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## **Mediation in the Appellate Courts**

Every appellate court in California, including the Ninth Circuit, has a mediation or settlement program. Some of these programs are quite elaborate and have been around for many years. The courts have put significant resources into these programs, which have been largely very successful in settling cases. Most appellate court mediation services are provided free of charge.

### **Why consider mediation?**

Mediation is a confidential process designed to encourage the parties to reach a settlement. A mediator is not a judge or arbitrator; he or she does not impose a binding result on the parties. Rather, a mediator listens to the parties' concerns and helps the parties communicate with each other. A skilled mediator will assist the parties in finding a solution to the dispute that works for everyone, bringing an end to the litigation. The mediator can help parties to explore more creative solutions to their dispute that may not be available in court.

### **Mediation in the Ninth Circuit**

The Ninth Circuit Court of Appeals has a sophisticated mediation program with experienced, full-time mediators, who also have a good understanding of appeals. The program, which is more than twenty years old, has a high rate of success. Cases of all kinds are accepted, from small tort cases to extremely complex cases involving important public issues. Even death penalty cases have been successfully resolved under the program. The only cases that are generally precluded from the mediation program are cases with parties who are unrepresented by counsel. Mediation is provided without cost to the parties.

The mediators are court employees, but are otherwise separate from other court operations. The court has developed strict confidentiality rules to encourage the parties to freely communicate with the mediator and each other during the mediation, without fear that the information will be later used in court.

Cases are usually selected for mediation early in the appellate process. The mediators review the Civil Appeals Docketing Statement, which is filed at the outset of the appeal, to determine whether the case might be a good one for mediation. The court will then order counsel to participate in a phone conference with the mediator to determine if the case should be included in the mediation program. Inclusion in the program is voluntary; a case will only be included if the parties and mediator agree that the case should proceed to mediation. If the case is selected, the mediator will usually arrange for the briefing schedule to be suspended while the case is in the mediation program.

The mediators will try to accommodate the needs of all parties and participants in the mediation, to the extent possible. The parties may or may not be required to personally attend the mediation at the court in San Francisco. If an in-person mediation is scheduled, the mediator will try to schedule it at a location that is convenient for everyone, and will travel to another location in the Ninth Circuit if necessary.

### **Mediation in the State Courts of Appeal**

All of the appellate districts in California offer settlement or mediation services. Some programs, like the one in Third District Court of Appeal in Sacramento, are mandatory. In other words, the mediation administrator will pre-screen and select certain cases for mediation, and once the case is selected, participation is mandatory. Other programs, like the one in the Second District Court of Appeal in Los Angeles, provide mediation services only when the parties voluntarily agree to mediation.

In most courts, certain cases are exempt from mediation. Most courts will not refer disputes to mediation where a party is unrepresented by counsel. Other exempt categories may include criminal cases, juvenile dependency cases, and adoption cases.

Once a case is selected for mediation—regardless of whether the parties agree to mediation or the court orders it—the parties must participate in good faith or risk the possibility of sanctions. Most courts require that all parties and their attorneys attend the mediation in person. If a party is a corporation or an organization, a representative of the party who has full authority to settle must attend the mediation session. Many courts also require that, in cases where a party has insurance coverage related to any of the issues in dispute, a representative of the insurance carrier must also attend the session. The mediator may invite other persons to attend if it appears that their participation would help to facilitate settlement. If a party or representative cannot attend because a particular hardship, the mediator can waive the in-person requirement, but usually the party must be available by phone.

Some of the mediation programs operate in separate facilities with their own full-time staff, to maintain a level of independence from the justices who may be deciding the cases that have been selected for mediation. Most of the programs use volunteer mediators who are attorneys or retired judges, and they provide mediation training to these volunteers in exchange for their pro bono mediation services. Some programs do not have a panel of mediators, but instead assign a “settlement justice” to mediate the dispute; if the case does not settle, the justice presiding over the settlement negotiations will not be on the panel deciding that appeal.

Most programs provide free mediation services for a certain number of hours. For example, the First District will provide three free hours of mediation. After that time, the mediator is free to charge the parties a fee (and the parties are also free to end the mediation at that time). In the Second District, the mediators provide a total of six hours of free mediation services, including two hours of preparation time and four hours of time in the mediation.

If a case is selected for mediation, the normal appeal deadlines may still apply. Most of the appellate courts do not suspend the preparation of the record or the briefing deadlines when a case is placed in the mediation program. Parties can file a request for an extension, which will usually be granted if the case is scheduled for mediation. The Third District's program is an exception to this rule; there, the preparation of the record and briefing schedule is completely stayed at the outset of the case, until a decision is made whether the case will be included in the mediation program or not.

Appeals can be costly and create uncertainty as to the rights of the parties going forward. Attorneys and clients should consider mediation whenever faced with an appeal. The appellate courts have highly developed, successful mediation programs, and they provide free mediation and settlement services to the participants. These programs help to ease the courts' crowded appeal dockets and help parties save resources that would be spent on further litigation.

C. Athena Roussos is an attorney in Elk Grove, California, and is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. She also teaches at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or [athena@athenaroussoslaw.com](mailto:athena@athenaroussoslaw.com).

Peg Carew Toledo also contributed to this article. Toledo is Of Counsel at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or [toledo@mgsllaw.com](mailto:toledo@mgsllaw.com).