

FREQUENTLY ASKED QUESTIONS ABOUT APPELLATE MEDIATION IN THE FOURTH CIRCUIT

1. Who are the mediators and where are they located?

There are 4 mediators in the Office of the Circuit Mediator (OCM). The Chief Circuit Mediator is Thomas F. Ball III and his office is in Palmyra, Virginia. The Senior Resident Circuit Mediator is Donna Slawson Hart, and her office is in Durham, North Carolina. Circuit Mediator Frank C. Laney has his office in Cary, North Carolina, and Circuit Mediator Edward G. Smith has his office in Duncan, South Carolina.

2. What is the authority for OCM?

Rule 33 of the Federal Rules of Appellate Procedure authorizes an appellate court to require litigants to participate in a settlement conference. The Fourth Circuit implemented OCM in Local Rule 33.

3. Is participation in OCM mediation conferences mandatory?

Local Rule 33 states, "Counsels' participation is required at any scheduled conference." You will receive a NOTICE OF SCHEDULED MEDIATION informing you of when the mediation conference is set. If there are unavoidable conflicts with the scheduled time for the conference, it is the policy of OCM to be flexible in rescheduling conferences to more agreeable times.

4. Where are the conferences held?

Consistent with the Fourth Circuit's desire to not make participation in mediation conferences an onerous burden, or an expensive process, conferences are generally conducted by telephone. In-person conferences can be done but due to a limited travel budget, those cases are screened carefully. Generally, a telephone conference is conducted before there is any consideration of an in-person conference. Therefore, participation in the conferences only requires a land-line telephone--initial conferences will NOT be conducted over mobile or cellular phones.

5. Does my client (or a client representative) have to attend the mediation conference?

Clients and/or client representatives are not routinely required to attend mediation conferences, but can attend if they wish to do so. However, in the appropriate case the mediator may require attendance by the parties in person or through appropriate corporate representatives of insurers providing a defense.

6. Do I have to participate in an initial conference if I know my client does not want to settle?

Yes. There are other issues addressed in the conferences aside from settlement and it is not infrequently the case that exploration of settlement possibilities by a neutral, professional mediator uncovers a new willingness to consider settlement.

7. How are cases selected for mediation?

All civil, counseled cases, except for certain agency cases, are eligible for mediation. There are three methods by which cases are selected for mediation: (1) referral by the Clerk, (2) request of a party (the fact of the request will be kept confidential), and (3) referral by a panel of the Court.

8. What topics are covered in a mediation conference?

Under Local Rule 33, mediation conferences can address: exploration of settlement possibilities, discussion of jurisdictional questions, clarification of the issues to be raised on appeal, and assistance with any procedural questions relating to appellate practice in the Fourth Circuit.

9. What do I have to do to prepare for a mediation conference?

Because mediation conferences address a wide variety of matters, counsel should take some time to review their cases. Generally, the mediator will have questions relating to the legal arguments in the case and the willingness of the parties to make compromises. Thus, counsel should be prepared to address those areas. Invariably, the utility of any conference depends in great part on the preparation of counsel. Additionally, counsel are required to consult with their clients and obtain settlement authority.

10. How long is the usual mediation conference?

The initial mediation conference can last from 15 minutes to several hours but typically last 1-1 ½ hours. Times vary depending on the mediator and the circumstances in an individual case.

11. Does participation in the program delay the processing of the appeal?

No. The appeal is processed in the normal course by the Clerk at the same time the case is in the program. Extensions of the briefing schedule are generally granted only where the circuit mediator and all parties agree. In rare cases where a party objects, the mediator may extend the briefing schedule or direct the parties to file a motion for extension with the court if the mediator determines the extension would be helpful to the aims of the program.

12. Are disclosures made in mediation conferences confidential?

Local Rule 33 states, "Information disclosed in the mediation process SHALL be kept confidential and SHALL NOT BE DISCLOSED to the judges deciding the appeal or to any other person outside the mediation program participants. Confidentiality is required of all participants in the mediation proceedings." (emphasis added). Thus, the Court respects the

privacy of the conferences and does not receive any confidential disclosures from mediators. While the OCM is an arm of the court, confidential information received by the mediators is not transmitted to the clerk or other court units. Under Local Rule 33, any mediation participant wishing to make a disclosure of mediation information may not make such disclosure “without prior approval of the Standing Panel on Attorney Discipline.”

13. Do Fourth Circuit judges know the results of mediation conferences?

Entries are made in court records showing whether a case settled or whether there was an impasse. No other details are noted. Monthly statistical reports, with no identifying information, are provided to the judges.

14. How many conferences am I required to attend in any given case?

Under Local Rule 33, counsel must attend “any scheduled conference.” However, mediators are careful not to require participation in multiple conferences where the parties do not appear open to the possibility of settlement (or there is no other purpose to be served). Follow-up conferences can be done by a phone call to one (or more) parties or by a joint conference of all counsel.

15. Am I exposed to sanctions for violating mediation rules?

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 appellate costs, dismiss the appeal, or take such other appropriate action as the circumstances warrant.

16. Do I have to pay anything extra to participate in mediation?

No. The Fourth Circuit provides appellate mediation as one of the services offered by the Court. Conference calls are generally initiated by the mediator. Mediators are full-time employees of the Court of Appeals, and are prohibited from accepting payment for travel for in-person mediations by government regulations.

17. Are conferences scheduled before briefs are filed?

Generally, OCM attempts to schedule cases prior to the filing of the briefs in order to save litigation costs for the parties and to avoid the hardening of positions that occurs after the briefing process. The initial mediation conference is usually held within three to four weeks of the date the case is accepted into mediation.

18. What background does the mediator have about my case going into the initial conference?

Because OCM intervenes early in the appellate process, mediators typically only have the lower court opinion for review. Mediators do not have the pleadings filed in the lower court. However, mediators average over 200 mediations per year and have good familiarity with the rulings and

opinions of lower court judges in the circuit and with Fourth Circuit precedent. And, if a mediator deems it helpful, he/she will request copies of other relevant documents. OCM mediators place a high value on being prepared themselves for all mediation proceedings.

19. Do mediators make decisions resolving cases?

No. Parties always make decisions about the settlement of their case. The mediator directs the process only--the parties control the final outcome. Because settlement is voluntary, no actions affecting the interests of any party are taken without the consent of all parties.

20. Are written settlement agreements required to settle cases?

Written agreements are not required but are strongly recommended by mediators for the protection of the parties and Court. Typically, mediators do not participate in drafting settlement agreements, but they are very familiar with a broad range of drafting issues and their advice is frequently sought on these issues.

21. Who drafts the motion to dismiss the appeal of a settled case?

The parties are free to draft their own motion or OCM will provide a form motion for that purpose. The form motion requires the signature of Appellant's counsel and, pursuant to FRAP 42, a representation by that counsel that all appellate counsel consent to the dismissal of the appeal.

22. May a party re-open mediation after an impasse has been declared?

Yes. Parties may contact OCM and request that the case be re-opened. Negotiations can resume at any time until the case is terminated by the clerk of court.

23. Can I electronically record mediation proceedings?

No. OCM prohibits electronic recordation of any mediation proceeding.

24. How well is the program working?

OCM has been in existence since September 1994. As of September 30, 2010, we have closed 9,754 cases and have settled 3,412, or 35%, of those cases.