

FILED

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

OCT 28 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN DOE #1, an individual; et al.,

Plaintiffs - Appellants,

v.

SAM REED, in his official capacity as Secretary of
State of Washington and BRENDA GALARZA, in
her official capacity as Public records Officer for the
Secretary of State of Washington,

Defendants - Appellees,

WASHINGTON COALITION FOR OPEN
GOVERNMENT and WASHINGTON FAMILIES
STANDING TOGETHER,

Intervenor-Defendants - Appellees.

No. 11-35854

DC # 3:09-cv-05456-BHS
Western Washington
(Tacoma)

ORDER

This case is NOT SELECTED for inclusion in the Circuit Mediation Program.

Counsel may contact Chris Goelz, Circuit Mediator, at (206) 224-2323 or
Chris_Goelz@ca9.uscourts.gov to discuss services available through the court's
mediation program or to request a settlement assessment conference. Upon agreement of
the parties, the briefing schedule can be modified or vacated to facilitate settlement
discussions.

Counsel are requested to send copies of this order and the attached memorandum
to their clients.

FOR THE COURT:

By: Lynn Warton
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit Mediation Office, Northwest Branch
1010 Fifth Avenue, Suite 730
Seattle, Washington 98104-1130

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Mediation Office: Lynn_Warton@ca9.uscourts.gov

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Procedures Governing the Circuit Mediation Program

A. Purpose of the Program

The Circuit Mediation Program was established pursuant to FRAP 33 and Circuit Rule 33-1. The goal of the program is to facilitate the voluntary resolution of appeals. In most cases, voluntary resolution is a result of settlement between the parties. In other cases, the focus of discussions is on managing the appeal process or other related litigation in a manner that saves the court from deciding issues unnecessarily. Each year hundreds of appeals are resolved through the mediation program

B. Mediation Alternatives

The court expects the parties and their counsel to consider carefully any possibilities for settling the case on appeal. The parties may utilize without cost the services of the court's mediation office to explore settlement. The court's eight mediators are full-time employees of the Ninth Circuit. They are experienced litigation attorneys who also have extensive training and experience in negotiation, mediation and Ninth Circuit practice and procedure.

Alternatively, the parties may elect to pursue settlement directly or through counsel or to schedule a mediation with a private mediator. Whether parties are pursuing settlement through the mediation office or independently, a court mediator can help with procedural matters to insure that the appellate process does not interfere with the parties' efforts. The mediator is also available to answer questions that might be relevant to settlement.

C. Settlement through the Mediation Office

The mediation office can be flexible with regard to its role in the parties' settlement discussions. The mediator can pass proposals between counsel, help counsel

evaluate the parties' litigation prospects, help generate settlement alternatives, and can help address procedural problems. In some cases the parties pursue settlement over a period of weeks or months by telephone and letter. In others, they schedule an in-person mediation. At the beginning of every case, the mediator will work with counsel to establish a settlement process agreeable to all parties.

In many cases, the court initiates settlement efforts by means of an "assessment conference" with counsel. The purpose of the assessment conference is to explore the parties' perspectives on settlement as well as any other issues that might help resolve the appeal. At the conference the mediator explores the factual and procedural background of the case, the issues on appeal, the possible outcomes of an appeal, and the parties' views on settlement. Frequently, the discussions include issues that are not part of the appeal. The typical assessment conference lasts 30 to 45 minutes.

D. Effect of Conference on Appellate Process

In cases in which the parties elect to pursue settlement, the mediator can "select" the case for mediation. This transfers procedural control of the case from the clerk's office to the mediation office. The mediator can adjust briefing schedules, can stay appeals, and can enter other procedural orders to facilitate settlement. As a general matter, the mediator will only enter such orders in a case with counsels' agreement. Also, if any party decides that it wishes to terminate settlement discussions, the appeal will be returned to the normal appellate track. From that point on, counsel should direct all inquiries and filings to the Clerk's office.

In most cases, delays in briefing to explore settlement will not delay a decision in the appeal. This is because appeals are scheduled for argument and disposition based on the date the notice of appeal is filed, not the date that briefing is completed. The time for the entire appellate process, including briefing, argument and disposition, is typically 18 months to 2 years.

E. Confidentiality of the Process

In order to encourage efficient and frank settlement discussions, the court exercises great care to ensure strict confidentiality of the settlement process. Circuit Rule 33-1 provides that settlement-related information disclosed to a court mediator will be kept confidential and will not be disclosed to the judges deciding the appeal or to any other person outside the Circuit Mediation Program participants. Documents and correspondence related to settlement are maintained only in the Circuit Mediation Office and are never made part of the main Ninth Circuit case file. Should the mediator confer

separately with the participants, those discussions shall also be maintained in confidence from the other participants in the settlement discussions to the extent that the communicating parties request.

In addition, participants in the Circuit Mediation Program are expected to respect the confidentiality of the settlement processes and to adhere to the following:

- (1) Unless they indicate otherwise to the mediator at the initiation of any settlement discussions, all parties, attorneys and other participants in the settlement discussions are assumed to agree that any written or oral communication made by the mediator, or any party, attorney, or other participant in the settlement discussions:
 - (a) may not be used for any purpose in any pending or future proceeding in this or any other court or administrative forum; and
 - (b) may not be disclosed to anyone who is not a participant in the mediation or an authorized agent of a participant.

- (2) The nondisclosure provisions of paragraph (1) do not apply if such disclosure:
 - (a) is agreed upon by the mediator and all participants in the mediation; or
 - (b) is made in the context of a subsequent confidential mediation or settlement conference with the agreement of all participants and the third-party neutral.