

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the
HAWAI‘I APPELLATE MEDIATION PROGRAM RULES

ORDER AMENDING THE HAWAI‘I
APPELLATE CONFERENCE PROGRAM RULES

(By: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.)

IT IS HEREBY ORDERED that Rules 1 through 10 of the Hawai‘i Appellate Conference Program Rules, to now be known as the Hawai‘i Appellate Mediation Program Rules, are amended, effective January 1, 2012, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 1. GOALS; SCOPE.

The Hawai‘i Appellate [~~Conference~~] Mediation Program (“~~P~~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 [~~Hawai‘i Appellate Conference~~] 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 [as] that may reduce costs[;]; and
- (e) aid the speedy and just resolution of [any] the case.

COMMENTARY:

The main objective of the [~~Hawaii Appellate Conference~~] [~~P~~] 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 [~~neutral~~] mediator explore [~~and work toward fashioning~~] various solutions to the issues [~~presented by the appeal~~]. Cases that settle will be dismissed.

Early resolution of [~~pending~~] cases on appeal [~~without the need for full consideration by the five-justice or three-judge panels of the appellate courts with~~] benefits both the settling parties and the court. Settling parties benefit through a [~~an~~] amicable] private resolution of their cases without the need for further time-consuming and [;] often [~~times~~] expensive litigation in the appellate courts. Reducing the courts' case [=] load[;] [~~with~~] allows the courts to [~~more quickly~~] resolve other cases more quickly and to decrease case processing time. The [~~appellate conference~~] program also assists parties in simplifying, clarifying, and, when possible, reducing the issues raised on appeal. This [~~with aid in~~] promotes speedier resolution of those cases that [~~are not settled and~~] remain before the court.

Rule 2. APPEALS TO BE INCLUDED IN OR EXCLUDED FROM THE [~~WHICH APPELLATE CONFERENCE~~] PROGRAM [~~APPLIES~~].

[~~All~~] Except as provided in this rule, any civil appeal[~~s are~~] may be included in the program. [;] [~~except that~~] 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 appella[~~te~~]nt/petitioner is incarcerated and is seeking relief related to [~~said~~] 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 [~~Supreme Court~~];
- (f) appeals from revocation of drivers' license[;];
- (g) appeals from [~~a~~] restraining orders[;];

- (h) appeals from termination of parental rights[;]; and
- (i) appeals from adjudication of [x] juveniles_ as [x] law violators_.

COMMENTARY:

The [~~Appellate Conference~~] [P]program schedules mediation [~~conducts settlement conferences~~] 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 [two]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 [~~neutral~~] mediator would be unable to reduce sentences.

Similarly, petitions for extraordinary relief and questions of law reserved to the [~~Hawai'i~~] 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.

Rule 3. PARTICIPATION IN THE [~~APPELLATE CONFERENCE~~] PROGRAM.

(a) Selection of Cases. [~~If staffing permits,]~~ I[t]he program will include and schedule mediation for as many cases as possible [~~conduct conferences in every civil appeal not excluded from program-eligible cases, cases will be selected from among those eligible for the program~~].

(b) Mandatory Participation. Participation is mandatory for [it] all cases included in the program [~~that are selected for a conference, participation in the conference is mandatory~~].

(c) Voluntary Participation [~~Requests to Participate~~]. If a case is not [~~selected into~~] included in the [appellate conference] program, parties [any party to the case] may request that the case be included in the program, provided the request is made no later than [within] 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 [~~appellate clerk and directed to the Appellate Conference Program~~]. Requests [~~for appellate conferences~~] will be accommodated when [~~ever~~] feasible [~~possible~~].

(d) Deadline for [~~resolution of an appeal in the appellate conference program~~] completion of mediation; extension of deadline. An appeal included in [~~accepted for participation in~~] the [~~appellate conference~~] program shall be returned to the appeals docket [~~one~~] 1 year after the notice of [~~acceptance~~]

inclusion in[~~to~~] the program is received, provided that the parties may file a joint motion for good cause[~~;~~] for an order recommitting the appeal to the [~~appellate conference~~] program.

COMMENTARY:

Comparisons of mandatory and voluntary programs show that mandatory programs are generally more successful. The purpose of [By] requiring participation (not settlement) in [its] the program [; Hawai'i hopes to spread] is to make the program benefits [this program has to offer] accessible to as many civil litigants and attorneys as possible.

[Absent staff to conduct appellate conferences in all program-eligible cases, cases will be selected from among eligible cases.]

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 [all parties wishing admission to the program]. 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. [If any party to a case that has not been admitted wishes for the case to be admitted by the program the party should so advise the Appellate Conference Program. Whenever possible, the case will be admitted to the program.]

Rule 4. CIVIL APPEAL DOCKETING STATEMENT; TIMING OF THE [~~APPELLATE CONFERENCE PROGRAM~~] MEDIATION.

(a) Civil Appeal Docketing Statement; Response. Concurrent with the filing of the notice of appeal or cross-appeal, each [the] appellant or cross-appellant[; or in the event that more than one appeal is taken, each appellant] in each civil case not otherwise excluded from [this] the program, [(see R[r]ule 2[7])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 [Civil Appeal Docketing Statement] 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 [~~the~~] a CADS [Civil Appeal Docketing Statement with the court or agency from which the appeal is taken]. The response must be filed within [seven] 7 days after service of the CADS [Civil Appeal Docket Statement, on the form provided by the court].

(b) Notice; Timing of [~~the Appellate Conference~~] Mediation. If a case is scheduled for [~~conference~~] mediation, the appellate clerk [of the supreme court] will send a notice to [notify] the parties [; Such notice to the parties be

sent] within 30 days after the CADS is filed. ~~[The Hawaii Appellate Conference Program will endeavor to hold conferences]~~ The program will schedule mediation as soon as possible after a case has been included ~~[accepted]~~ in ~~[to]~~ 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 ~~[Civil Appeal Docketing Statement]~~ CADS form is included in the Appendix to the Hawai'i Rules of Appellate Procedure ~~[and is available upon request at the Supreme Court Clerk's Office and the clerk's offices of the circuit and district courts]~~. ~~[The form may be freely copied:]~~ Appellants in civil cases that fall within this program, ~~[see Rule 2]~~ of these rules, must file the CADS ~~[Civil Appeal Docketing Statement]~~ when they file their Notice of Appeal ~~[with the trial court or the agency from which the appeal is taken]~~. ~~[The clerk of the supreme court will forward the Civil Appeal Docketing Statement to the conference program after it is received from the trial court.]~~

An appellee may file a response to the CADS ~~[Civil Appeal Docketing Statement]~~ within ~~[seven]~~ 7 days after service.

Copies of the CADS ~~[Civil Appeal Docketing Statement]~~ 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 ~~[appellate conference]~~ mediation. ~~[If the case involves counsel from the neighbor islands they will be notified whether the conference will be in person, by telephone, or on the neighbor island.]~~

Rule 5. ~~[SELECTION OF] THE [NEUTRAL] MEDIATOR.~~

~~[A mediator may be selected in one of two ways:~~

~~———— (a) A volunteer mediator may be assigned from a rotating list. The list of volunteers shall initially be composed of retired justices and judges and retired or semi-retired attorneys. These neutrals shall be appointed by the court, shall work as volunteers, and shall serve at the pleasure of the court. When necessary, the administrator of the program and the Director of the Center for Alternative Dispute Resolution may also serve as neutrals upon the approval of the parties.~~

The parties will not be charged for the services of neutrals appointed by the program.

~~(b) The parties may jointly select any person they wish to serve as a mediator, including persons on or not on the court's list of volunteers. The selected neutral shall operate under these appellate conference program rules. If the parties select this option they shall be responsible for all costs incurred and fees of 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 [untapped] invaluable resource in the form of highly respected retired justices and judges, and semi-retired and retired counsel. These persons [can] make a tremendous contribution to the [appellate conference] program, and with their work the program [can] continue to build a solid reputation and [achieve] is successful. Therefore, the [Appellate Conference] [P]program [with initially] relies[y] on these volunteers to serve as court-appointed [neutrals] mediators. To avoid any potential conflicts of interest, all court-appointed [volunteers] 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 [Alternative Dispute Resolution] may [also] be appointed by the program to serve as [neutrals] mediators. [The parties' consent must be obtained before the administrator or Director may act as neutrals.]

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

Rule 6. THE MEDIATOR'S ROLE AND AUTHORITY.

~~[(a) 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 [(1) facilitate the voluntary resolution of cases; (2) and assist the parties in] simplify[ing], clarify[ing], and [; when possible;] reduce[ing] the issues [raised] on appeal [; and (3) extend deadlines such as the deadline for ordering transcripts or filing of briefs and the record on appeal, when appropriate]. The mediator [has the authority to] may withdraw the case from the program before mediation begins, or terminate [the] mediation if the mediator [believes] decides that the process is unproductive or inappropriate [that any party is not mediating in good faith].

~~[(b) Mediator's Order.]~~ After the case has been assigned to the appellate conference program, the mediator will enter an order that either returns the case to the appellate docket or states that a tentative settlement was reached.;

COMMENTARY:

Mediators [with] generally use a consensus-building style of mediation in conducting appellate [conferences] mediations for the court. Usually, t[F]he mediator begins [each conference] the process by explaining the goals of [the conference] mediation, the role of the mediator, [;] the mechanics of the process (including the possibility of private sessions with parties [private caucuses]), and the confidentiality of the process. The mediator may remind[s] 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 [create a level of comfort] with the process, and to provide the mediator with relevant information. Discussions proceed in joint session [as long as it is productive, or] until the mediator finds it appropriate to begin private sessions. In private sessions, the mediator may work[s] 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, t[F]he mediator then initiates [the] negotiations, often alternating individual sessions with the parties [proceeding with the discussions through "shuttle diplomacy."]. The mediation process is flexible and, in certain situations, parties may not meet in joint sessions. [The mediator informs the parties at the conclusion of each session when to

~~expect the next contact and what information the mediator will need.] The process continues until either a settlement or an impasse is reached [or an impasse develops that cannot be circumvented].~~

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 [in some instances an appeal may enter] the [Appellate Conference] [P] program [tate,] while briefing is incomplete, transcripts are unfinished, or even after briefing is complete[. In these cases], the parties may choose either that: (1) all deadlines [automatically] be postponed, or (2) the appeal proceed on the appellate and program tracks [and] simultaneously [through the appellate conference program]. [Thus, the mediator is given authority to extend deadlines. In making the decision whether to do so, the mediator balances the likelihood of settlement against the risk of inordinate delay.]

When the mediator concludes that the process is complete [Following assignment of a case to the appellate conference program], [the mediator] 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. [and instructs t] The parties [that if they] have 30 days to [do not] file the appropriate documentation with the court; [within 30 days,] otherwise, the case will be returned to the appellate docket.

~~[If settlement is not feasible, the mediator may work with the parties to develop the most efficient and expeditious way to brief the case, including limiting the issues and record on appeal. The mediator also may assist with procedural questions and problems.]~~

The ~~[conference]~~ program's involvement in the case terminates ~~[upon] when the Mediator's Report is filed. [release from the program, unless a request for] T[t]he program [to] may resume jurisdiction over the case[is received] upon a joint request by the parties.~~

~~[In order] T[t]o ensure that time spent in mediation is [are] productive, the mediator may [has the power to] end the mediation if [in the event] the mediator [believes] decides that the process is unproductive or inappropriate [that the parties are not participating or mediating in good faith].~~

Rule 7. ATTENDANCE AT ~~[THE CONFERENCE]~~ MEDIATION.

Counsel with the most direct relationship to the client for the purpose of settlement shall attend all ~~[appellate conferences]~~ mediation sessions ~~[scheduled by the court]~~. Clients and parties are required to appear in person and shall have settlement authority. The ~~[neutral]~~ mediator may request that ~~[clients or]~~ third persons attend the mediation sessions ~~[conference]~~. ~~[If the neutral believes the presence of clients or third persons is critical to the resolution of a case, the neutral may require them to attend the conference.]~~ 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 ~~[conferences]~~ mediation sessions unless excused by the mediator. If more than one attorney represents a party, ~~[then]~~ 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, ~~t~~ ~~[F]~~he ~~[neutral]~~ mediator ~~[conducting the appellate conference]~~ may ~~[; at the conclusion of the conference continue it]~~ schedule further mediation for ~~[to]~~ another time and date if the ~~[neutral]~~ mediator believes this ~~[is]~~ would be beneficial. If ~~[At time]~~ the ~~[neutral]~~ mediator ~~[may]~~ believes it ~~[is necessary]~~ would be helpful to have ~~[clients or other]~~ third persons present at ~~[the appellate conferences]~~ mediation~~[-]~~. ~~[In those cases]~~ the mediator ~~[neutral]~~ may ~~[require these persons to attend]~~ request that they attend ~~[the]~~ mediation.

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

Rule 8. CONFIDENTIALITY.

(a) Communication Between the Court and the Mediator or the Parties Prohibited. The ~~[court]~~ mediator or any court official who becomes involved in settlement discussions as part of the ~~[appellate conference]~~ program shall not communicate any matters discussed at the ~~[conference]~~ mediation to any court. Similarly ~~[likewise]~~, parties are prohibited from advising members of the court of discussions or actions taken at ~~[the conference]~~ mediation.

(b) Communication by the Trial Court Judge to the Mediator. The trial judge and the mediator may communicate ~~[with the court mediator]~~ about

matters related to the ~~[appellate conference]~~ mediation, provided all parties consent to the communication ~~[prior to the time of the]~~ before any communication begins. If the ~~[appellate conference]~~ mediation does not result in a settlement ~~[is unsuccessful]~~ 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 ~~[one]~~ who communicated with the ~~[court]~~ mediator.

COMMENTARY:

To encourage full and frank discussion, all communications and matters discussed at ~~[a conference]~~ mediation and in subsequent discussions are kept confidential and are not to be communicated to ~~[any member of]~~ the court. This includes the view of the ~~[court]~~ mediator as to the merits of the case pending before the court. ~~[Thus]~~ Therefore, ~~[all]~~ matters discussed at ~~[appellate conferences]~~ mediation are confidential.

~~[Nothing said in the conference is placed on the record or disclosed in anyway to the court by the court mediator. Likewise,] For example, the parties ~~[are prohibited from communicating about the case to the court, and they]~~ may not refer to or quote any statements made during the course of the ~~[conference]~~ 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 ~~[neutral]~~ mediator about matters concerning the case that may be relevant to the ~~[appellate conference]~~ mediation. Such communications could be helpful and timesaving to the ~~[neutral]~~ mediator. If there is a communication between the trial court and the ~~[Appellate Conference Program]~~ mediator, and if the case is ~~[not resolved through the program but instead]~~ later remanded to the trial court, ~~[by the appellate court, then]~~ the trial judge assigned to the case shall not be the judge who ~~[presided over the trial]~~ communicated with the mediator.

Rule 9. IMMUNITY.

Mediators selected in accordance with Rule 5 of these ~~[Appellate Conference P]~~ program ~~[R]~~ rules shall be absolutely immune from suit for all conduct in the course of their official duties.

Rule 10. SANCTIONS.

(a) Authorization. The program administrator or the Director of the Center for ADR ~~[Alternative Dispute Resolution]~~ may impose sanctions ~~[including reasonable attorneys' fees payable to other parties,]~~ upon any party or attorney for a party ~~[who does not comply]~~ 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) Types. Sanctions may include, but are not limited to, monetary assessments and dismissal of the appeal or cross-appeal. At the direction of the program administrator or the Director of the Center for Alternative Dispute Resolution, monetary assessments shall be made payable to Hawai'i Lawyers Care, Legal Aide Society of Hawai'i, Mediation Centers of Hawai'i, Inc., the William S. Richardson School of Law, or the Hawai'i Justice Foundation.]~~

~~(b) [(c)] Procedure.~~ To impose sanctions the program administrator or the Director of the Center for ADR [~~Alternative Dispute Resolution~~] 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 [~~are anticipated~~] may be imposed, [~~shall~~] require a response not later than [~~ten~~ 10] days after entry of the order, and [~~shall~~] note that failure to respond or to show good cause will result in imposition of a sanction.

~~(c) [(d)] 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 [mediation] program and the mediator's ability [of mediators] to meet program objectives. Counsel and parties are subject to sanctions for noncompliance unless good cause is shown. Examples of noncompliance with [P]program rules for which sanctions may be imposed [on parties or counsel] include but are not limited to: [-(1) failure to submit a pre-mediation statement as required by the program; (2) submission[ting] of an incomplete [frivolous] pre-mediation statement; and (3) [that] failure of a party, attorney, or person authorized to settle the case to attend [the] mediation without advance approval by the mediator, the program administrator, or the Director of the Center for ADR [Alternative Dispute Resolution, or unless good cause is shown for such failure or neglect].

DATED: Honolulu, Hawai'i, September 7, 2011.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna

