

U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT CIRCUIT MEDIATION OFFICE

In accordance with Rule 33 of the Federal Rules of Appellate Procedure and Circuit Rule 33, the Court schedules mediations in civil appeals so that clients and counsel can fully consider their alternatives at this stage of litigation. Rule 33 mediations are conducted by three full-time Circuit Mediators. With the exception of habeas corpus, sentencing, mandamus and pro se appeals, all types of civil appeals are eligible for mediation. The Court spontaneously issues notices of mediation in the majority of eligible appeals, but attorneys for one or more parties may also confidentially request that an eligible appeal be mediated. Regardless of how a mediation comes to be scheduled, participation is mandatory.

Experience has shown that many cases can be settled at the appellate stage, substituting a certain and acceptable outcome for the risk, expense and delay of further litigation. The following information explains how mediations are conducted in the Seventh Circuit and how counsel and clients can make best use of the opportunity for settlement.

- ◆ **How are counsel notified that a Rule 33 mediation will be conducted?** A Notice of Rule 33 Mediation is posted to the docket, usually two to three weeks ahead of the mediation date. The Notice is an order of the Court. It advises counsel of the date and time of the mediation, whether it is to be in person or by telephone, whether clients are required to attend, and how counsel and clients are expected to prepare.
- ◆ **Can counsel request a Rule 33 mediation?** Counsel in mediation-eligible appeals are invited to request a Rule 33 mediation by contacting the Circuit Mediation Office, U.S. Court of Appeals for the Seventh Circuit, 219 S. Dearborn, Room 1120, Chicago, Illinois 60604, (312) 435-6883, or one of the Circuit Mediators. A mediation will be scheduled if the mediation calendar permits, and a Notice of Mediation will issue.
- ◆ **Can a request for mediation be confidential?** Yes. If a party wishes to keep its request confidential, the Circuit Mediation Office will not disclose to other parties or to the Court that mediation was requested.
- ◆ **Is it mandatory to participate in Rule 33 mediation?** Yes. When a Rule 33 mediation is scheduled, participation is mandatory.
- ◆ **Are clients required to attend?** Clients and insurance representatives are required to attend Rule 33 mediations whenever the mediator so directs. If clients or insurance representatives are not directed to attend the initial mediation session, they must be available – with full settlement authority – to be consulted by phone for the duration of the mediation session.
- ◆ **Is it mandatory to settle?** No. Whether to settle is for the parties and their counsel to decide. However, counsel and parties are required to participate with the utmost diligence and good faith. Experience shows that settlements can often be achieved when neither side thought it possible.
- ◆ **Who conducts Rule 33 mediations?** The Court has delegated the responsibility for conducting Rule 33 mediations to three full-time Circuit Mediators – Joel N. Shapiro, Rocco J. Spagna, and Jillisa Brittan. All were civil litigators in private practice prior to their appointment by the Court.
- ◆ **Is there a fee for the services of the Court’s mediators?** No. The assistance of the Circuit Mediators is available to appellate litigants at no charge.
- ◆ **Are the parties’ lead attorneys required to attend the mediation?** Ordinarily, yes. It is essential that each party be represented at the mediation by an attorney who not only is conversant with the case but is the attorney on whose advice the party relies. If more than one attorney meets these criteria, any of them may represent the client in the mediation.
- ◆ **When are Rule 33 mediations conducted in person and when by telephone?** When counsel and clients reside in the Chicago metropolitan area, Rule 33 mediations are held in the Circuit Mediation Office at the United States Courthouse. Otherwise, mediations are most often conducted by telephone. The Court’s internet-based teleconferencing system can accommodate as many as a dozen or more separate lines and join them in joint or private sessions.
- ◆ **Are in-person mediations ever held outside Chicago?** Because the resources of the Mediation Office are limited, in-person mediations cannot routinely be held throughout the Circuit. However, if participants believe an in-person mediation would be more productive than a mediation by telephone, they are welcome to suggest it.

- ◆ **Are Rule 33 mediations confidential?** Yes. The Court requires all participants to keep what is said in these mediations strictly confidential. Oral and written communications that take place in the course of Rule 33 mediations may not be disclosed to anyone other than the litigants, their counsel, and the mediator.
- ◆ **Are judges of the Court of Appeals informed of what has happened in a Rule 33 mediation?** No. Participants in Rule 33 mediations, including the mediator, are forbidden to disclose to judges or other court personnel, at the Court of Appeals or elsewhere, what has been communicated during these mediations.
- ◆ **What occurs during a Rule 33 mediation?** Rule 33 mediations are official proceedings of the Court but are off-the-record and relatively informal. Discussion is intended to be conversational rather than argumentative. The focus is on realistically assessing the prospects of the appeal, the risks and costs of further litigation, the interests of the parties, and the benefits each side can gain through settlement. The mediator ordinarily meets with counsel both together and separately. Settlement proposals are discussed. A resolution may or may not be reached during the initial mediation session. Often, follow-up sessions or "shuttle" negotiations are conducted. Letters or draft proposals may be exchanged. By the conclusion of the Rule 33 process, the parties will either have reached an agreement to settle or learned how far apart they are and what the remaining obstacles to settlement are.
- ◆ **Is discussion of settlement limited to the appeal itself?** Not necessarily. If settlement of the appeal will not dispose of the entire case, or if related litigation is pending in other forums, the parties are invited and encouraged to explore the possibility of a global settlement.
- ◆ **Is the briefing schedule modified when a Notice of Rule 33 Mediation issues?** Briefing is usually deferred until after the initial mediation session. If further modification of the briefing schedule would be conducive to settlement, an order to that effect may later be entered.
- ◆ **What preparation is required of counsel?** In preparation for the Rule 33 mediation, attorneys are required to consult rigorously with their clients and obtain as much authority as feasible to settle the case. Counsel must also review their legal and factual contentions so as to be able to discuss candidly the prospects of the appeal and the case as a whole. Pre-mediation submissions are not required, but counsel are free to contact the mediator in advance, by phone or in writing, if they wish.
- ◆ **What is the role of the mediator?** Because the format of Rule 33 mediations is flexible and each appeal is approached on its own terms, the mediator plays a variety of roles. He or she acts as moderator, facilitator, and intermediary; as a neutral evaluator and a reality check. The mediator may suggest terms of settlement. Without being coercive, he or she acts as a determined advocate for settlement.
- ◆ **What can participants expect of the mediator?** Before the initial mediation session, the mediator will have familiarized him or herself with the history of the litigation, the posture of the case, and the issues on appeal. During the mediation, the mediator will seek additional information about the background of the dispute and the parties' interests, claims and defenses in order to explore all possibilities for a voluntary resolution. The mediator is strictly impartial. He or she does not advocate for any party and avoids making comments that could advantage one side or another in arguing the issues on appeal. The mediator will disclose any affiliation or prior representation of which he or she is aware that could call his or her neutrality into question. The mediator does not force any party to settle or to accept terms it is not willing to accept. While the mediator urges parties to take advantage of opportunities to settle favorably, he or she recognizes that whether and how to settle is for the parties to decide, and that settlement is not always possible.
- ◆ **How can counsel make best use of the Rule 33 mediation to benefit their clients?** Recognize that the Rule 33 mediation is an opportunity to achieve a favorable outcome for your client. Without laying aside the advocate's responsibility, approach the mediation as essentially cooperative rather than adversarial. Help your client make settlement decisions based not on overconfidence or wishful thinking, but on a realistic assessment of the case; not on emotion – however justified it may be – but on rational self-interest. Suggest terms of settlement that maximize the benefits of settlement for all parties. Take advantage of the opportunity to talk confidentially and constructively with counsel for the other parties. If clients are present, address them respectfully but convincingly. Let the mediator know how he or she can help you obtain a satisfactory resolution. Be candid. Don't posture. Listen closely to what other participants have to say. Give the process a chance to work.