

Sample Court ADR Rule

FEDERAL

U.S. Court of Appeals – 11th Appellate Circuit

[Rule 33-1 and Mediation Guidelines](#)

Process: Mediation

Eligible cases: All civil appeals in which parties are represented by counsel, with the exception of prisoner, habeas corpus, and immigration appeals.

Summary:

These rules outline a program in which either a panel of judges or the Kinnaird Mediation Center (the court's mediation center) may order parties to mediation, but which allows parties to request mediation as well. When a case is referred to mediation, the court assigns a staff mediator to conduct the mediation. Parties are not charged for this service. Alternatively, parties may stipulate to employ a private mediator at their own expense.

What is good about this rule:

- *Relative thoroughness:* This rule, when combined with the guidelines from the mediation center, covers more topics with greater detail than the mediation rules for any other U.S. Court of Appeals.
- *Detailed mediation procedures:* It provides a clear process from referral to termination, including what should happen within the mediation session. This helps to mold expectations and provides a certain amount of control over the quality of the process.
- *Private mediators must be certified or registered in Alabama, Florida, or Georgia and follow procedures as specified by the mediation center:* Since this is a court-annexed program, the court has some responsibility for what happens throughout the mediation process, even when the mediator is selected by the parties and not officially approved by the court. Asking that the parties select a mediator who has been certified and meet certain criteria provides a measure of quality control. The minor degree to which a party's choice of mediator may be limited is easily offset by the benefits control of quality brings.
- *Helpful tips for counsel in mediation:* In the accompanying guidelines, the court provides information for the attorney on how to prepare for an effective mediation.

Additional points to note:

- *Does not require parties to participate in the mediation:* This is typical of appellate programs in the federal courts, but atypical of mediation programs in other areas. Mediation is considered to be more effective if the parties are involved in the process.
 - ⇒ For a good discussion of this, see Nancy Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?" in *Washington University Law Quarterly*, Vol 79, p. 787, 2001.
- *Calls for a facilitative model of mediation:* The guidelines state that because mediation is based upon the principles of party self-determination and mediator neutrality, the mediators apply the facilitative model.

- *Confidentiality extends to whether the case was mediated:* No reference to mediation can be made in any further proceedings if the case is not settled at mediation.
- *Any request to the mediation center by a party for mediation is not revealed to opposing counsel:* Some attorneys are concerned that requesting mediation would be interpreted a sign of weakness by opposing counsel. The court's practice of not revealing such requests is in response to this concern.
- *Makes explicit what must be in the confidential statement to the mediator:* This ensures the mediator gets the proper information. Further, some information that must be provided, such as the respective strengths and weaknesses of each party's case, gets counsel to begin considering questions that will arise in the mediation.

Further Reading:

Qualifications

[National Standards for Court-Connected Mediation Programs](#), Center for Dispute Settlement

Ethics

[National Standards for Court-Connected Mediation Programs](#), Center for Dispute Settlement

[Model Standards of Conduct for Mediators](#), American Arbitration Association, American Bar Association, Association for Conflict Resolution

Training

[Guidelines for Implementation of Qualifications Standards for Neutrals](#), Massachusetts Supreme Judicial Court Standing Committee on Dispute Resolution

Monitoring and Evaluation

[Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers](#), National Center for State Courts, 1997.

FRAP 33. Appeal Conferences

The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

(As amended Apr. 29, 1994; eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

* * * *

11th Cir. R. 33-1 Kinnard Mediation Center.

(a) Filing Civil Appeal Statement.

A Civil Appeal Statement is required in all civil appeals, except as provided in section (a)(3) below.

(1) Civil appeals from United States district courts. When notice of the filing of a notice of appeal is served pursuant to FRAP 3(d), the clerk of the district court shall notify the appellant(s) (and cross-appellant(s)) that a Civil Appeal Statement form is available as provided in section (a)(4) below. The appellant(s) (and cross-appellant(s)) shall file with the clerk of the court of appeals, with service on all other parties, an original and one copy of a completed Civil Appeal Statement within 10 days after filing the notice of appeal in the district court. The completed Civil Appeal Statement shall set forth information necessary for an understanding of the nature of the appeal and shall be accompanied by the portion of the district court record described in 11th Cir. R. 33-1(b)(1). Any appellee may file an original and one copy of a response with the court of appeals within seven days of the receipt of the completed Civil Appeal Statement and shall serve a copy of the response on all other parties.

(2) Review of administrative agency orders and appeals from the United States Tax Court. When the clerk of the court of appeals notifies the parties that an appeal or petition has been docketed, the clerk shall also notify the appellant(s)/petitioner(s) (and cross-appellant(s)/cross-petitioner(s)) that a Civil Appeal Statement form is available as provided in section (a)(4) below. The appellant(s)/petitioner(s) (and cross-appellant(s)/cross-petitioner(s)) shall file with the clerk of the court of appeals, with service on all other parties, an original and one copy of a completed Civil Appeal Statement within 10 days from the date the notice was transmitted by the clerk of the court of appeals. The completed Civil Appeal Statement shall set forth information necessary for an understanding of the nature of the appeal or petition and shall be accompanied by the portion of the record described in 11th Cir. R. 33-1(b). Any appellee/respondent may file an original and one copy of a response with the court of appeals within seven days of the receipt of the completed Civil Appeal Statement and shall serve a copy of the response on all other parties.

(3) A Civil Appeal Statement is not required to be filed in (1) appeals or petitions in which the appellant/petitioner (or cross-appellant/cross-petitioner) is proceeding without the assistance of counsel or in which the appellant/petitioner (or cross-appellant/cross-petitioner) is incarcerated; (2) appeals from habeas corpus actions filed under 28 U.S.C. §§ 2241, 2254, and 2255; and (3) immigration appeals.

(4) Availability of Civil Appeal Statement forms. The Civil Appeal Statement form is available on the Internet at www.ca11.uscourts.gov. Copies may also be obtained from the clerk of the court of appeals and from the clerk of each district court within the Eleventh Circuit.

(b) Portions of Record to Accompany Completed Civil Appeal Statement.

(1) Civil appeals from United States district courts and the United States Tax Court. The appellant shall file with each completed Civil Appeal Statement the following portions of the district court or tax court record:

(i) the judgment or order appealed from;

(ii) any other order or orders sought to be reviewed, including, in bankruptcy appeals, the order(s) of the bankruptcy court appealed to the district court;

(iii) any supporting opinion, findings of fact, and conclusions of law filed by the court;

(iv) the magistrate judge's report and recommendation, when appealing a court order adopting same in whole or in part; and

(v) findings and conclusions of an administrative law judge, when appealing a court order reviewing an administrative agency determination involving same.

(2) Review of administrative agency orders. The petitioner shall file with each completed Civil Appeal Statement the following portions of the agency record:

(i) the agency docket sheet, or index of documents comprising the record, if one exists;

(ii) any order or orders sought to be reviewed; and

(iii) any supporting opinion, findings of fact, and conclusions of law filed by the agency, board, commission, or officer.

(c) Mediation.

(1) An active or senior judge of the court of appeals, a panel of judges (either before or after oral argument), or the Kinnard Mediation Center, by appointment of the court, may direct counsel and parties in an appeal to participate in mediation conducted by the court's circuit mediators. Mediations are official court proceedings and the Kinnard Mediation Center circuit mediators act on behalf of the court. Counsel for any party may request mediation in an appeal in which a Civil

Appeal Statement is required to be filed if he or she thinks it would be helpful. Such requests will not be disclosed by the Kinnard Mediation Center to opposing counsel without permission of the requesting party. The purposes of the mediation are to explore the possibility of settlement of the dispute, to prevent unnecessary motions or delay by attempting to resolve any procedural problems in the appeal, and to identify and clarify issues presented in the appeal. Mediation sessions are held in person or by telephone. Counsel must, except as waived by the mediator in advance of the mediation date, have the party available during the mediation. Should waiver of party availability be granted by the mediator, counsel must have the authority to respond to settlement proposals consistent with the party's interests. The mediator may require the physical presence of the party at an in-person mediation or the telephone participation of the party in a telephone mediation. For a governmental or other entity for which settlement decisions must be made collectively, the availability, presence, or participation requirement may be satisfied by a representative authorized to negotiate on behalf of that entity and to make recommendations to it concerning settlement.

(2) A judge who participates in the mediation or becomes involved in the settlement discussions pursuant to this rule will not sit on a judicial panel that deals with that appeal.

(3) Communications made during the mediation and any subsequent communications related thereto shall be confidential. Such communications shall not be disclosed by any party or participant in the mediation in motions, briefs, or argument to the Eleventh Circuit Court of Appeals or to any court or adjudicative body that might address the appeal's merits, except as necessary for enforcement of Rule 33-1 under paragraph (f)(2), nor shall such communications be disclosed to anyone not involved in the mediation or otherwise not entitled to be kept informed about the mediation by reason of a position or relationship with a party unless the written consent of each mediation participant is obtained. Counsel's motions, briefs, or argument to the court shall not contain any reference to the Kinnard Mediation Center.

(d) Confidential Mediation Statement. The court requires, except as waived by the circuit mediator, that counsel in appeals selected for mediation send a confidential mediation statement assessing the appeal to the Kinnard Mediation Center before the mediation. The Kinnard Mediation Center will not share the confidential mediation statement with the other side, and it will not become part of the court file.

(e) Filing Deadlines. The filing of a Civil Appeal Statement or the scheduling of mediation does not extend the time for ordering any necessary transcript (pursuant to 11th Cir. R. 10-1) or for filing briefs (pursuant to 11th Cir. R. 31-1). Such time may be extended by a circuit mediator to comply with these rules if there is a substantial probability the appeal will settle and the extension will prevent the unnecessary expenditure of time and resources by counsel, the parties, and the court.

(f) Noncompliance Sanctions.

(1) If the appellant or petitioner has not taken the action specified in paragraph (a) of this rule within the time specified, the appeal or petition may be dismissed by the clerk of the court of appeals after appropriate notice pursuant to 11th Cir. R. 42-1.

(2) Upon failure of a party or attorney to comply with the provisions of this rule or the provisions of the court's notice of mediation, the court may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; dismiss the appeal; or take such other appropriate action as the circumstances may warrant.

(g) Use of Private Mediators.

(1) Upon agreement of all parties, a private mediator may be employed by the parties, at their expense, to mediate an appeal that has been selected for mediation by the Kinnard Mediation Center.

(2) Such private mediator (i) shall have been certified or registered as a mediator by either the State of Alabama, Florida, or Georgia for the preceding five years; (ii) shall have been admitted to practice law in either the State of Alabama, Florida, or Georgia for the preceding fifteen years and be currently in good standing; and (iii) shall be currently admitted to the bar of this court.

(3) All persons while employed as private mediators shall follow the private mediator procedures as set forth by the Kinnard Mediation Center.

(4) The provisions of this subsection (g) shall be in effect until September 30, 2006, and thereafter if re-authorized by order of this court.

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UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

Mediation and Guidelines for Effective Mediation Representation

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PART 1: Introduction

The Eleventh Circuit's mediation program was created in 1992. Formerly known as the Circuit Mediation Office, in 2001 the Eleventh Circuit designated the office as the Kinnard Mediation Center (KMC) in recognition of Stephen O. Kinnard's (its first chief circuit mediator) extraordinary service in making mediation a fundamental component of the Eleventh Circuit's appeals process.

The KMC conducts mediation of civil appeals pursuant to Federal Rule of Appellate Procedure 33 and Eleventh Circuit Rule 33-1. The court's mediation process provides confidential, risk-free opportunities for parties to resolve their dispute with the help of a neutral third-party. Each year hundreds of appeals are resolved through the mediation program.

The KMC's circuit mediators are full-time employees of the Eleventh Circuit and have extensive trial and appellate experience as well as significant training and experience in mediation. The circuit mediators are located in Atlanta, Tampa, and Miami.

Pursuant to Rule 33-1(g), a private mediator may be employed by the parties, at their expense, to mediate an appeal that has been selected for mediation by the KMC. The private mediator will conduct the mediation under the procedures set forth by the KMC, and the assigned circuit mediator will provide assistance as specified in those procedures. Information about substituting a private mediator is in the document "Private Mediator Procedures for Mediation of Appeals."

PART 2: Eligible Appeals

All fully counseled civil appeals, except prisoner, habeas corpus, and immigration appeals, are eligible for mediation conducted by the KMC. Certain categories of eligible but low-expectation appeals may be excluded from assignment to adjust the total universe of covered appeals to the capacity of the mediator staff to mediate cases.

PART 3: Selection Process

Eligible appeals are sorted by district and rotationally assigned to the circuit mediators. The circuit mediators review each assigned appeal before scheduling it for mediation and may remove an appeal from the mediation program based on a procedural reason or a discretionary reason.

The KMC, an active or senior judge of the court of appeals, or a hearing panel of judges, either before or after oral argument, may direct counsel and parties in an appeal to participate in mediation conducted by the KMC. Counsel for any party may confidentially request mediation in eligible appeals by calling the KMC. Such requests are not disclosed by the KMC to opposing counsel without permission of the requesting party.

PART 4: Documents Reviewed

The Civil Appeal Statement, accompanied by required portions of the record, the notice of appeal, the district court and court of appeals dockets, and, in appeals scheduled for mediation, the required Confidential Mediation Statements of counsel provide the KMC with the information necessary for an understanding of the nature of the appeal.

PART 5: Scheduling Process

The KMC sends written notice of the initial mediation to lead counsel, to be received at least two weeks before the mediation date. The KMC schedules most mediations soon after court of appeals docketing. Participation in the mediation is mandatory; however, if the parties consult and all agree that mediation would not be productive, they may contact the circuit mediator handling the appeal to discuss changing the scheduled mediation date to a half-hour assessment conference. The decision to change the scheduled mediation to an assessment conference rests with the circuit mediator. **If counsel files a joint or unopposed motion to dismiss the appeal before the mediation, counsel should call the KMC to cancel the mediation.**

PART 6: Mediation Process

Initial mediations are conducted in person and by telephone. If counsel are located in the Atlanta area, Tampa area, or Miami area, the initial mediation will usually be held in person at the KMC. If counsel are noticed for a telephone mediation, but all parties prefer to have an in-person mediation, counsel may call the circuit mediator to discuss a change.

The circuit mediator begins the mediation by discussing confidentiality, and inquiring whether any procedural questions or problems can be resolved by agreement. The parties and the circuit mediator then discuss, either jointly or separately, and in no particular order, the following topics: (1) the legal issues and the appellate court's decision-making process; (2) the history of any efforts to settle the case; (3) the parties' underlying interests, preferences, motivations, assumptions, and new information or other changes that may have occurred; (4) future events based upon the various outcome alternatives of the appeal; (5) how resolution of the appeal impacts the underlying problem; (6) cost-benefit and time considerations; (7) any procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand, etc.). The discussion is not limited to these topics and varies considerably because each appeal has its own circumstances. The circuit mediator also attempts to generate offers and counteroffers and may have several follow-up mediation sessions by telephone or in person until the case settles or it is decided the case will not settle.

Because circuit mediation is based on the principles of self-determination by the parties and impartiality of the neutral, the circuit mediators apply the facilitative model of mediation.

Counsel should allow two hours for initial telephonic mediations; from four hours to all day for initial in-person mediations; and from 30 minutes to one hour for follow-up mediation sessions. To pursue fully all opportunities of negotiated settlement, there is extensive follow-up activity such as additional telephone calls, in-person sessions, or caucuses with each side separately.

PART 7: Party Participation

Rule 33-1(c)(1) requires that counsel must, except as waived by the mediator in advance of the mediation date, have the party available during the mediation. Should waiver of party availability be granted by the circuit mediator, counsel must have the authority to respond to settlement proposals consistent with the party's interests. The circuit mediator may require the physical presence of the party in an in-person mediation or the telephone participation of the party in a telephone mediation. For a governmental or other entity for which settlement decisions must be made collectively, the availability, presence, or participation requirements may be satisfied by a representative authorized to negotiate on behalf of that entity and to make recommendations to it concerning settlement.

The KMC attempts to identify lead counsel for all parties when scheduling a mediation. Counsel should promptly advise the Center if the purposes of the mediation would be accomplished more effectively with different or additional attorneys or participants.

PART 8: Confidential Mediation Statement

Rule 33-1(d) requires counsel in appeals selected for mediation to send the circuit mediator a Confidential Mediation Statement assessing the appeal before the mediation. The statement should be in compliance with the factors outlined and questions raised below, prepared in letter format, and faxed or mailed to the circuit mediator so that it is received at least two days prior to the initial mediation date. The statement is not shared with the other side and does not become part of the court file. The statement should include:

- A brief recitation of the circumstances that gave rise to the litigation. If the appeal involves procedural issues, the facts of the underlying dispute are included as well, since the purpose of the mediation process is to resolve disputes in their entirety.
- A description of any matters pending in the lower court or in any related litigation.
- Any recent developments that may impact on the resolution of the appeal.
- A history of any efforts to settle the appeal including any prior offers or demands.
- A candid assessment of the parties' respective strengths and weaknesses.
- Identification of individuals counsel believe should be directly involved in the settlement discussions.

- A description of any sensitive issues that may not be apparent from the court records but influence the settlement negotiations.
- The nature of the relationship between counsel and between the parties.
- The parties' priority of interests.
- Any suggested approaches or creative solutions for the circuit mediator to take in an attempt at settlement ("problem" to be settled, sequence of issues).
- The necessary terms in any settlement.
- Any limitations in counsel's authority to make commitments on behalf of the client.
- Any concerns about confidentiality.
- Any additional information your client or the other party needs to settle the appeal and whether it should be provided before the mediation.

PART 9: Extensions of Time to File Briefs

Mediation does not automatically stay appellate proceedings, including the briefing schedule. If counsel has a brief due and would like to request an extension of time, the circuit mediator can grant an extension for counsel if (1) all parties agree on extending the time, (2) the extension will facilitate settlement, (3) the deadline for submitting the brief has not passed, and (4) counsel has not previously filed a motion for an extension of time. Counsel should telephone the circuit mediator to make this request, and if the circuit mediator grants the extension, counsel must fax a confirmation letter to the circuit mediator, copied to all counsel, that reads as follows:

Re: [appeal number and caption]. This confirms that to facilitate settlement you have granted my unopposed request to extend the time to file the [appellant's/appellee's] brief from the current due date of [date] to the new due date of [date].

The circuit mediator will forward counsel's letter to the clerk, and the clerk will update the docket to reflect the new due date. If the circuit mediator cannot grant an extension for any of the above reasons, counsel can request an extension from the clerk or file a motion for an

extension that will be acted upon by the court (Eleventh Circuit Rule 31-2). If counsel files a motion for an extension, it should not contain any reference to the KMC or circuit mediation because the court does not know which appeals are being mediated by the circuit mediators, except when a hearing panel has referred an appeal for mediation.

PART 10: Voluntary Settlement

Because settlement is voluntary, no actions affecting the interests of any party are taken without the consent of all parties. If a settlement is reached, counsel prepare the settlement agreement, which is binding upon all parties to the agreement, and file a joint (or agreed) motion to dismiss. If the appeal does not settle, the circuit mediator declares an impasse, but negotiations can resume at any time until the appeal is terminated.

PART 11: Post-Settlement Dismissal Procedures

If the parties have reached a settlement, once they have agreed on the terms of settlement, they should file a joint (or agreed) motion to dismiss under Fed. R. App. P. 42(b) and 11th Cir. R. 42-1(a). This motion should address the following:

- Whether the dismissal pertains to all parties and claims on appeal.
- Whether the appeal is to be dismissed without prejudice (which may be granted by the clerk) or with prejudice (which must be ruled upon by a panel of three judges).
- Whether the parties are to bear their own costs or another agreed apportionment.

The motion to dismiss either should be signed by all parties or, if submitted by one party, should contain an explicit statement that all other parties to the settlement agreement consent. If submitted by only one party, the motion should be submitted by the appellant. All motions must be accompanied by a certificate of service and a certificate of interested parties. See 11th Cir. R. 27-1(a).

Settlement does *not* automatically stay any of the actions required under the rules to be timely performed, including ordering necessary transcripts and briefing. If counsel has a brief due prior to a motion to dismiss being *presented and decided*, counsel may request an extension of time to complete that action. Counsel should make the request by telephone

directly to the circuit mediator, rather than by motion, and then fax the circuit mediator a confirmation letter of the extension granted, which the circuit mediator will forward to the clerk's office. If this appeal is scheduled for oral argument, counsel should contact Matt Davidson in the court sessions unit of the clerk's office at 404-335-6131 for further direction.

PART 12: Confidentiality

Communications made during the mediation and any subsequent communications related thereto are confidential. Communications are not disclosed by any party or participant in the mediation in motions, briefs, or argument to any court or adjudicative body that might address the appeal's merits, except as necessary for enforcement of noncompliance sanctions, nor are communications disclosed to anyone not involved in the mediation or otherwise not entitled to be kept informed about the mediation by reason of a position or relationship with a party unless the written consent of each mediation participant is obtained. Counsel's motions, briefs, or argument to the court may not contain any reference to the KMC or circuit mediation. The circuit mediator's notes and counsel's Confidential Mediation Statements do not become part of the court's file. The KMC does not reveal any request by counsel for mediation without the requesting party's permission. *Ex parte* communications are also confidential except to the extent disclosure is authorized. This confidentiality applies in all mediated appeals including those referred to mediation by an active or senior judge or a hearing panel of judges.

PART 13: Noncompliance Sanctions

Mediations conducted by the circuit mediators are official court proceedings and the circuit mediators act on behalf of the court. Rule 33-1(f) imposes sanctions against any party who fails to comply with the provisions of the rule or provisions of the court's notice of mediation.

PART 14: Preparing for Effective Mediation

Approaching the Process

- Discuss with your client their goals in resolving the litigation.
- Prepare to negotiate in good faith and express your client's views on the appeal's merits as well as your client's interests.
- Obtain advance authority from your client to make those commitments as may reasonably be anticipated, keeping in mind the appeal's potential worst-case scenario in establishing this authority.
- Encourage your client to participate at every stage of the mediation process.
- Prepare thoroughly (as if you were going to a hearing or a trial) with the final goal of resolving the dispute in mind.
- Understand the rules of the court and the role of the KMC.
- Initiate informal *ex parte* contacts with the circuit mediator to discuss information that will help the circuit mediator understand the appeal and your interests.
- Consider whether a premediation session with the circuit mediator and your client would be beneficial.

The "Authority" Issue in Mediation

- If having the right person involved in the negotiation has been a problem in the past, raise the issue with the circuit mediator *before* the mediation session. The better practice is to have a clear understanding of who will be present at the mediation and what authority they will have.
- Authority by "telephone standby" may be appropriate.
- In appeals where your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the circuit mediator in advance.
- Understand whether the person has authority to decide or to "report and recommend" a proposed settlement to a superior.
- Have someone with "worst-case authority" present or available.

Working with the Circuit Mediator

- Follow the circuit mediator's cues. Look for two types of questions circuit mediators may ask in initial joint session: (1) What happened? (2) What do you want from the mediation (priorities, interests, results)?
- If the circuit mediator asks you to restate a point, be patient. The circuit mediator may be asking you questions to elicit information that the other party needs to hear.
- Provide the circuit mediator with legal, factual, and practical information that can be used to reality-test the other party's expectations.
- Use the circuit mediator to point out settlement options and reality-test your client's expectations. Be candid and realistic about your "worst case."
- Use the circuit mediator to suggest your proposals or to offer proposals as options "not owned by anyone."
- Confer with the circuit mediator as to how or when to make proposals or settlement offers. Consider: What is your outcome analysis? What is a fair settlement analysis (range) in light of it? Is this a reasonable move in relation to where you are going?
- Confer with the circuit mediator as to the best strategy towards closure and whether and when it is advisable to offer a "bottom-line" figure or a "best and last" proposal.
- Use the circuit mediator to guide you in ascertaining whether there are impasses that take time to work out or whether the other side is intractable and the mediation should be terminated. If you must impasse, know precisely why you have been unable to settle and what must change before impasse can be broken.
- Be patient and persistent. Each mediation has its own rhythm and pace.

The Role of Appeal Evaluation in the Mediation

- Mediation is not designed for "deciding past rights and past wrongs"--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.
- After problems have become lawsuits there is the inevitable desire by the parties and counsel to have a third-party tell them "how they are going to do" in the appeal. The circuit mediator will address that desire in such a way that does not blunt the overall objectives of mediation and unnecessarily narrow the focus but rather gives the parties

and counsel some assistance, or tools, for *them* to better evaluate their appeal. In this part of the mediation process “self realization is the best form of persuasion.”

- The circuit mediator will not predict how the court will rule in a particular appeal, but rather attempt to clarify the issues on appeal.
- The circuit mediator may discuss objective court information—how the court operates. Many times counsel have specific expectations about what they want to achieve; for example, a published opinion. The circuit mediator may discuss the probabilities of that occurring and also discuss time lines and generic reversal rates.
- The circuit mediator may discuss some of the court’s decision-making components: (1) standards of review (including Rule 36-1); (2) preservation of error; (3) waiver; (4) new issues on appeal; (5) mootness.
- The circuit mediator may discuss the various outcome options and how they may relate to the course of the litigation: (1) So what if you win? (2) So what if you lose? (3) Where is the money? (4) Does a resolution of the legal issues solve your problem? (5) Are you potentially headed for an inconclusive result?

The Elements of an Effective Initial Presentation

- A skillful initial presentation is not necessarily “conciliatory.” There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the “common ground” that the parties may have in seeking to resolve the situation.
- Let your client speak if you believe it appropriate, and let your client respond directly to questions from the circuit mediator or the other side, if you are prepared to do so.
- Effectively use what you have developed in prior proceedings: prior rulings, deposition testimony, key documents, and any admissions.
- Do not use “legalese.”
- Do not give everybody in the room the impression that you, the lawyer, are the gate through which all reason must pass before a settlement will be reached.

- Do not be antagonistic to the opposing party. Save your comments on personality problems and the conduct of parties or their counsel for private caucus with the circuit mediator.
- Do not “draw a line in the dirt” in your initial presentation.
- When opposing counsel is giving their initial presentation: (1) Let them speak without argument or interruption. (2) Consider this an opportunity to learn new facts. (3) Use this as an opportunity to have the other side describe “what it really wants” in the dispute rather than restate its legal position. (4) Ascertain if the other side has a hierarchy of true interests. (5) Look for common ground. (6) Assess the other party’s weaknesses. (7) Listen carefully to what the other side is saying and even repeat back what the other side is saying to convince them that you have heard their position. (8) If a settlement proposal is made at the conclusion of the initial presentation, do not reject it out-of-hand. Given the fluid nature of many mediations, lawyers and clients may be presented with settlement possibilities (or proposals) that they had not considered at the outset.
- Work to draw your opponent to your position. (“Defeat your enemy by making him your friend.”)

Private Caucuses with Your Client and the Circuit Mediator

- Be clear about what information you expect the circuit mediator to treat as confidential.
- Ask the circuit mediator for more information about the other party’s position.
- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the appeal; (4) discuss the other party’s needs or interests; (5) discuss what information the circuit mediator can use to do “reality-testing” of other party’s expectations and position.
- Use “downtime”--when the circuit mediator is having a private caucus with the other side--to review your client’s interests in light of any new information and any historical information that may have become important and to “brainstorm” about possible solutions with your client and any co-counsel.

Mediation Don'ts

- Don't prevent the circuit mediator from talking to your client or from talking with all the parties.
- Don't be afraid to ask for a moment during the mediation to speak privately with your client.
- Don't base your settlement strategy on how well you are going to do in a particular court.
- Don't accuse the opposing party or their counsel of "bad faith" during a mediation just because their settlement posture did not live up to your expectation.
- Don't burn your bridges during mediation. Your appeal may take an unexpected turn for the worse as it develops, and you may wish to re-initiate mediation.

Further information is available through the Kinnard Mediation Center, United States Court of Appeals, Eleventh Judicial Circuit, 56 Forsyth Street, NW, #535, Atlanta, Georgia 30303, telephone 404-335-6260, fax 404-335-6270; through its Tampa office at 801 North Florida Avenue, #1030, Tampa, Florida 33602, telephone 813-301-5530, fax 813-301-5539; through its Miami office at 51 Southwest First Avenue, #1304, Miami, Florida 33130, telephone 305-714-1900, fax 305-714-1910; and on the Internet at www.ca11.uscourts.gov.