

Sixth Circuit: Pre-Argument Conference Program

In the Sixth Circuit, the Office of Conference Attorneys schedules preargument conferences to facilitate settlement for most appellate cases that meet program eligibility requirements. In addition, if a party requests a conference, the Office of Conference Attorneys generally will schedule one in any nonprisoner case in which all parties are represented by counsel. Usually, once the office schedules a conference, participation in the process is mandatory; parties usually participate through counsel. Five attorneys employed in the Office of Conference Attorneys conduct all conferences.

The primary purpose of the program is to facilitate settlement in as many cases as possible. The program also seeks to identify, clarify, and simplify issues; resolve procedural problems to prevent unnecessary motions or delays; and consider other appropriate case-management measures.

The court established a Pre-Argument Conference Program on a trial basis in 1981 and implemented the permanent program in 1983. The process is governed by Fed. R. App. P. 33, 6th Cir. B.. 18, and 6th Cir. I.O.P. 10.1. In recent years, the Office of Conference Attorneys has scheduled about 1,000 cases per year for conferencing: 1,015 cases in fiscal 1995, 1,077 in fiscal 1994, and 853 in fiscal 1993. Conferences were held in nearly all eligible cases scheduled for conferencing. Each conference attorney handles four to eight new cases per week.

About 90-95% of all conferences in the Sixth Circuit's program are conducted by telephone. In the first year of the program, active and senior circuit judges conducted conferences. Under the current program design, the court's conference attorneys conduct all conferences.

Selecting Cases for Conferences

Eligible case types

By local rule, all civil cases docketed in the court are eligible for the program. In practice, conferences generally are not scheduled in prisoner cases, tax appeals (from the district court and the U.S. Tax Court), agency cases such as review of administrative orders from the Social Security Administration and nlr, cases in which at least one party appears pro se, and cases with unresolved jurisdictional problems. If a party requests a conference, the Office of Conference Attorneys generally grants the request in any nonprisoner civil appeal where all parties are represented by counsel. (Upon docketing of the case, the clerk's office sends all parties a package of case opening materials that includes, for eligible cases, a preargument statement form and a separate form by which parties may request a preargument conference.)

Selection process

For each eligible case, the conference attorneys review the preargument statement and jurisdictional screening form (described below). The Office of Conference Attorneys schedules a preargument conference in as many eligible cases as the resources of the office will allow.

Documents reviewed

For all eligible cases, the clerk's office sends the Office of Conference Attorneys the preargument statements filed by the parties. (In all eligible cases, the appellant must file a preargument statement with the clerk within fourteen days after receipt of case opening materials from the clerk's office.) The statement provides information about the parties, the disposition of the case at the trial level, the issues to be raised on appeal, and appropriate citations to governing statutes or dispositive cases.

The clerk's office also forwards to the conference attorneys a jurisdictional screening form that indicates any immediately apparent jurisdictional defects.

Requests by parties

A party may request a conference any time before the case is calendared for oral argument. The Office of Conference Attorneys generally grants the request in any nonprisoner civil appeal where all parties are represented by counsel.

Judicial selection

Occasionally, hearing panels refer cases to the program just before or after oral argument.

Scheduling the Conferences

Scheduling process

For cases selected for conferencing, the Office of Conference Attorneys sends lead counsel a notice setting the date and time for the conference and explaining the purposes of the program. The notice is usually sent within two weeks after the notice of appeal is filed and two to three weeks before the conference date. Conferences may be rescheduled when necessary at the request of a party.

Timing of conferences

Most conferences are set for a date before briefs are due.

Teleconferences

Initial conferences are generally scheduled as telephone conferences with counsel. About 90% to 95% of all conferences are conducted by telephone, with the court initiating the calls.

In-person conferences

If all counsel are in the Cincinnati area, the initial conference is in-person, usually at the courthouse of the court of appeals in Cincinnati. A few times a year, conference attorneys conduct in-person conferences outside Cincinnati. This occurs only under unusual circumstances if such travel would greatly facilitate settlement, such as when large numbers of people must participate in the negotiations and all of them are in the same city. Limited time and travel funds prohibit routine travel to conference sites.

Conference Sessions

Nature of sessions

At the conference, the conference attorney sets out the ground rules, emphasizes the confidentiality rules, and answers questions about court rules and procedures. Counsel for the parties explain their views on the issues raised on appeal, with the conference attorney commenting and questioning as appropriate. The conference attorney facilitates each side's understanding of the issues on appeal and usually caucuses with each side separately, exploring each party's interests and soliciting settlement ideas, offers, and counteroffers.

In about 25% of the cases, settlement is clearly impossible and negotiations go no further than the initial conference, although the conference attorney may help the parties resolve procedural issues before the conference ends. In cases that continue beyond the initial conference, the conferences conclude with discussion of next steps in the negotiations, which might include follow-up conferences or briefing extensions as appropriate.

Party participation

If a conference is scheduled, lead counsel for all parties are required to participate. Counsel are expected to come with authority to make and respond to settlement proposals. Generally, clients are not required to be present at initial conferences.

Number and length of sessions

Initial telephone conferences last an average of 1 hour; initial in-person conferences last an average of 1.5 hours. Approximately 25% of scheduled cases do not go beyond the initial conference. In the balance of cases, after the initial conference, the conference attorney conducts follow-up telephone or in-person negotiations, with or without clients, as necessary.

Post-conference procedures

Absent consent of all parties,- the conference process is not to result in any actions that affect the interests of any party or the case on its merits.

If the conference results in settlement, the parties sign a stipulation to dismiss the appeal or, in appropriate situations, a joint motion to remand. When the Office of Conference Attorneys receives the signed papers, the office prepares the order of dismissal or other appropriate order and sends the completed papers to the clerk for entry.

For cases that do not settle, lithe parties agree on resolution of a procedural issue, such as a revised briefing schedule, the conference attorney confirms the agreed-on due dates in writing and notifies the clerk s office of the revised schedule. If a case cannot be resolved fully through the conference process, the Office of Conference Attorneys notifies the clerk s office that the office is finished with the case, and the case proceeds normally on the court s docket.

Other Rules or Policies

Effect on appellate proceedings

The conference process does not automatically stay other events in a case. However, the conference attorney may extend deadlines for briefing as necessary so that the first brief is due no earlier than two weeks after the date scheduled for the conference. If negotiations continue productively and all parties and the conference attorney agree, briefing may be postponed for a reasonable time until negotiations are completed. The administrator in the Office of Conference Attorneys monitors cases for briefing due dates, status reports, submission of stipulations on settled issues, and other events.

Motions during the conference process are rare. When briefing motions or other procedural motions are filed during the conference process, the clerk s office refers them to the Office of Conference Attorneys. Conference attorneys often facilitate party agreement on such motions, but if the motion cannot be resolved by party agreement, the clerk s office handles it as any other contested motion.

Confidentiality

The statements and comments made during the conference by the parties and the conference attorney are confidential. Statements and comments otherwise made by the parties to the Office of Conference Attorneys are confidential. The parties are not permitted to disclose these communications in briefs or argument unless all parties agree to the disclosure.

The fact that a conference was scheduled is entered on the docket to facilitate coordination of the case within the court, but whether the conference was held, what happened at the conference, the results of the conference, and other events in the conference program are not entered on the

docket or in case files. Files relating to the conferences are kept separate from case files of the court of appeals. If a party requests a conference, the court keeps that request confidential, but the requesting party need not do so.

Sanctions

If a party or attorney fails to comply with conference procedures, the court may assess reasonable expenses, including costs and attorneys' fees, or dismiss the appeal.

Conference Attorney Staffing

Assignment of cases

Cases are randomly assigned to conference attorneys employed by the court.

Qualifications and training

Court personnel report that in selecting conference attorneys, the court seeks attorneys who have a working knowledge of law, demonstrated legal analytical and problem-solving skills, maturity, and good judgment. All conference attorneys complete a mediation or negotiation training course within the first year of their employment; most have attended a one-week program at Harvard University. The Office of Conference Attorneys also provides in-house training and encourages other continuing education in the mediation and negotiation fields and in the areas of substantive law typically involved in cases in the program.

Recusal

The program has no written recusal rules for conference attorneys other than the code of conduct for federal judicial employees.

Program Administration

Organization and management

The court's Office of Conference Attorneys includes the senior conference attorney, four conference attorneys (three full-time equivalents), the conference administrator, and two secretaries. Organizationally, the office is a separate unit of the court, physically and administratively separate from other court offices. The senior conference attorney manages the program under the direction of the court, usually through the chief judge. The conference administrator's duties include managing the clerical operations of the office, scheduling the conferences, and monitoring due dates for briefs and other filings.

Reports and evaluation

The Federal Judicial Center published an evaluation of the court's conference program in 1990. See James B. Eaglin, *The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals* (Federal Judicial Center 1990). See generally Robert W. Rack, Jr., *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 *Toledo L. Rev.* 921 (1984) (description of settlement negotiation at the appellate level and of the court's program in 1984).

For More Information

Robert W. Rack, Jr., Esq., Senior Conference Attorney, U.S. Court of Appeals for the Sixth Circuit, 245 Potter Stewart U.S. Courthouse, 100 E Fifth St, Cincinnati OH 45202, tel. 513-564-7330

Excerpted from *Mediation and Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* (Federal Judicial Center 1997)
