

**HAWAI‘I APPELLATE
MEDIATION
PROGRAM RULES**

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the Supreme Court
of the State of Hawai‘i**

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*Comments and commentary are provided by the rules committee
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**The Judiciary
State of Hawai‘i**

HAWAI‘I APPELLATE MEDIATION PROGRAM RULES

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**HAWAI'I APPELLATE MEDIATION
PROGRAM RULES**

Rule 1. GOALS; SCOPE.

The Hawai'i Appellate Mediation Program ("program") is established herewith pursuant to Rules 3.1 and 33 of the Hawai'i Rules of Appellate Procedure to provide an alternative means for resolving civil appeals. A goal of the program is to enhance public confidence in the court system. To the extent resources are available, this program will provide parties a forum and process to:

- (a) realistically consider the possibility of settlement of the entire case or issues in the case;
- (b) discuss limiting and simplifying the issues on appeal;
- (c) discuss briefing schedules, the content of the record, and other pertinent matters;
- (d) take actions that may reduce costs; and
- (e) aid the speedy and just resolution of the case.

COMMENTARY:

The main objective of the program is to provide an alternative to litigation to parties who have filed an appeal. This objective is met by providing parties with a neutral place and process for resolving pending cases in total or, alternatively, issues within the case. Through this process, parties and the mediator explore various solutions to the issues. Cases that settle will be dismissed.

Early resolution of cases on appeal benefits both the settling parties and the court. Settling parties benefit through a private resolution of their cases without the need for further time-consuming and often expensive litigation in the appellate courts. Reducing the courts' case load allows the courts to resolve other cases more quickly and to decrease case processing time. The program also assists parties in simplifying, clarifying, and, when possible, reducing the issues raised on appeal. This promotes speedier resolution of those cases that remain before the court.

(As amended September 7, 2011, effective January 1, 2012.)

**Rule 2. APPEALS TO BE INCLUDED IN
OR EXCLUDED FROM THE
PROGRAM.**

Except as provided in this rule, any civil appeal may be included in the program. Criminal appeals and civil proceedings in the nature of the following are excluded from the program:

- (a) petitions for extraordinary relief such as a petition for a writ of mandamus or the like;
- (b) petitions for a writ of habeas corpus;
- (c) appeals or petitions in which the appellant/petitioner is incarcerated and is seeking relief related to the incarceration;
- (d) appeals or cases arising under Rule 40 of the Hawai'i Rules of Penal Procedure;
- (e) questions of law reserved to the Supreme Court of Hawai'i;
- (f) appeals from revocation of drivers' licenses;
- (g) appeals from restraining orders;
- (h) appeals from termination of parental rights; and
- (i) appeals from adjudication of juveniles as law violators.

COMMENTARY:

The program schedules mediation in as many civil appeals, not otherwise excluded, as staffing for the program permits.

Criminal cases, habeas corpus petitions, and cases brought by incarcerated persons complaining about their confinement, arrest, or trial are excluded from the program for 2 reasons: (1) the exposure of counsel to claims of ineffectiveness of counsel for their participation; and (2) the ineffectiveness of a settlement process in which the mediator would be unable to reduce sentences.

Similarly, petitions for extraordinary relief and questions of law reserved to the Supreme Court of Hawai'i are excluded because these types of cases may generally be resolved only by judicial decision. Also, in these types of cases it is often critical that the court enter its decision on an expedited basis.

(As amended and effective February 26, 1996; further amended November 17, 2000, effective January 1, 2001; further amended September 7, 2011, effective January 1, 2012.)

Rule 3. PARTICIPATION IN THE PROGRAM.

(a) **Selection of Cases.** The program will include and schedule mediation for as many cases as possible.

(b) **Mandatory Participation.** Participation is mandatory for all cases included in the program.

(c) **Voluntary Participation.** If a case is not included in the program, parties may request that the case be included in the program, provided the request is made no later than 30 days after briefing is complete. In cases with more than 2 parties, mediation under this section need not include all parties in the case, but may be limited to those parties wishing to mediate issues between or among them that are within their authority to settle. The request must be made by letter directed to the program and filed with the appellate clerk. Requests will be accommodated when feasible.

(d) **Deadline for completion of mediation; extension of deadline.** An appeal included in the program shall be returned to the appeals docket 1 year after the notice of inclusion in the program is received, provided that the parties may file a joint motion for good cause for an order recommitting the appeal to the program.

COMMENTARY:

Comparisons of mandatory and voluntary programs show that mandatory programs are generally more successful. The purpose of requiring participation (not settlement) in the program is to make the program benefits accessible to as many civil litigants and attorneys as possible.

Parties may “opt-in,” that is, request their case be included in the program. Subject to staffing considerations, the program will make every effort to accommodate these requests. For opt-in cases, the program will include only those parties who wish to participate in matters in the case at issue between or among them. Therefore, in a multiple party case, not all parties or all issues need be included.

(As amended and effective February 26, 1996; further amended June 20, 2006, effective July 1, 2006; further amended September 7, 2011, effective January 1, 2012.)

Rule 4. CIVIL APPEAL DOCKETING STATEMENT; TIMING OF THE MEDIATION.

(a) **Civil Appeal Docketing Statement; Response.** Concurrent with the filing of the notice of appeal or cross-appeal, each appellant or cross-appellant in each civil case not otherwise excluded from the program, see Rule 2 of these rules, shall file a Civil Appeal Docketing Statement (CADS) on the form provided by the court. Each appellant or cross-appellant shall attach to the CADS:

(1) a copy of the judgment or order appealed from;

(2) a copy of any written opinion or findings of fact and conclusions of law supporting the judgment or order; and

(3) proof of service on all other parties to the proceedings below.

Any other party may file a response to a CADS. The response must be filed within 7 days after service of the CADS.

(b) **Notice; Timing of Mediation.** If a case is scheduled for mediation, the appellate clerk will send a notice to the parties within 30 days after the CADS is filed. The program will schedule mediation as soon as possible after a case has been included in the program and will send the parties a Notice of Mandatory Mediation with information about program requirements.

(c) **Required Submittals to Mediation.** Attorneys and parties shall comply with the requirements in the Notice of Mandatory Mediation issued by the program. The mediator may request additional information and documents from attorneys and parties and may extend deadlines for those submittals.

COMMENTARY:

The CADS form is included in the Appendix to the Hawai‘i Rules of Appellate Procedure. Appellants in civil cases that fall within this program, see Rule 2 of these rules, must file the CADS when they file their Notice of Appeal.

An appellee may file a response to the CADS within 7 days after service.

Copies of the CADS and any response thereto must be served on all parties to the proceedings below. Failure to comply with

these requirements may result in dismissal of the appeal.

If a case is accepted into the program, counsel and parties will be notified. The notice will be sent within 30 days after the CADS is filed. A scheduling order will notify counsel and parties listed on the Court’s docket of the date, time, and place of the mediation.

(As amended and effective February 26, 1996; further amended September 7, 2011, effective January 1, 2012.)

Rule 5. THE MEDIATOR.

(a) Authorization to serve as volunteer mediator. The supreme court may authorize retired justices and judges and retired or semi-retired attorneys to serve as mediators. Authorized mediators shall work as volunteers and shall serve at the pleasure of the supreme court. When necessary, the administrator of the program and the Director of the Center for Alternative Dispute Resolution may serve as mediators.

(b) Assignment by program. Except as provided by section (c), the program administrator or the administrator’s designee shall assign a volunteer mediator to each case selected for appellate mediation. The parties will not be charged for the services of mediators assigned by the program.

(c) Selection by parties. The parties may jointly select any person to serve as a mediator, including a person who is not appointed as a volunteer mediator under section (a). If the parties select the mediator, the parties are responsible for any fees charged by the mediator and all costs incurred.

(d) Application of Program Rules. Without regard to the manner assigned or selected, the mediator shall operate under the program rules.

COMMENTARY:

Hawai‘i is fortunate to have an invaluable resource in the form of highly respected retired justices and judges, and semi-retired and retired counsel. These persons make a tremendous contribution to the program, and with their work the program continues to build a solid

reputation and is successful. Therefore, the program relies on these volunteers to serve as court-appointed mediators. To avoid any potential conflicts of interest, all court-appointed mediators will be either retired or semi-retired. Additionally, they shall have received training in mediation and alternative dispute resolution techniques. When necessary, and with the prior consent of the parties, the administrator of the program and the Director of the Center for ADR may be appointed by the program to serve as mediators.

The parties have the option of jointly selecting their own mediator. Whereas all court-appointed mediators are either attorneys or judges, under this option the parties may select anyone upon whom they jointly agree. When the parties choose the mediator, they are responsible for paying the mediator for his/her services. The mediator selected shall follow the program rules.

(As amended and effective February 26, 1996; further amended September 7, 2011, effective January 1, 2012.)

Rule 6. THE MEDIATOR'S ROLE AND AUTHORITY.

The mediator's role is to facilitate communication and negotiation between parties to reach a voluntary agreement to settle their case. If the parties do not resolve all issues, the mediator may help them simplify, clarify, and reduce the issues on appeal. The mediator may withdraw the case from the program before mediation begins, or terminate mediation if the mediator decides that the process is unproductive or inappropriate.

COMMENTARY:

Mediators generally use a consensus-building style of mediation in conducting appellate mediations for the court. Usually, the mediator begins the process by explaining the goals of mediation, the role of the mediator, the mechanics of the process (including the possibility of private sessions with parties), and the confidentiality of the process. The mediator may remind the participants that although the mediator guides the process, the parties retain control over the result.

Following the introductory remarks, the mediator usually asks each party to provide background on the dispute, to discuss briefly the issues on appeal, and to recount the settlement history. The purpose of the initial joint session is to build rapport with the participants, to familiarize the parties with the process, and to provide the mediator with relevant information. Discussions proceed in joint session until the mediator finds it appropriate to begin private sessions. In private sessions, the mediator may work with the parties to develop a non-partisan evaluation of the merits of each side's legal and settlement positions, and an assessment of the potential benefits, risks, and costs of various options.

Generally, the mediator then initiates negotiations, often alternating individual sessions with the parties. The mediation process is flexible and, in certain situations, parties may not meet in joint sessions. The process continues until either a settlement or an impasse is reached.

Rule 3.1(e) of the Hawai'i Rules of Appellate Procedure stays preparation of the record, effectively staying preparation of briefs. However, when parties opt-in to the program while briefing is incomplete, transcripts are unfinished, or even after briefing is complete, the parties may choose either that: (1) all deadlines be postponed, or (2) the appeal proceed on the appellate and program tracts simultaneously.

When the mediator concludes that the process is complete, the program enters an order with the appellate clerk that either returns the case to the appellate docket or states that a tentative settlement has been reached. The parties have 30 days to file the appropriate documentation with the court; otherwise, the case will be returned to the appellate docket.

The program's involvement in the case terminates when the Mediator's Report is filed. The program may resume jurisdiction over the case upon a joint request by the parties.

To ensure that time spent in mediation is productive, the mediator may end the mediation if the mediator decides that the process is unproductive or inappropriate.

(As amended and effective February 26, 1996; further amended September 7, 2011, effective January 1, 2012.)

Rule 7. ATTENDANCE AT MEDIATION.

Counsel with the most direct relationship to the client for the purpose of settlement shall attend all mediation sessions. Clients and parties are required to appear in person and shall have settlement authority. The mediator may request that third persons attend the mediation sessions. Upon written request by counsel or a party, the mediator may waive the requirement of having clients or parties physically present at the mediation sessions.

COMMENTARY:

All counsel and parties intending to file briefs in the appeal shall attend all mediation sessions unless excused by the mediator. If more than one attorney

represents a party, the attorney with the most direct relationship with the client for the purpose of settlement discussions must attend. The attorney will be expected to be familiar with all aspects of the case. Co-counsel and other attorneys in the principal counsel's firm may attend if their presence would be beneficial.

The program requires that a client or client's representative attending the mediation have settlement authority. This insures that the process will not be delayed when important decisions are to be made.

At the conclusion of a mediation session, the mediator may schedule further mediation for another time and date if the mediator believes this would be beneficial. If the mediator believes it would be helpful to have third persons present at mediation, the mediator may request that they attend mediation.

In the event the mediator allows telephone or video conferencing, the costs shall be borne by the party or parties making the request.

(Amended September 7, 2011, effective January 1, 2012.)

Rule 8. CONFIDENTIALITY.

(a) Communication Between the Court and the Mediator or the Parties Prohibited. The mediator or any court official who becomes involved in settlement discussions as part of the program shall not communicate any matters discussed at the mediation to any court except as expressly allowed by the Uniform Mediation Act or other applicable law. Similarly, parties are prohibited from advising members of the court of discussions or actions taken at mediation.

(b) Communication by the Trial Court Judge to the Mediator. The trial judge and the mediator may communicate about matters related to the mediation, provided all parties consent to the communication before any communication begins. If the mediation does not result in a settlement and the case is remanded to the trial court by the appellate court for further proceedings, the case shall be

remanded to a trial judge other than the judge who communicated with the mediator.

COMMENTARY:

To encourage full and frank discussion, all communications and matters discussed at mediation and in subsequent discussions are kept confidential and are not to be communicated to the court. This includes the view of the mediator as to the merits of the case pending before the court. Therefore, matters discussed at mediation are confidential.

For example, the parties may not refer to or quote any statements made during the course of the mediation in briefs or at oral argument.

If all parties to the appeal consent, the trial judge who presided over the case may communicate with the mediator about matters concerning the case that may be relevant to the mediation. Such communications could be helpful and timesaving to the mediator. If there is a communication between the trial court and the mediator, and if the case is later remanded to the trial court, the trial judge assigned to the case shall not be the judge who communicated with the mediator.

(Amended September 7, 2011, effective January 1, 2012; further amended August 26, 2014, effective January 1, 2015.)

Rule 9

HAWAI‘I APPELLATE MEDIATION PROGRAM

Rule 9. IMMUNITY.

Mediators selected in accordance with Rule 5 of these program rules shall be absolutely immune from suit for all conduct in the course of their official duties.

(Amended March 8, 1995, effective March 15, 1995; further amended September 7, 2011, effective January 1, 2012.)

(As added, effective February 26, 1996; amended effective July 1, 1999; further amended May 5, 2000, effective July 1, 2000; further amended September 7, 2011, effective January 1, 2012.)

Rule 10. SANCTIONS.

(a) Authorization. The program administrator or the Director of the Center for ADR may impose sanctions upon any party or attorney for a party for noncompliance with these rules or the Hawai‘i Rules of Appellate Procedure, or who unduly interferes with the orderly procedures of the program.

(b) Procedure. To impose sanctions the program administrator or the Director of the Center for ADR shall first issue an order to show cause (order) as to why a sanction should not be imposed. The order shall be filed in the record and shall state the act or omission for which sanctions may be imposed, require a response not later than 10 days after entry of the order, and note that failure to respond or to show good cause will result in imposition of a sanction.

(c) Review. The sanction order shall be filed in the record and shall be subject to review by the appellate courts pursuant to Rule 40 of the Hawai‘i Rules of Appellate Procedure.

COMMENTARY:

Noncompliance with program rules and requirements hampers the effectiveness of the program and the mediator’s ability to meet program objectives. Counsel and parties are subject to sanctions for noncompliance unless good cause is shown. Examples of noncompliance with program rules for which sanctions may be imposed include but are not limited to: (1) failure to submit a pre-mediation statement as required by the program; (2) submission of an incomplete pre-mediation statement; and (3) failure of a party, attorney, or person authorized to settle the case to attend mediation without advance approval by the mediator, the program administrator, or the Director of the Center for ADR.