

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

Appellate Mediation Program Guidelines (Effective December 6, 2013)

## **1. Introduction**

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

The program is administered by the Circuit Executive, through the Office of General Counsel. A three-judge committee monitors the program and makes recommendations to the Chief Judge. The program is periodically assessed by the court.

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

## **2. Eligible Cases**

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

## **3. Case Selection Process**

Participation in the court's mediation program is mandatory for all cases selected for participation in the program. The Circuit Executive, through the Office of General Counsel, contacts principal counsel in cases selected for mediation to determine whether the case is a good candidate for mediation and seeks the opinion of counsel regarding participation in the program. If at the outset it appears to the designated court officials that mediation will not be fruitful, then court mediation efforts cease.

Additionally, counsel may jointly request that a case be included in the mediation program. A Confidential Joint Request to Enter Mediation Program form is available on the court's website. Such a request should be to:

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

The Office of General Counsel may review the notice of appeal, the trial tribunal's docket sheet, the decision of the trial tribunal, the court's docketing statement, and briefs to aid in selecting cases for mediation. The docketing statement is a form to be completed by counsel. The form is included in the docketing packet sent to counsel by the Clerk of Court. All counsel must complete the form within 14 days of docketing. When the United States or its officer or agency is a party, all counsel must complete the form within 30 days of docketing. The docketing statement is not part of the formal mediation process, but assists the Office of General Counsel with the selection process. The docketing statement is filed using CM/ECF.

#### **4. Mediators**

The court has selected a roster of outside mediators, including magistrate judges and volunteer mediators. The court's mediators include distinguished, experienced attorneys, and others with expertise in the substantive areas of the court's jurisdiction, as well as expertise in mediating. The court invites more applicants to become volunteer mediators. The application is available on the Federal Circuit Bar Association's website and the court's websites. The candidates are encouraged to be members of the bar of the court, but are not required to be members.

Volunteer mediators and applicants to be volunteer mediators must not be in active practice. For purposes of these guidelines "not be in active practice" means that the applicant or volunteer mediator is not appearing, and will not appear while a member of the court's mediation panel (i) as counsel for a party or amicus in any matter that would or could be appealed to this court, or (ii) as counsel for a party or amicus in any appeal to this court. Volunteer mediators are not paid for their services, but are reimbursed by the court for minor out-of-pocket expenses such as photocopying costs, telephone charges, facsimile charges, and transportation to the courthouse. Mediation proceedings may be held in the courthouse if desired. Reimbursement for reasonable travel and lodging expenses of the mediator is assumed by the litigants if the volunteer mediator must travel to conduct the mediation. No reimbursement is required or provided if the mediation is conducted by a magistrate judge.

The Circuit Executive, through the Office of General Counsel, selects a volunteer mediator from the court's list, unless the parties jointly propose an alternative mediator. If the parties jointly propose a mediator not on the court's list, then the parties must agree to pay any travel, lodging, and out-of-pocket expenses of the mediator, and the mediator must agree to serve pro bono. Parties are free, of course, to participate in mediation outside the court's program under terms to which they agree, whether or not the case is selected for mediation under the court program.

If a volunteer mediator is affiliated with a law firm and that law firm represents or has represented a party to an appeal before the court within the last 5 years, the volunteer mediator will not mediate any case involving that party. Before final selection of a volunteer mediator for an appeal, the Office of General Counsel will inquire about conflicts of interest. The mediator must not presently represent, or have represented within the last five years, either party or any amicus for any purpose, must disclose any past relationships that he or she had with counsel, counsels' firms, and the parties, and must disclose any potential "issues" conflicts. Volunteer mediators are required to decline to participate in any cases in which there is a conflict of interest, in which they perceive a conflict, or in which a reasonable person would perceive a conflict.

## **5. Confidentiality**

Confidentiality is ensured throughout the mediation process except as noted in these guidelines. The Circuit Executive and the Office of General Counsel staff members involved in the mediation program do not communicate with the judges of the court about the substance of mediation proceedings. During the program, however, the mediation committee from time to time has discussions with the Circuit Executive and the Office of General Counsel staff members with a view to revising the program while it is ongoing, as appropriate and necessary. Communications concerning statistical information and information needed to assess the program are not prohibited. All mediators must protect the confidentiality of the substance of all proceedings and are prohibited from complying with subpoenas or other requests for information about mediated cases except in response to a final court order requiring such disclosure. All communication with the court about mediation matters is between the mediator and the Circuit Executive or members of the Office of General Counsel staff.

The substance of mediation is confidential and may not be disclosed by any participants, except that the duty of non-disclosure does not cover disclosure or use in the course of litigation concerning enforceability of any agreements reached

through mediation, which may be separately addressed by agreement or otherwise under legal standards not addressed here. The fact that a case is in mediation is not confidential. For example, any motions for extensions of time that are filed because the parties are engaged in mediation are part of the public file. Section 7 sets forth the procedures for seeking extensions of time.

## **6. Mandatory Mediation Process**

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

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

If the staff of the Office of General Counsel determines that mediation may be fruitful, then principal counsel must participate in any initial telephone conference that is ordered. If an initial telephone conference is ordered, then participation is mandatory. If the participants agree that a telephone conference is not necessary and that they wish to meet for a mediation session, then no telephone conference will be ordered. If, in the judgment of the mediator, a mediation session might be fruitful, then the court requires that participation in at least one session is mandatory.

The court requires that the principal attorney for each party attend all sessions and that at the initial session a party representative with actual settlement authority also attend. "Actual settlement authority" does not simply mean sending a person allowed to accept or offer a minimum or maximum dollar amount. Rather, the party representative should be a person who can make independent decisions and has the knowledge necessary to generate and consider creative solutions. These requirements may be modified or waived by the mediator if circumstances dictate. When the United States government is one of the parties, the requirement that a party representative with actual settlement authority attend any mediation session is waived because government settlement decisions must be made collectively and approved by the authorized representative of the Attorney General, as set forth in 28 C.F.R. Part 0, Subpart Y. A government attorney with authority to negotiate on behalf of the government and to make recommendations concerning settlement must participate in the mediation session.

## **7. Extensions of Time**

It is contemplated that after a case is referred to a mediator, mediation should be completed in 90 days. At the outside, mediation should be completed within 150 days of the date of reference. Cases generally are selected before the first brief is filed. However, cases in which briefs have been filed may also be selected. While cases in mediation remain subject to the normal scheduling for briefs and oral argument by the Clerk of Court, counsel may file a motion for an extension of time. If the mediator believes that multiple mediation sessions are required, that the filing of a brief or the scheduling of oral argument will interfere with good faith settlement efforts, and that additional extensions of time are needed, then motions for additional extensions may be filed. Motions for extensions of time are referred to the Office of General Counsel. If a particular staff member of the Office of General Counsel spoke with counsel concerning mediation of a particular case, then a different staff member of the Office of General Counsel who was not involved in that mediation matter will handle any motion in that case. Any consent motion for an extension of time under this paragraph need not disclose that the extension is sought in order to facilitate mediation. The court does not favor extensions of time that exceed 150 days after the case was referred to a mediator. Usually, the extensions are for a shorter period of time.

The Circuit Executive and the Office of General Counsel will monitor the progress of any case directed to mediation and may require a status report from either the parties or the mediator involved.

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

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

If, as a result of mediation, a settlement is reached which includes a term concerning vacatur of a District Court or other trial forum ruling, the following notice must be included in the text (not as a footnote) in any motion in that trial forum for an indicative ruling:

As a result of a mediation conducted pursuant to the Mediation Program of the U.S. Court of Appeals for the Federal Circuit, a settlement of this case was reached which includes a term concerning vacatur of one or more rulings of the District Court. Pursuant to Rule 12.1 of the Federal

Rules of Appellate Procedure, this motion seeks an indicative ruling that the District Court will so vacate if the case is remanded by the Federal Circuit for such purpose. Neither the U.S. Court of Appeals for the Federal Circuit nor its Mediation Program takes a position as to whether the motion for vacatur should be granted.

In addition to the requirement that the above notice be included in any motion in the District Court for an indicative ruling, any remand order by the Federal Circuit will include the following statement:

In remanding this case to the District Court to consider the motion for vacatur, the Federal Circuit takes no position as to whether the District Court should grant the motion for vacatur.

## **9. Noncompliance Sanctions**

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

## **10. Evaluation**

At the conclusion of the mediation process in an individual case, the mediator notifies the Circuit Executive's mediation administrator of the resolution of the mediation. The Office of General Counsel thereafter sends a questionnaire to counsel and the mediator inviting their candid confidential responses, which are not provided to this court's judges or others, about the effectiveness of the program. The questionnaire responses are summarized by the Office of General Counsel – without identification of any specific case – for purposes of evaluating the program, compiling statistics, etc. The summary is provided to the court for purposes of assessing the program, but it does not reveal any details about or names of specific cases.