



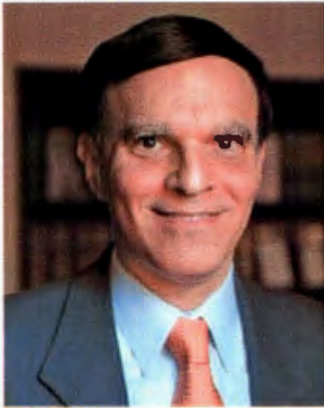
# MEDIATION IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT



The Civil Appeals Mediation Program



## A NOTE FROM THE CHIEF JUDGE



The Second Circuit's mediation and settlement program (CAMP) is a long-standing and integral part of the court's appellate process. Experienced and skilled circuit mediators work with counsel and their clients to resolve disputes across the spectrum of the court's civil docket. All counseled civil appeals, whether complex or raising a single issue, are eligible for the mediation program, which the court provides at no cost.

The court offers this service because resolving disputes quickly and efficiently by agreement can provide parties with a satisfactory result and avoid continued litigation and uncertainty. Our mediation program has facilitated the resolution of hundreds of appeals. Even if an appeal is not resolved, the mediation process often helps litigants frame and focus the issues to be argued before the court.

Confidentiality is central to the settlement program. By court rule and practice, participants are assured that what is discussed in mediation remains in mediation.

The court is proud to offer the professional services of highly experienced attorneys with extensive training in mediation and years of experience in Second Circuit practice and procedure.

Robert A. Katzmann, Chief Judge



## THE SECOND CIRCUIT'S APPELLATE MEDIATION PROGRAM

Established in 1974, the Second Circuit's Civil Appeals Mediation Program (CAMP) was the first program of its type in the United States, and has facilitated the resolution of thousands of appeals. Authorized by the Federal Rules of Appellate Procedure, Local Rule 33.1 provides that "[t]he court may direct counsel for the parties {and their clients} to participate in a conference to explore the possibility of settlement, narrow the issues, and discuss any matters that may expedite the deposition of the appeal."

The court stands ready to decide any appeal on the merits, but recognizes that in some cases, the parties can arrive at a satisfactory result and avoid continued litigation. The CAMP process is mandatory if the court orders it; nonetheless, any result reached in mediation is entered upon the consent of the parties. If the court does not order it, parties may request a CAMP conference themselves. Even if an appeal is not resolved, mediation often helps litigants focus the issues to be briefed for the court.

The court's mediation program has two full-time circuit mediators and a distinguished panel of highly experienced and trained court-appointed mediators, who serve on a pro bono basis. CAMP is an autonomous department in the Office of Legal Affairs.

### DID YOU KNOW?

**Mediators can help parties in identifying and overcoming strategic, principal/ agent, cognitive, and "reactive devaluation" barriers that impede the achievement of negotiated settlements.**

Robert H. Mnookin  
Why Negotiations Fail,  
8 Ohio State Journal On Dispute Resolution 2, 235-249 (1993)

## MEDIATION

Justice Anthony Kennedy has remarked that “it is very important that we have an adequate, decent and formed civil discourse to protect our heritage.” CAMP provides a forum for such conversations between attorneys, their client and experienced mediators to explore appellate issues and options.

Mediation is a party-centered, confidential, and interactive process where a neutral third party (the mediator) assists counsel and parties to resolve disputes for themselves. Mediators use a wide variety of techniques and methodologies, including facilitation, issue evaluation, and risk/scenario analysis, to guide the process in a constructive direction, and help the parties consider resolutions outside the litigation process.

Appellate mediation is often the last opportunity for parties to craft a resolution themselves. The underlying district court judgment plays an important role in the process. Counsel and parties, with the assistance of a mediator, assess the risks and benefits of pursuing an appeal, and whether it is the best alternative to a negotiated agreement. In the process of doing so, options and interests are discussed and explored with the assistance and guidance of the mediator. In some cases, a settlement is reached after such discussions; in others, it leads to more concise briefs to aid the court.

### DID YOU KNOW?

Mediators can assist each side in understanding the other side's interests. Research suggests that the best negotiators spend up to four times as much time thinking in a strategic way about what the world looks like to the other party than average negotiators.


G. Richard Shell  
Bargaining for Advantage 87 (1999)



## CAMP SCREENING PROCESS

All counseled, civil appeals are eligible for mediation under Local Rule 33.1, except for a very limited category. CAMP screens all eligible cases to further assess whether mediation may be suitable. Numerous factors are taken into consideration, including (but not limited to) likelihood in achieving a settlement, the costs and potential outcome on appeal, the relationship between the parties in the dispute or the type of relief sought. The screening process uses a comprehensive approach, and thus no single factor is conclusive.

As a result of this comprehensive approach to screening, CAMP engages in mediation of a wide variety of disputes. The calendar will often include, among others, Admiralty, Bankruptcy, Civil Rights, Consumer Protection, Contracts, Counsel Fees, Employment, Fair Labor Standards Act (FLSA), Free Appropriate Public Education (FAPE), Individuals with Disabilities Education Act (IDEA), Insurance, Products Liability, Trademark, and Torts matters.

A photograph of a woman with dark hair, wearing a white collared shirt, sitting at a table. Her hands are clasped together on the table in front of her. The background is a warm, out-of-focus interior setting.

*The court stands ready to decide any appeal on the merits, but recognizes that in some cases, the parties can arrive at a satisfactory result and avoid continued litigation.*

## MEDIATION AND THE DISPUTE

Disputes are inevitable, but litigation is not. A negotiated outcome outside the litigation structure may better serve the interests of the parties, but may be blocked because of negotiation barriers. Mediators can overcome many of these barriers that prevent parties from identifying their underlying interests, needs, priorities and aspirations. Even if no settlement is reached, mediation can be productive because:

- Issues are sharpened for briefing, cutting pages and expense;
- Parties are empowered because they speak for themselves;
- Groundwork is laid that improves the chances of resolution in the future; and
- Jurisdictional issues are spotted early which may save the parties time and expense.

### DID YOU KNOW?

Mediators can assist in reducing the risk of rejecting a settlement proposal that might be better than pursuing the appeal. For example, a large-scale empirical study of settlement decision error concluded that plaintiff's counsel erroneously rejected a settlement proposal in 61.2% of the cases that went to trial. For defense counsel the rate of error was 24.3%, but the magnitude of error vastly exceeded those of plaintiff-side errors. Notably, involvement of an attorney trained as a mediator lowered the decision error rates on both sides.

Kiser, Asher, McShane

Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations,  
5 *Journal of Empirical Legal Studies*, 3, 551-591 (2008)



## MEDIATION AND THE LAWYER-CLIENT RELATIONSHIP

The ABA Model Rules of Professional Conduct call for lawyers to “exercise independent professional judgment and render candid advice [including not only law, but] other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Rule 2.1. In consultation with counsel, mediators may assist lawyers to provide such candid advice, which may include non-legal points, when exploring resolution options.

## CONFIDENTIALITY

To encourage open, frank, and effective discussion of matters on appeal, Local Rule 33.1 (e) provides that “[i]nformation shared during a CAMP proceeding is confidential and is not included in court files or disclosed to the judges of this court except to the extent disclosed by an order entered as a result of a CAMP proceeding. The attorneys and other participants are prohibited from disclosing what is said in a CAMP proceeding to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurance that the recipient will honor confidentiality.”



## LOCAL RULE 33.1

- (a) **Scope of Plan.** The Civil Appeals Mediation Program (CAMP) applies to all civil cases except proceedings in which at least one party appears pro se, matters initially placed on the court's Non-Argument Calendar, petitions for writs of mandamus or prohibition, and habeas corpus cases and proceedings under 28 U.S.C. §2255.
- (b) **Referral to Circuit Mediation.** When a case within CAMP's scope is docketed, the clerk refers it to the Circuit Mediation Office for review. At any time during the pendency of a case, including one outside CAMP's scope, a party may request referral to the Circuit Mediation Office or the Court may so order. The Circuit Mediation Office may recommend to the clerk the entry of orders governing the case.
- (c) **Mediators.** The court employs mediators and may appoint attorneys to serve as volunteer mediators. Mediator disqualification is governed by the Code of Conduct for Judicial Employees.
- (d) **CAMP Conference.** The court may direct counsel for the parties to participate in a conference to explore the possibility of settlement, narrow the issues, and discuss any matters that may expedite disposition of the appeal.
  - (1) **Counsel's Participation.** Before a CAMP conference, counsel must consult with the client and obtain as much authority as feasible to settle the case. At the conference, counsel must be prepared to discuss in depth the legal, factual and procedural issues of the case.
  - (2) **Client Participation.** A mediator may require a client to participate in a conference in person or by telephone.
  - (3) **Conference Location.** A mediator may hold a conference in person at the Circuit Mediation Office or at another location, or by telephone or video.
  - (4) **Survey.** After the conclusion of a CAMP proceeding, each party must complete the anonymous Post-Conference Survey and submit it electronically to this court's Director of Legal Affairs.
- (e) **Confidentiality.** Information shared during a CAMP proceeding is confidential and is not included in court files or disclosed to the judges of this court except to the extent disclosed by an order entered as a result of a CAMP proceeding. The attorneys and other participants are prohibited from disclosing what is said in a CAMP proceeding to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurance that the recipient will honor confidentiality.
- (f) **Grievance Procedure.** Any complaint regarding the handling of any CAMP proceeding must be submitted to the chief judge of the court.
- (g) **Non-Compliance Sanctions.** The court may, after affording notice and an opportunity to be heard, impose sanctions on an attorney or party who does not participate in good faith in the CAMP program.





## CAMP STAFF INFORMATION

For more information on CAMP, contact us at

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