

KINNARD MEDIATION CENTER
UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

Private Mediator Procedures for Mediation of Appeals

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PART 1: Introduction

Eleventh Circuit Rule 33-1(g) provides that upon agreement of all parties, a private mediator may be employed by the parties to mediate an appeal that has been selected for mediation by the Kinnard Mediation Center (KMC). Persons employed as private mediators under the rule shall follow the private mediator procedures as set forth by the KMC. Those procedures are provided below along with other information that may be useful to private mediators conducting these mediations. Although specific procedures are set forth, private mediators employed under the rule are reminded that their conduct will reflect on the court. Therefore, their conduct should reflect the highest professional standards.

PART 2: Eleventh Circuit Rule 33-1

The applicable portions of Eleventh Circuit Rule 33-1 are as follows:

(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, have the client either physically present or available by telephone during the mediation. Should waiver of client participation be granted by the mediator, counsel must have the authority to respond to settlement proposals consistent with the client's interests. The mediator may require the physical presence of the client at an in-person mediation. For a governmental or other entity for which settlement decisions must be made collectively, the availability or presence 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) Statements and comments 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.

PART 3: Appeals That May Be Mediated by a Private Mediator

All fully counseled civil appeals, except prisoner, habeas corpus, and immigration appeals, are eligible for mediation by the KMC. Certain eligible appeals, however, are not generally selected for mediation. A private mediator employed by the parties and who meets the qualifications required by the rule may be substituted for the assigned circuit mediator to conduct the KMC-selected mediation. Appeals specifically sent to mediation by the court may not be privately mediated.

PART 4: Private Mediator Selection Form

When parties desire to employ a private mediator in an appeal that has been selected for mediation by the KMC, they must complete a "Request for Use of a Private Mediator" form (Appendix A). The form must be signed by counsel for all parties and by the selected private mediator. The completed and executed form must then be submitted to the KMC within ten days of the date of the notice of mediation.

PART 5: Assistance by Assigned Circuit Mediator

Even though the parties have decided to employ a private mediator to conduct the mediation of an appeal, the circuit mediator whose name appears on the court's notice of mediation will remain assigned to the matter and is available to answer questions by the private mediator and parties and provide other assistance as needed. Further, no extension of time to file a brief (see Part 12) may be granted by a private mediator; only the assigned circuit mediator may authorize such extensions.

PART 6: Information Furnished to the Private Mediator

Upon the filing of the Request for Use of a Private Mediator, the KMC will provide to the private mediator copies of the following materials: (1) the Civil Appeal Statement with required attachments and (2) a copy of the USCA docket as of the date of the approved substitution. Thereafter the required confidential mediation statements and any courtesy copies of briefs or other documents shall be sent directly by the parties to the private mediator. Counsel are instructed to prepare their confidential mediation statement in letter format and fax or mail it to the private mediator. Counsel need not forward to the KMC copies of the confidential mediation statement.

Confidential mediation statements are not shared with the other side and do not become part of the court file and 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 will 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 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 7: Conduct of Mediation

The mediation process is nonbinding, so no settlement is reached unless all parties agree.

The private mediator should begin the mediation by describing the mediation process, discussing confidentiality, and inquiring whether any procedural questions or problems can be resolved by agreement. The parties and the mediator may 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 regarding these issues (e.g., preservation of error, waiver, standards of review, etc.); (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 will vary considerably because each appeal has its own circumstances. The mediator will also attempt to generate offers and counteroffers and may have several follow-up mediation sessions by telephone or in person until the appeal settles or it is decided the appeal will not settle.

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

The private mediator should contact the assigned circuit mediator if he or she needs assistance or further information about the conduct of the mediation.

PART 8: Confidentiality

See Rule 33-1(c)(3) in Part 2 above, which specifically addresses confidentiality.

The 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 for mediation made by counsel without the requesting party's permission. *Ex parte* communications are confidential except to the extent disclosure is authorized.

Parties, counsel, and private mediators shall neither contact nor disclose to third parties, the media, or the court and its employees, save the KMC, any of the contents of the mediation. Parties, counsel, and private mediators may disclose the contents of the mediation to clients, co-counsel, and other persons entitled to be kept informed about the mediation by reason of a position or relationship with a party. Parties, counsel, and private mediators may disclose the fact of the occurrence of the mediation.

The confidentiality rule applies in all mediated appeals including those conducted by a private mediator. The court *strictly enforces* this rule.

The private mediator should contact the assigned circuit mediator if he or she has any questions regarding confidentiality.

PART 9: Bias, Conflicts of Interest, and Disqualification

Private mediators shall govern their behavior under the standards of professional responsibility promulgated by the state bars of which they are members and the state mediation or alternative dispute resolution programs by which they are certified or registered.

A private mediator may be disqualified from mediating KMC appeals or subject to other sanctions for:

- Violating Rule 33-1, including KMC private mediation procedures;
- Failure to remain in good standing with this court;
- Failure to remain in good standing and abide by the standards of practice established by his or her state bar licensing authority;
- Failure to remain in good standing and abide by the standards of practice established by his or her state ADR authority;
- At the discretion of the chief judge of this court.

PART 10: Time Period of Mediation

Time is of the essence for conducting appellate mediations given the exigencies of brief writing and the process of appellate review. If the parties choose to employ a private mediator rather than use the assigned circuit mediator, they shall submit to the KMC a Request for Use of a Private Mediator within ten days of the date of the court's notice of mediation. The private mediator shall conduct the first mediation session within 28 days of the date of the court's notice of mediation. This time schedule allows the parties the opportunity to assess the settlement possibilities of the appeal, request an extension of time to file a brief if an extension would be appropriate, conduct follow-up sessions, and not preclude a settlement because of the court's issuance of a decision.

The private mediator should contact the assigned circuit mediator if he or she has any questions about the time period for mediation and shall immediately advise the assigned circuit mediator when the mediation has concluded and whether it ended by settlement or impasse.

PART 11: Location of Mediations

Mediations are to take place in a location that is conducive to discussion, provides security so confidentiality may be maintained, and is convenient for the parties, all in a manner appropriate to the dignity of the court. Mediations may be conducted in person or by telephone. Private mediations may not be conducted at the facilities of the United States District Courts or Court of Appeals.

PART 12: Extensions of Time to File Briefs

Mediation, whether by a circuit mediator or a private mediator, does not automatically stay appellate proceedings, including the briefing schedule. However, the parties may request an extension from either the clerk or the assigned circuit mediator or may file a motion that will be acted upon by the court. Private mediators cannot grant extensions.

If counsel has a brief due and would like to request an extension of time, the assigned 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 discuss extensions of time first with the private mediator for his or her approval, then with the assigned circuit mediator. The private mediator should telephone the assigned circuit mediator to make the request for an extension of time. The assigned circuit mediator will inquire regarding the status of the mediation and ask whether any prior extensions have been granted and, if so, by whom (the clerk, KMC, or the court). If the assigned circuit mediator grants the extension, counsel must fax a confirmation letter to the assigned circuit mediator, copied to all counsel and to the private mediator, 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 [and record excerpts if appellant's brief] from the current due date of [date] to the new due date of [date].

The assigned circuit mediator will forward counsel's confirmation letter to the clerk, and the clerk will update the docket to reflect the new due date. If the assigned 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 the mediation has reached an impasse, the assigned circuit mediator may grant a final brief extension of relatively short duration.

PART 13: Adjudication During Mediation

Because the mediation is proceeding on a contemporaneous track with the appellate court review, it may occur before the mediation is concluded that an appeal is dismissed for lack of prosecution or lack of jurisdiction or that the court may decide the appeal. If there is such a disposition of the appeal by the court, the parties may agree to further mediation efforts by the private mediator to reach a settlement of the dispute. Should a party not agree to such further mediation, the mediation shall be impassed.

PART 14: Communications

The private mediator should communicate directly with the assigned circuit mediator regarding the administration and conduct of the mediation. Private mediators cannot directly contact either the clerk or the court regarding the appeal. Counsel may individually contact the private mediator and the assigned circuit mediator. If counsel have questions or concerns regarding the mediation, those questions should be first addressed to the private mediator then to the assigned circuit mediator. There is no prohibition on ex parte contacts in the mediation program. Parties, counsel, and private mediators cannot directly or indirectly contact judges or chambers' staff.

Parties and counsel should address questions to either the private mediator or the assigned circuit mediator, as appropriate. Counsel should discuss extensions of time to file briefs first with the private mediator for his or her approval then with the assigned circuit mediator.

PART 15: Report of Mediation Results

Upon request of the assigned circuit mediator, the private mediator shall report the status of the mediation. Upon conclusion of the mediation, the private mediator shall report immediately by telephone, email, or fax to the assigned circuit mediator whether the mediation ended at complete settlement, partial settlement, or impasse. In the event a settlement was reached, the private mediator must advise parties and counsel that the reporting of 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 some action will be due prior to a motion to dismiss being presented and decided, counsel should request an extension of time to complete that action. The private mediator shall complete and fax to the KMC a Mediator's Report (Appendix B) within one week of the conclusion of the mediation.

PART 16: Post-Settlement Dismissal Procedures

Once all parties agree on the terms of settlement, counsel should file a joint (or agreed) motion to dismiss under Federal Rules of Appellate Procedure 42(b) and Eleventh Circuit Rule 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 Eleventh Circuit Rule 27-1(a)(1).

Settlement does *not* automatically stay any of the actions required under the rules to be timely performed, including ordering necessary transcripts and briefing. If some action on behalf of a party will be due prior to a motion to dismiss being *presented and decided*, counsel may also request an extension of time to complete that action. If a party needs an extension of

the briefing schedule, counsel should make a request by telephone directly to the KMC, rather than by motion, and send a confirmation letter of the extension, by fax *or* mail, which the KMC 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 17: Evaluation Procedures

At the conclusion of all mediation procedures, the KMC sends an evaluation questionnaire to counsel of record inviting their candid responses about the effectiveness of the Eleventh Circuit's mediation program in assisting the parties to resolve issues on appeal. Counsel return their responses directly to the KMC's Chief Circuit Mediator.

PART 18: Billings to Parties

The private mediator shall bill the parties based upon the rates and terms previously agreed to by the mediator and parties. It is not necessary to send copies of fee agreements or billings to the KMC. The parties are solely responsible for any billings by the private mediators.

Neither the court nor the KMC will aid in the enforcement of the terms and conditions of the contract, including the collection of any outstanding fees, costs, and expenses.

It is highly recommended that the private mediator fully disclose and explain to the parties the basis of compensation, fee, and charges to the parties in advance of the mediation and that same be memorialized in a written contract. Generally fees are divided equally among the parties, although there can be exceptions. Further, such disclosures and explanations usually include:

- The basis for and amount of any charges for services to be rendered, including minimum fees and travel time;
- The amount charged for the postponement or cancellation of mediation sessions and the circumstances under which such charges will be assessed or waived;
- The basis and amount of charges for any other items;
- The parties pro rata share of mediation fees and costs if previously agreed to by the parties.

PART 19: Questions or Complaints

Private mediator questions regarding the program or conduct of the mediation should be addressed to the assigned circuit mediator.

Party or counsel questions regarding the program or conduct of the mediation may be addressed to either the private mediator or the assigned circuit mediator or both.

Party or counsel complaints or concerns regarding the private mediator or the conduct of the mediation should first be addressed to the private mediator. If complaints and concerns still remain they should be addressed to the assigned circuit mediator. Any remaining complaints or concerns should be addressed to the Chief Circuit Mediator.

Questions shall not be addressed to either the court or clerk's office staff unless the party, counsel, or private mediator is so directed by the KMC.

PART 20: Training Programs

The KMC reserves the right to establish such training programs as it may deem necessary from time to time. Private mediators must remain current with their state bar and state ADR agency licensing, certification, registration, and continuing education requirements to be eligible to perform Eleventh Circuit appellate mediations.

APPENDIX A

Request for Use of a Private Mediator

Appeal Caption _____

Appeal Number(s) _____

The undersigned parties in the above-captioned appeal(s) agree to employ the services of the private mediator identified below for the purpose of conducting a mediation. The parties are aware of the requirements for use of a private mediator as set forth in Eleventh Circuit Rule 33-1.

(Signature of Counsel for Appellant)

(Signature of Counsel for Appellee)

Acceptance by Private Mediator: _____ accepts the employment by the parties to conduct a mediation in the above-captioned appeal(s). Further, the mediator represents to the court that he or she:

- (1) Has been certified or registered as a mediator by either the State of Alabama, Florida, or Georgia for the preceding five years. State of certification and certification date: _____.
- (2) Has been admitted to practice law in either the state of Alabama, Florida, or Georgia for the preceding fifteen years and is currently in good standing. State and date of admission: _____.
- (3) Is currently admitted to the bar of this court.

Further, the undersigned mediator represents that he or she has read the "Private Mediator Procedures for Mediation of Appeals" and agrees to follow the procedures set forth therein.

(Signature of Mediator)

(Telephone)

(Print Name)

(Fax)

(Address)

(Email)

Please fax this completed form to the Kinnard Mediation Center 404-335-6270, within ten days of the date of the court's notice of mediation.

APPENDIX B

Private Mediator's Report

Appeal Caption _____

Appeal Number(s) _____

Mediator _____

Mediation Conferences _____ In Person Telephone
_____ In Person Telephone

Total _____ In Person _____ Telephone _____

Who was lead counsel in the mediation for each side? _____

Full Settlement Partial Settlement Impasse Date: _____

If a settlement was reached, please describe the terms: _____

Do you have any suggestions for the improvement of the mediation program? _____

*Please fax this completed form to the Kinnard Mediation Center, 404-335-6270,
within one week after the mediation is concluded.*