 = no chance at all of settlement  
50 = fifty-fifty chance  
100 = certainly would have settled

2. Specifically how, if at all, did the Conference Attorney assist in the settlement of this case?

FOR CASES THAT DID NOT SETTLE:

1. What, if anything, could the Conference Attorney have done differently to improve the chances of settlement in this case?

2. Was the conference procedure helpful in:

Clarifying the issues:	YES	NO
Evaluating the appeal:	YES	NO
Dealing with any procedural problems:	YES	NO

Any other way (please specify):

FOR ALL CASES:

1. Was an in-person conference held in this case?

YES

NO

2. Were the clients and other key personnel, such as insurance company representatives, present during the settlement conference(s)?

YES

NO

3. Was there anything about the way the conference was conducted that was unfair or inappropriate?

4. Please note any comments or suggestions you have for the improvement of the prebriefing conference program.

OPTIONAL IDENTIFYING INFORMATION:

\_\_\_\_\_  
Name and Number of Case

\_\_\_\_\_  
Your Name

\_\_\_\_\_  
Party You Represent(ed)

Thank you