

# **HAWAI‘I APPELLATE CONFERENCE PROGRAM RULES**

**Adopted and Promulgated by  
the Supreme Court  
of the State of Hawai‘i**

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*Comments and commentary are provided by the rules committee  
for interpretive assistance. The comments and commentary express  
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**The Judiciary  
State of Hawai‘i**

# HAWAI‘I APPELLATE CONFERENCE PROGRAM

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**HAWAII APPELLATE CONFERENCE  
PROGRAM RULES**

*issues raised on appeal. This will aid in speedier resolution of those cases that are not settled and remain before the court.*

**Rule 1. GOALS; SCOPE.**

The Hawai'i Appellate Conference 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 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 (1) realistically consider the possibility of settlement of the entire case or issues in the case, (2) discuss limiting and simplifying the issues on appeal, (3) discuss briefing schedules, the content of the record, and other pertinent matters, (4) take actions as may reduce costs, and (5) aid the speedy and just resolution of any case.

**COMMENTARY:**

*The main objective of the Appellate Conference 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 explore and work toward fashioning solutions to the issues presented by the appeal. Cases that settle will be dismissed.*

*Early resolution of pending cases without the need for full consideration by the five-justice or three-judge panels of the appellate courts will benefit both the settling parties and the court. Settling parties benefit through an amicable resolution of their cases without the need for further time-consuming and, often times, expensive litigation in the appellate courts. Reducing the courts' case-loads will allow the courts to more quickly resolve other cases and to decrease case processing time, thereby increasing the pace in which the courts decide cases. The appellate conference program also assists parties in simplifying, clarifying, and, when possible, reducing the*

**Rule 2. APPEALS TO WHICH APPELLATE CONFERENCE PROGRAM APPLIES.**

All civil appeals are included in the program, except that criminal appeals and civil proceedings in the nature of the following are excluded: (1) petitions for extraordinary relief such as a petition for a writ of mandamus or the like, (2) petitions for a writ of habeas corpus, (3) appeals or petitions in which the appellate/petitioner is incarcerated and is seeking relief related to said incarceration, (4) appeals or cases arising under Rule 40 of the Hawai'i Rules of Penal Procedure, (5) questions of law reserved to the Hawai'i Supreme Court, (6) revocation of drivers' license, (7) appeals from a restraining order, (8) appeals from termination of parental rights, and (9) appeals from adjudication of a juvenile as a law violator.

**COMMENTARY:**

*The Appellate Conference Program 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 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 would be unable to reduce sentences.*

*Similarly, petitions for extraordinary relief and questions of law reserved to the Hawai'i Supreme Court 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.)*

**Rule 3. PARTICIPATION IN THE APPELLATE CONFERENCE PROGRAM.**

(a) **Selection of Cases.** If staffing permits, the program will 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.** In all cases that are selected for a conference, participation in the conference is mandatory.

(c) **Requests to Participate.** If a case is not selected into the appellate conference program, any party to the case may request that the case be included in the program, provided the request is made within 30 days after briefing is complete. The request must be made by letter, filed with the appellate clerk, and directed to the Appellate Conference Program. Requests for appellate conferences will be accommodated whenever possible.

(d) **Deadline for resolution of an appeal in the appellate conference program.** An appeal accepted for participation in the appellate conference program shall be returned to the appeals docket one year after the notice of acceptance into 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. By requiring participation (not settlement) in its program, Hawai'i hopes to spread the benefits this program has to offer 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.*

*The program will make every effort to accommodate all parties wishing admission to the program. 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.*

*(As amended and effective February 26, 1996;*

*further amended June 20, 2006, effective July 1, 2006.)*

**Rule 4. CIVIL APPEAL DOCKETING STATEMENT; TIMING OF THE APPELLATE CONFERENCE PROGRAM.**

(a) **Civil Appeal Docketing Statement.** Concurrent with the filing of the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant in each civil case not otherwise excluded from this program (see rule 2), shall file a Civil Appeal Docketing Statement on the form provided by the court. Each appellant shall attach to the Civil Appeal Docketing Statement (i) a copy of the judgment or order appealed from; (ii) a copy of any written opinion or findings of fact and conclusions of law supporting the judgment or order; and (iii) proof of service on all other parties to the proceedings below. Any other party may file a response to the Civil Appeal Docketing Statement with the court or agency from which the appeal is taken. The response must be filed within seven days after service of the Civil Appeal Docket Statement, on the form provided by the court.

(b) **Notice; Timing of the Appellate Conference.** If a case is scheduled for conference, the clerk of the supreme court will notify the parties. Such notice will be sent within 30 days after the CADS is filed. The Appellate Conference Program will endeavor to hold conferences as soon as possible after a case has been accepted into the program.

**COMMENTARY:**

*The Civil Appeal Docketing Statement 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) must file the 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 Civil Appeal Docketing Statement within seven days after service.*

*Copies of the 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 conference program, counsel will be notified. The notice will be sent within 30 days after the CADS is filed. A scheduling order will notify counsel listed on the Court's docket of the date, time, and place of the appellate conference. 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.*

*(As amended and effective February 26, 1996.)*

**Rule 5. SELECTION OF THE NEUTRAL.**

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.

**COMMENTARY:**

*Hawai'i is fortunate to have an untapped 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 build a solid reputation and achieve success. Therefore, the Appellate Conference Program will initially rely on these volunteers to serve as court-appointed neutrals. To avoid any potential conflicts of interest, all court-appointed volunteers will be either retired or semi-retired. Additionally, they shall have received training in mediation and alternative dispute resolution techniques. When necessary, the administrator of the program and the Director of the Center for Alternative Dispute Resolution may also be appointed by the program to serve as neutrals. 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 are either attorneys or judges, under this option the parties may select anyone upon whom they jointly agree. When the parties choose the neutral, the parties are responsible for paying the neutral for his/her services and the selected neutral shall follow the Appellate Conference Program rules.*

*(As amended and effective February 26, 1996.)*

**Rule 6. THE MEDIATOR'S AUTHORITY.**

**(a) Mediator's Role and Authority.** The mediator may (1) facilitate the voluntary resolution of cases; (2) assist the parties in simplifying, clarifying, and, when possible, reducing 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 terminate the mediation if the mediator believes the process is unproductive or 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 will generally use a consensus-building style of mediation in conducting appellate conferences for the court. The mediator begins each conference by explaining the goals of the conference, the role of the mediator; the mechanics of the process (including the possibility of private caucuses), and the confidentiality of the process. The mediator reminds 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 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 session. In private sessions, the mediator works 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.*

*The mediator then initiates the negotiations, often proceeding with the discussions*

*through "shuttle diplomacy." 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 a settlement 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 effective staying preparation of briefs. However, in some instances an appeal may enter the Appellate Conference Program late, while briefing is incomplete, transcripts are unfinished, or 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 tract 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.*

*Following assignment of a case to the appellate conference program, the mediator enters an order that either returns the case to the appellate docket or states that a tentative settlement has been reached and instructs the parties that if they do not file the appropriate documentation with the court within 30 days, 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 release from the program, unless a request for the program to resume jurisdiction over the case is received.*

*In order to ensure that mediation are productive, the mediator has the power to end the mediation in the event the mediator believes the process is unproductive or that*

*the parties are not participating or mediating in good faith.  
(As amended and effective February 26, 1996.)*

**Rule 7. ATTENDANCE AT THE CONFERENCE.**

Counsel with the most direct relationship to the client for the purpose of settlement shall attend all appellate conferences scheduled by the court. The neutral may request that clients or third persons attend the 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.

**COMMENTARY:**

*All counsel intending to file briefs in the appeal shall attend all conferences. 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 neutral conducting the appellate conference may, at the conclusion of the conference, continue it to another time and date if the neutral believes this is beneficial. At time the neutral may believe it is necessary to have clients or other third persons present at the appellate conferences. In those cases the neutral may require these persons to attend the conference.*

**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 to any court. Likewise, parties are prohibited from advising members of the court of discussions or actions taken at the conference.

**(b) Communication by the Trial Court Judge to the Mediator.** The trial judge may communicate with the court mediator about matters related to the appellate conference, provided all parties consent to the communication prior to the time of the communication. If the appellate conference 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 one who communicated with the court mediator.

**COMMENTARY:**

*To encourage full and frank discussion, all communications and matters discussed at a conference 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 all matters discussed at appellate conferences are confidential.*

*Nothing said in the conference is placed on the record or disclosed in anyway to the court by the court mediator. Likewise, 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 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 about matters concerning the case that may be relevant to the appellate conference. Such communications could be helpful and timesaving to the neutral. If there is a communication between the trial court and the Appellate Conference Program, and if the case is not resolved through the program but instead is 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.*

**Rule 9. IMMUNITY.**

Mediators selected in accordance with Rule 5 of these Appellate Conference 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.)*

**Rule 10. SANCTIONS.**

**(a) Authorization.** The program administrator or the Director of the Center for 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 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.

**(c) Procedure.** To impose sanctions the program administrator or the Director of the Center for 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, 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.

**(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 hamper the effectiveness of the mediation program and the ability of mediators to meet program objectives. Examples of noncompliance with program rules for which sanctions may be imposed on parties*

*or counsel include but are not limited to, failure to submit a pre-mediation statement as required by the program; submitting a frivolous pre-mediation statement; 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 Alternative Dispute Resolution, or unless good cause is shown for such failure or neglect.*

*(As added, effective February 26, 1996; amended effective July 1, 1999; further amended May 5, 2000, effective July 1, 2000.)*