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Mediation At The Ninth Circuit

All of the federal circuits have a mediation or settlement program, pursuant to Federal Rule of Appellate Procedure, Rule 33. The Ninth Circuit Court of Appeals has had a mediation program for over twenty years and is the largest among the federal circuit courts. Almost all civil cases in which the parties are represented by counsel are eligible to participate in the Ninth Circuit's Mediation Program. Every year the Circuit Mediation Office facilitates the settlement of approximately 1000 civil and administrative matters pending before the Ninth Circuit, representing approximately eight percent of the total number of case dispositions in an entire year.

Professional Mediators

One unique aspect of the program is that it is staffed by professional mediators. The Ninth Circuit has a Chief Circuit Mediator and eight full time mediators. The mediators are all experienced attorneys who come from diverse backgrounds. All of the mediators have extensive training and have served as mediators in the Circuit Mediation Office for at least ten years.

Although the mediation program is housed in the Ninth Circuit's main courthouse in San Francisco, the program operates separately from the Court. On the Ninth Circuit website, Ninth Circuit Chief Judge Alex Kozinski explains that: "Although the mediators are court employees, they are well shielded from the rest of the court's operations. The court has enacted strict confidentiality rules

and practices; all who participate in one of the court's mediations may be assured that what goes on in mediation stays in mediation."

What is the purpose of the Civil Appeals Docketing Statement?

Ninth Circuit Rule 3-4 currently requires that an appellant file a Civil Appeals Docketing Statement ("CADS"), otherwise known as Circuit Form 6, with the Notice of Appeal. On its face, it is not obvious that the only purpose for the CADS is to assess whether a case is appropriate for the mediation program. The mediators review the CADS to help determine whether the case should be included in the mediation program.

After reviewing the CADS, the mediators select cases for a telephonic Settlement Assessment Conference. In the majority of cases, the court will order counsel to participate in a telephonic conference with a circuit mediator to discuss whether the case would benefit from inclusion in the mediation program. Normally, clients do not participate in the assessment conference. Indeed, the Ninth Circuit discourages client participation in the assessment call.

The initial assessment conference usually lasts for less than an hour. At the conclusion of the assessment conference call, counsel and the mediator attempt to reach agreement regarding whether the case should be included in the mediation program. In some instances, additional telephone calls are necessary before the parties and the mediator reach consensus about

whether the case should be included in the program.

If there is consensus to participate in mediation, the appeal will be selected for inclusion in the mediation program. Approximately 60% of the cases participating in the initial assessment conference call participate in the mediation program.

Counsel can contact the Chief Circuit Mediator, Claudia Bernard, if they would like to have an appeal included in the program. Claudia Bernard can be reached at claudia_bernard@ca9.uscourts.gov or (415) 355-7908. Once the request has been made, the same assessment procedures are followed as described above.

In the amendments to the Ninth Circuit rules, which will take effect on January 1, 2010, Circuit Rule 3-4 will be amended. Under the amended rule the CADS form will be replaced by the Ninth Circuit Mediation Questionnaire and it will not be filed in the district court with the Notice of Appeal. The Mediation Office revised the rule to provide for the confidential submission of the Mediation Questionnaire directly to the Circuit Mediation Office.

Mediation Process

Once a case is in the mediation program, the mediator may set up telephonic or in-person sessions. In-person mediations are usually held at the court. In most media-

tions, the mediator requests that counsel submit mediation statements. In order to maintain confidentiality, the mediation statements are sent via email to the mediator

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and they are not filed in the Court's electronic docketing system.

Circuit Rule 33-1 provides that settlement-related information provided to the mediator will be kept confidential and will not be disclosed to the judges deciding the appeal or any other person outside the mediation program participants. Documents and correspondence related to the mediation are maintained only in the Circuit Mediation Office. These documents are never

made part of the main Ninth Circuit appeal file.

The scope of the mediation is an issue that is subject to the agreement of counsel. The mediation is not limited to the case that is on appeal in the Ninth Circuit. The mediation may include other parties and related cases.

After the filing of the Notice of Appeal, the Ninth Circuit promptly issues the Scheduling Order which sets the briefing schedule. The mediators can vacate or extend the briefing schedule to accommodate the mediation process. Participation in the mediation program does not delay the final disposition of any appeal in the event that mediation is unsuccessful. At the Ninth Circuit, the scheduling of oral argument is based on the date of the Notice of Appeal, not when the briefing is completed.

Mediation After Oral Argument

The mediation program often gets referrals from district judges and Ninth Circuit judges. Surprisingly, some of the cases are referred to the mediation program after oral argument, but

before the matter is submitted for decision. Approximately ten percent of the mediation program's cases come from referrals from panels of Ninth Circuit judges and from the Ninth Circuit's Appellate Commissioner.

Conclusion

The Ninth Circuit mediation program is an excellent resource for settling cases on appeal. Many practitioners find that the depth of experience of the circuit mediators is comparable to private mediation. However, unlike private mediation, there is no charge for participation in the mediation program. On any appeal pending in the Ninth Circuit, counsel should give serious consideration to utilizing the Ninth Circuit's mediation program. ↗

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