

## NOTES

# Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation

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*“The courts of this country should not be the places where the resolution of disputes begins. They should be the places where disputes end—after alternate methods of resolving disputes have been considered and tried.”<sup>1</sup>*

### I. INTRODUCTION

Although the field of alternative dispute resolution (“ADR”) remains in its infant stages relative to the expanse of well-established legal jurisdictions, the province of ADR outside the strict legal arena has existed since the inception of civilized society. In fact, the use of mediation or arbitration to settle disputes dates back to the Old Testament where the Bible recounts the story of Moses’ recruitment of “capable men” to assist in adjudicating the various claims brought by the people of Israel: “The difficult cases they brought to Moses, but the simple ones they decided for themselves.”<sup>2</sup> The development of ADR programs at the appellate level, however, is a much

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<sup>1</sup> Justice Sandra Day O’Connor, Address at the Consumer Dispute Resolution Conference: Exploring the Alternatives (Jan. 21, 1983).

<sup>2</sup> *Exodus* 18:13–26 (New International Version).

more recent innovation that has only now begun to see widespread implementation.<sup>3</sup>

While the manifestation of appellate ADR has for the most part looked very similar in form across programs, especially at the federal level, one difference that has existed between state appellate programs—though not prevalent—has been the availability of private mediation.<sup>4</sup> Although many courts effectively privatize their mediation programs, the discussion of private mediation in this Note focuses on a more limited role of privatization.<sup>5</sup> Private mediation in this context connotes the decision by court-annexed, in-house mediation programs to allow parties the option of selecting a private-sector neutral for what is the mandatory mediation of their appeal.<sup>6</sup> The Federal Courts of Appeal have, until recently, maintained a level of uniformity on the subject, requiring mediation by staff or court-appointed mediators.<sup>7</sup> However, responding to calls for more in-person mediation and greater party autonomy, the U.S. Court of Appeals for the Eleventh Circuit is now the first federal appellate panel to institute a circuit-wide private mediation program.<sup>8</sup>

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<sup>3</sup> See CPR Institute for Dispute Resolution, *The ABCs of ADR: A Dispute Resolution Glossary*, <http://cpradr.wld.com/adrcourt.htm> (last visited Feb. 22, 2006) [hereinafter *ABCs of ADR*].

<sup>4</sup> See, e.g., The North Carolina Court System, *Mediation Instructions* (2004), <http://www.nccourts.org/Courts/Appellate/Appeal/Mediation/Instructions.asp> (last visited Feb. 22 200). The North Carolina appellate mediation program, which became permanent in February of 2004, allows participants three options concerning mediator selection, one of which is a “Private Mediator.” *Id.* The majority of courts require that a staff appellate mediator, or at least a mediator who is on a roster of court-approved appellate mediators, conduct the mediation conferences. See, e.g., OHIO R. APP. P. 20 (Prehearing Conference Procedures); ALA. R. APP. P. 4 (The Alabama appellate mediation program maintains a roster of approved mediators, although the rules do not preclude selection of a “nonroster mediator.”).

<sup>5</sup> See Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 747–50 (1999) (discussing various models for court-connected mediation, including true privatization through contracting with mediation firms or organizations).

<sup>6</sup> See *infra* note 29 (distinguishing private mediation and traditional private-setting mediation).

<sup>7</sup> See *Federal Circuit First to Allow Private-Sector Mediators*, ADRWorld.com (Nov. 4, 2004), <http://www.adrworld.com/sp.asp?id=27330> [hereinafter *ADRWorld*].

<sup>8</sup> See American Arbitration Association, *Federal Court Developments: 11th Cir.: Pilot Program Allows Private Mediators*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 5 [hereinafter *Pilot Program*]. The Second Circuit actually developed the first form of private mediation in the federal appellate courts, but the program—which was abandoned during its second year—was not circuit-wide and parties could only select from a list of

In response to the development of private mediation in the circuits, some commentators consider the concept less than innovative because parties are at all times and at all stages of litigation free to seek out mediation in the private sector, irrespective of whether such mediation is required through the court. This statement, while correct, does not account for the myriad of circumstances under which private mediation provides alternative channels to parties that might not otherwise exist. First, parties do not always consider the option of alternative dispute resolution, especially at the appellate level, and when courts require these parties to mediate, the benefits of pursuing private mediation while simultaneously satisfying the court's requirements might be more attractive. In other words, a formal program implicitly encourages and reassures parties that private mediation remains an option and that the court recognizes the benefits thereof. Second, there is no reason parties should be forced to mediate twice, once through the court and once through private mediation, when they desire to mediate with a specific private-sector neutral.<sup>9</sup> Third, although this author lacks any anecdotal evidence as support, it is not entirely inconceivable that the lack of a formal private mediation program may actually discourage use of a private-sector neutral where mediation with court staff is already required.

The thesis of this Note is that the advent of private mediation in the federal circuits is a positive development that has the potential to provide numerous benefits to parties, all a function of self-determination in the process. This thesis will be advanced in several stages, commencing with Part II, which offers a brief history of ADR at the appellate level as well as a look at appellate mediation generally and why programs have become so prevalent. Part III addresses the Eleventh Circuit's pilot program enabling private mediation. The program's origins are discussed and its procedures explored.

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"pre-approved" mediators. *See infra* note 75 (addressing the Second Circuit's program in more detail).

<sup>9</sup> In a conversation with Robert Rack, Chief Circuit Mediator for the Sixth Circuit, the Chief Mediator was skeptical as to whether private mediation was actually necessary in the sense of creating a formalized program because his experience had shown that many circuits, including his own, already allow parties to mediate privately in satisfaction of the court's mandatory mediation requirements under certain circumstances. This fact, however, seems to at least partially justify the creation of formal private mediation programs as it is clear that courts are already acquiescing in the practice to some extent and creating formal procedures would help standardize the process, thus maintaining a desired level of court control. At the same time, the need for specific court programs spelling out the opportunity for private mediation would tend to encourage the use of a private-sector neutral, with the benefits that coincide.

Prior to the availability of private mediation in the Eleventh Circuit, parties were forced to mediate at mediation centers located in only three cities within just two of the circuit's three-state jurisdiction.<sup>10</sup> This results in a large majority of mediation conferences occurring via telephone. Whether this is a negative consequence will be examined in Part IV, which conducts a substantive analysis of private mediation, emphasizing the benefits of allowing parties to select a private-sector neutral, while also taking account of possible concerns. Finally, Part V suggests recommendations for the further development of private mediation, concentrating on issues of mediator quality and the costs associated with private mediation.

## II. DEVELOPMENT OF APPELLATE ADR

The existence of alternative dispute resolution within the appeals process may seem somewhat counterintuitive at first glance. After all, when a case reaches the appellate level, there has already been at least one winner and one loser at the trial court below.<sup>11</sup> The consequence of this adjudication is that the incentives for settlement are drastically altered—inevitably more so for the winner.<sup>12</sup> Additionally, precedent is forged within the walls of state and federal courts of appeals. Settling disputes prior to adjudication in the appellate courts might appear to strip the judiciary of the opportunity to adjudicate cases with broader implications, establish precedent, and in essence construct the common law.<sup>13</sup>

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<sup>10</sup> The jurisdiction of the Eleventh Circuit covers the states of Alabama, Florida, and Georgia. The three branches of the Circuit's mediation center are located in Atlanta, Tampa, and Miami. See KINNARD MEDIATION CENTER, *MEDIATION AND GUIDELINES FOR EFFECTIVE MEDIATION REPRESENTATION* 1 (2004), <http://www.ca11.uscourts.gov/documents/pdfs/medinfo1204.pdf> [hereinafter KMC GUIDELINES].

<sup>11</sup> See Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341, 345–46 (1999).

<sup>12</sup> See Richard Becker, *Development in Practice Note: Mediation in the New Mexico Court of Appeals*, 1 J. APP. PRAC. & PROCESS 367, 368 (1999) (discussing various criticisms of appellate mediation, including the belief by some that “[a]ppellate mediation doesn’t work because there is no incentive to settle”).

<sup>13</sup> See Mori Irvine, *The Lady or the Tiger: Dispute Resolution in the Federal Court*, 27 U. TOL. L. REV. 795, 802–03 (1996) (raising questions about possible adverse effects of settlement at the appellate level). See also Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Widely known for his anti-settlement viewpoints, Professor Fiss does not believe “that settlement as a generic practice is preferable to judgment.” Professor Fiss considers settlement a “highly problematic technique for streamlining dockets” that “should be neither encouraged nor praised.” See *Id.* at 1075.

Although this Note will not address the utility of appellate mediation, it is generally accepted that ADR during the appeals process does not hinder—to any significant extent—the development of viable and progressive case law;<sup>14</sup> whatever adverse effects do exist are substantially outweighed by the benefits that result.<sup>15</sup> Additionally, while the inducements for settlement that exist prior to trial dissipate significantly following disposition at trial, some rationales do persist and other incentives are derivations of the unique nature of the appellate process.<sup>16</sup> Consequently, the reality is that appellate cases “remain ripe for mediation and do settle on appeal.”<sup>17</sup>

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<sup>14</sup> Because a vast majority of cases traditionally settle out of court, many believe—though empirical evidence is lacking and would be difficult to assess—that “diversion of additional cases to mediation [does] not appreciably affect the justice system’s ‘output’ of precedent.” Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 331–32 (1996) (“Furthermore, mediation, particularly public-policy mediation, can produce precedent in its own right.”); see also Edward R. Becker, *Appellate Mediation in the Third Circuit: Foreword*, 47 VILL. L. REV. 1055, 1056–57 (2002) (“It is clear in retrospect that the mediation program has had no adverse effect on the development of Circuit law. The Court writes precedential opinions in only 15% of its cases. That number has remained consistent since the inception of the Appellate Mediation Program.”); cf. Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 92–93 (“The common law may evolve more quickly if the process of pre-trial settlement leaves the courts with mainly the difficult and therefore precedent-setting cases to decide.”). But see Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 268 (1999) (“Precedent has public value, and its content is altered by settlements. In fact, settlement is nonrandom, so even settlements made with no thought of the effect of the settlement on a body of precedent influence the substantive content of the body of precedent. Settlement, or refusal to settle, can also be a conscious manipulation of precedent.”).

<sup>15</sup> See *infra* Part II.A.2 (discussing the benefits of appellate ADR); see also Becker, *supra* note 12, at 380 (“The success of appellate mediation programs throughout the nation suggests that when court-annexed mediation is made readily available to parties, the interests of judicial administration are well served.”). “[I]t is difficult to argue that the offer by the State of a wider spectrum of official dispute resolution mechanisms, possibly through the provision of court-annexed ADR schemes is not a qualitative improvement in the result disputants get from the civil justice system . . .” ANTOINE CREMONA, FORCED TO MEDIATE: CRITICAL PERSPECTIVES ON COURT-ANNEXED MEDIATION SCHEMES 4, [http://www.chamberofadvocatesmalta.org/seminar\\_papers/antoine\\_cremona.pdf](http://www.chamberofadvocatesmalta.org/seminar_papers/antoine_cremona.pdf).

<sup>16</sup> See Becker, *supra* note 12, at 370 (“There are a number of reasons why appellate adversaries are motivated to settle even after they have been through the rigors and expense of trial.”); see also *infra* Part II.A.1 (discussing the idea that ADR at the appellate stage is actually ideally timed to facilitate settlement).

<sup>17</sup> Irvine, *supra* note 11, at 346. From a statistical standpoint, “there is no denying

The development of ADR programs at the appellate level actually began in the federal courts.<sup>18</sup> The first program was instituted in 1974 by the U.S. Court of Appeals for the Second Circuit pursuant to Federal Rule of Appellate Procedure ("FRAP") 33, which permissively directed the courts to construct mediation programs.<sup>19</sup> Although the first appellate mediation program was introduced by a federal court, the Sixth Circuit would not implement the next federal program until seven years later in 1981, and the majority of federal court programs would not come into existence until the 1990s.<sup>20</sup> The state courts, however, quickly followed the Second Circuit's direction, initially instituting a multitude of appellate mediation programs in the late 1970s with continued development throughout the 1980s.<sup>21</sup> Some of these state programs have endured in uninterrupted operation since their beginnings, while others suffered abandonment after only a few years.<sup>22</sup>

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the success of appellate ADR. In fact, the 50 and 60 percent settlement rates achieved by some appeals courts rival those found in trial-level programs and even some private contexts." S. Gale Dick, *The Surprising Success of Appellate Mediation*, 13 ALTERNATIVES TO HIGH COSTS LITIG. 41, 49 (1995).

<sup>18</sup> See Sandra Shultz Newman & Scott E. Friedman, *Appellate Mediation in Pennsylvania: Looking Back at the History and Forward to the Future*, 5 J. APP. PRAC. & PROCESS 409, 409-10 (2003).

<sup>19</sup> See ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 2* (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/\\$File/mediconf.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/$File/mediconf.pdf). FED. R. APP. P. 33 provides:

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

FRAP 33 acts as statutory authorization for the U.S. Circuit Courts of Appeals to develop mediation programs in conjunction with a local rule or order of the specific court which is necessary to implement such a program. See Irvine, *supra* note 13, at 798.

<sup>20</sup> See NIEMIC, *supra* note 19, at 3.

<sup>21</sup> See Newman & Friedman, *supra* note 18, at 419 ("Numerous state programs have followed suit, instituting appellate mediation programs to handle burgeoning caseloads.").

<sup>22</sup> See NANCY NEAL YEEND, *STATE APPELLATE ADR: NATIONAL SURVEY AND USE ANALYSIS WITH IMPLEMENTATION GUIDELINES 2-1 to -3* (2002). A myriad of state appellate mediation programs created in the 70s and 80s did not survive due to various

Over the past decade, the country has seen a collective resurgence in state appeals court mediation programs: as of 2002, thirty-one states had programs at the appellate level reflecting “both a general societal trend toward greater use of ADR and specific statutory authorization to use ADR.”<sup>23</sup>

A. *What is Court-Annexed Mediation?*

The broad scope of ADR encompasses various forms of dispute resolution beyond mediation,<sup>24</sup> including: arbitration, early neutral evaluation, mini-trials, negotiations, neutral fact-finding, settlement conferences, and summary jury trials.<sup>25</sup> However, mediation has proved so effective in its application to nearly all forms of disputes that it has become

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constraints on financial resources and personnel; many were abandoned after only a year or two while some lasted significantly longer before their eventual end. *See Newman & Friedman, supra* note 18, at 419. The Third District Court of Appeals in Sacramento, California was the first state court to implement an appellate mediation program and although the program lasted nearly two decades, the program was cut in 1993. *See Id.* The Missouri Court of Appeals for the Eastern District founded in 1976 what has now become one of the longest running state court appellate mediation programs. *See Id.* at 419–20.

<sup>23</sup> ROBERT J. NIEMIC ET AL., *GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR* 1 (2001); *see also Newman & Friedman, supra* note 18, at 421.

<sup>24</sup> Although there is no singular definition for mediation, a general understanding provides:

In its simplest form mediation is a process through which two or more disputing parties negotiate a voluntary settlement of their differences with the help of a third party (the mediator) who typically has no stake in the outcome. The parties’ negotiation is guided and structured by the mediator, who acts primarily as a catalyst for the process by shaping both the agenda and the discussion. The mediator helps the parties identify issues and explore possible solutions. The mediator also encourages each party to accommodate the other party’s interests.

Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 *RUTGERS L.J.* 155, 158 (1994). The Uniform Mediation Act furnishes a more efficient rendition, defining mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” UNIF. MEDIATION ACT § 2 (2002).

<sup>25</sup> For a brief description of the various ADR processes, *see generally* AMERICAN BAR ASSOCIATION, *WHAT YOU NEED TO KNOW ABOUT DISPUTE RESOLUTION: THE GUIDE TO DISPUTE RESOLUTION PROCESSES* 1–3 (2001), <http://www.abanet.org/dispute/draftbrochure.pdf> [hereinafter ABA].

the leading ADR method in local, state, and federal courts.<sup>26</sup> Even though the mediation programs of the federal circuits can take multiple forms and are called by many different names—appellate mediation programs, settlement programs, settlement conferences, appeal conferences, mediation conferences, pre-argument conferences, pre-hearing conference program, appeal settlement conferences—each circuit’s approach significantly parallels that of traditional mediation.<sup>27</sup> Accordingly, for the purposes of this Note, the various federal programs will be referred to individually and collectively as appellate mediation programs.<sup>28</sup>

Court-annexed mediation, as opposed to traditional private setting mediation,<sup>29</sup> is simply the institutionalization of ADR.<sup>30</sup> There exist no

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<sup>26</sup> See ABCs of ADR, *supra* note 3, at 2. See generally PENNSYLVANIA BAR INST., MEDIATION IN THE MILLENNIUM (1998) [hereinafter MILLENNIUM]. “Mediation, among all of the alternatives to litigation, is emerging as the cornerstone of dispute resolution for the 21st century.” *Id.* at iii.

<sup>27</sup> See NIEMIC, *supra* note 19, at 5 (“Although the programs go by various names, most are essentially mediation programs.”). Many of the appellate mediation programs are actually forms of settlement conferences which are separate ADR processes distinct from mediation. However, settlement conferencing is very similar to mediation and the differences—settlement conferencing is typically shorter and there is judicial oversight—are inconsequential to the present analysis. See *Id.*; see also ABA, *supra* note 25, at 3.

<sup>28</sup> Actual program descriptions or local rules outlining program procedures for each circuit’s appellate mediation program can be found on the relevant circuit’s website. For example, see U.S. Court of Appeals for the First Circuit, <http://www.ca1.uscourts.gov>; U.S. Court of Appeals for the Second Circuit, <http://www.ca2.uscourts.gov> (so on and so forth).

<sup>29</sup> See generally Cremona, *supra* note 15, at 4–6. The term “private setting mediation” is simply an industry reference to traditional mediation conducted by parties independent of the court system (i.e., outside of a mediation program that is either sponsored or operated by the court). This should not be confused with references to “private mediation” throughout this Note, which refers to the use of private-sector mediators in court-annexed mediation.

<sup>30</sup> See ALAN SCOTT RAU ET AL., MEDIATION AND OTHER NON-BINDING ADR PROCESSES 219 (2d ed. 2002). Mediation in the judicial process can take many forms:

The term “court-annexed” is also something of a misnomer because ADR can be integrated into the litigation process in variety of ways not necessarily comprehended by the word “annexed.” Again, however, the term is used today to describe a wide variety of relationships between the ADR process and an on-going litigation. This relationship ranges from a formal order incorporating ADR into the litigation schedule to more informal court action that merely acquiesces in, recognizes, or validates resort to an ADR process before the trial of the case will go forward.

*Id.*



significant differences between the two other than the consequences of court sponsorship of the program and, most often, court control over the process.<sup>31</sup> The development of court-annexed appellate mediation, as well as the general institutionalization of ADR, has occurred primarily in response to the continual overcrowding of court dockets.<sup>32</sup> However, process quality and party-oriented concerns are now offered as a partial foundation for the continued expansion of ADR in the courts.<sup>33</sup>

Although court-annexed mediation is most often equivalent to “mandatory mediation,”<sup>34</sup> which runs contrary to the conventional perception of mediation as a voluntary method,<sup>35</sup> participation is the only mandatory aspect of such programs.<sup>36</sup> It is the freedom to decide whether or not to settle

<sup>31</sup> See ABCs of ADR, *supra* note 3, at 1. See generally COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998).

<sup>32</sup> See KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 799–800 (2000) (“The use of court-ordered ADR is usually justified on the basis of efficiency. Supporters claim that it promotes settlement of pending cases, and thus it relieves over-crowded dockets and conserves judicial resources for the cases where they are needed the most.”); see also Cremona, *supra* note 15, at 4 (“We have seen that the call for experimentation and often for the institutionalization of ADR processes (and particularly of mediation) within the justice system appears to have been spurred primarily by efficiency concerns rather than considerations on the quality of the process.”).

<sup>33</sup> The quality of the mediation process and party-oriented concerns refers generally to substantive benefits offered by mediation, such as greater party participation and the increase of equitable outcomes, as opposed to the procedural benefits of judicial efficiency and economy. See generally Cremona, *supra* note 15.

<sup>34</sup> The Eighth Circuit Court of Appeals and the Federal Circuit possess the only completely voluntary appellate mediation programs within the federal courts, where the parties can at all times opt in or out of the mediation process. See NIEMIC, *supra* note 19, at 9; see also *infra* note 59 (discussing the recent advent of the Federal Circuit’s pilot program for appellate mediation).

<sup>35</sup> Carrie Menkel-Meadow, *Introduction to MEDIATION: THEORY, POLICY, AND PRACTICE*, at xiii, xxvii (Carrie Menkel-Meadow ed., 2001) (“Because mediation has developed in parallel forms in both the private and public sector, the growth of mediation in these two areas now often influences each other as they attempt to maintain some separate identity. In what is widely regarded as a classic misnomer, some court programs now refer to ‘mandatory mediation,’ seemingly robbing mediation of one of its axioms—voluntariness.”).

<sup>36</sup> Under most circumstances, cases eligible and selected for mediation in any circuit’s program move forward without the ability of the parties to request or secure removal of their case from the mediation docket. See NIEMIC, *supra* note 19, at 9. Although such mandatory participation is prevalent among courts, some courts have at this stage already taken into account the parties’ willingness to participate during the

that is the cornerstone of mediation, and this aspect is preserved with court-annexed mediation because settlement is never supposed to be required or even coerced.<sup>37</sup> Furthermore, the existence of mandatory mediation can actually assist in bringing the parties together where this would otherwise prove difficult due to the emotions and circumstances of the ongoing litigation.<sup>38</sup>

### 1. *Why is Appellate Mediation Unique?*

The heart of the differences between mediation programs at the trial and appellate levels lie in the distinctions that exist between the two stages of litigation. Unique attributes of the appellate process, which subsequently affect the efficacy of appellate mediation, include: a narrowing of the issues,

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original selection process. Additionally, even for those courts where participation is blanketly mandatory, the mediation process is, as always, non-binding and no particular outcome is ever required. *See Id.* Most mediation programs in general, including those within the federal circuits, use what is referred to as a “facilitative” approach to mediation. *See, e.g., KMC GUIDELINES, supra* note 10, at 3 (“Because circuit mediation is based on the principles of self-determination by the parties and impartiality of the neutral, the circuit mediators apply the facilitative model of mediation.”).

This technique speaks to the role of the mediator as a facilitator who is in place to assist parties in finding solutions to the issues which have given rise to the current litigation. However, there are programs that utilize additional methods beyond the facilitative approach such as the “predictive” technique where the third-party neutral will not only make merit-based predictions concerning the likely outcome of the case on appeal, but will also recommend specific solutions to the parties. Regardless of the approach taken, opinions, predictions, or recommendations made by a mediator are only advisory, and because the outcome of mediation is intended to be self-determinative, the parties are never compelled to settle and the mediation outcome is always inherently nonbinding. *See Id.* at 8.

<sup>37</sup> *See Menkel-Meadow, supra* note 35, at xxvii (“Mandatory mediation often just means mandatory participation in mediation, with no requirement to agree, but scholars and judges have begun to plumb the depths of what the legal requirements might be to have to participate in ‘good faith.’”). *But see* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, in *MEDIATION AND OTHER NON-BINDING ADR PROCESSES* 81, 85 (Alan Scott Rau et al. eds., 2d ed. 2002) (arguing that the self-determination dynamic of mediation “is fundamentally altered when mediation is imposed rather than sought or offered. When mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory.”).

<sup>38</sup> *See* RAU, *supra* note 30, at 269 (“But parties and lawyers who have gone through a trial (or other court proceeding) are sometimes so emotionally committed to their position, and so angry about the tactics of the other side, that settlement is difficult. For this reason, mandatory ADR helps each side to save face and provides a structure for reaching agreement.”).

standards of review resulting from the decision below, and evolving party goals. These characteristics may at first glance appear contrary to the viability of the mediation mechanism. Experience has revealed, however, that “settlement discussions at the appellate level are ideally timed.”<sup>39</sup> The unique aspects of the appellate stage most often create new and sometimes greater opportunities for settlement rather than hindering the process.<sup>40</sup>

At the point a case enters the appellate realm, something has occurred below that will inevitably have a profound impact on the outcome of future litigation: a decision was rendered and one party “won.”<sup>41</sup> The immediate impact of the trial court decision is that the applicable law has been determined, there have been multiple findings of facts, and the relevant issues have now been narrowed.<sup>42</sup> Although it is possible to alter these decisions, appellate standards of review make this possibility very unlikely in many circumstances.<sup>43</sup> Subsequently, the appellant may, realizing the diminished chances of success after filing the appeal or even during actual mediation discussions, reassess the future course of litigation.<sup>44</sup> Settlement at this stage may provide the appellant the opportunity to “get out with something” through softening her position on the issues that remain in dispute.<sup>45</sup>

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<sup>39</sup> Joseph A. Torregrossa, *Appellate Mediation in the Third Circuit—Program Operations: Nuts, Bolts, and Practice Tips*, 47 VILL. L. REV. 1059, 1061 (2002); see also Irvine, *supra* note 11, at 346 (“The answer is that, even though the case is on appeal, it is still driven by the professional, practical, and personal motives of the participants. Consequently, appellate cases remain ripe for mediation and do settle on appeal.”).

<sup>40</sup> See RAU, *supra* note 30, at 269 (“Appellate cases seem particularly well suited to ADR since there are few imponderables; the facts, the record, and the judgment are all known, and the range of possible outcomes is narrowed.”).

<sup>41</sup> See Torregrossa, *supra* note 39, at 1061.

<sup>42</sup> See *Id.* (“Major uncertainties about disputed facts and questions of applicable law have been resolved.”).

<sup>43</sup> See *Id.* at 1061–62. Standards of review can range from “de novo,” where the appellate court approaches questions of law without regard for prior adjudications, to the more common “clear error” and “abuse of discretion” standards that accompany questions of fact and discretionary rulings, respectively. The latter standards of review are highly deferential to the determinations of the lower court and are difficult to overcome.

<sup>44</sup> *Id.* at 1062 (“The modest chances of success on appeal will often lead the appellant to reconsider what was once thought to be a strong case prior to the decision in the [lower] court.”).

<sup>45</sup> *Id.* In other words, because an appellant was not victorious below, settlement on appeal offers the chance for an appellant to meet the appellee in the middle on the issues still in dispute, thereby walking away with at least a quasi-positive outcome rather than

An additional consequence of the lower court adjudication is a shifting of party goals that often leads the appellee to consider some form of settlement through the mediation process. The appellee's personal motives for settlement may include a feeling of fairness and equity in resolving the remaining dispute amicably following the decision below, as well as a desire to "move beyond the conflict and finally let go of it."<sup>46</sup> Both the appellee and the appellant may also possess various practical motives that dictate an individualized need to mediate and settle, including time and financial constraints.<sup>47</sup> Navigating a case through the appeals process to its ultimate culmination can take years and will inevitably result in the further expenditure of significant resources.<sup>48</sup>

## 2. How Does Mediation Benefit the Appeals Process?

While Moses' sole design in instituting his mediation approach was to relieve the pressure upon himself and ensure that the people of Israel were able to be heard,<sup>49</sup> caseload lightening, although a vital purpose behind modern employment of ADR methods by courts, is not the only policy justification for taking the decision out of a judge's hands. When Chief Judge Irving R. Kaufman of the Second Circuit Court of Appeals first instituted the maiden federal appellate mediation program, known as the Civil Appeals Management Plan (CAMP), his primary goal was simply to reduce the Second Circuit's caseload.<sup>50</sup> However, when the program took effect in 1974, CAMP had four stated goals:

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pursuing the "zero-sum game of adjudication" which they have already lost once prior. Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 429 (1986).

<sup>46</sup> See Irvine, *supra* note 11, at 346.

<sup>47</sup> See *Id.* ("[E]ven though the case is on appeal, it is still driven by the professional, practical, and personal motives of the participants."); see also Torregrossa, *supra* note 39, at 1062.

<sup>48</sup> See Irvine, *supra* note 11, at 346 ("An appeal takes a long time to reach a final decision, and waiting may be disruptive" and a party "may have an immediate need to settle for financial reasons.").

<sup>49</sup> *Exodus* 18:13-23 (New International Version) ("That will make your load lighter, because they will share it with you. If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied.").

<sup>50</sup> See Newman & Friedman, *supra* note 18, at 410; see also Irving R. Kaufman, *The Federal Rules: The Human Equation Through Pretrial*, 44 A.B.A. J. 1170, 1172-73 (1958) (discussing the caseload reduction in federal courts through the use of pretrial conferences); Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253 (1988).

“(1) to encourage the resolution of appeals without participation by judges, thus preserving their scarcest and most precious asset, time; (2) to expedite the consideration of appeals that will be briefed and argued; (3) to have Staff Counsel help the parties clarify the issues on appeal; and (4) to dispose of minor procedural motions without expenditure of judicial resources.”<sup>51</sup>

As is evident from the goals of the CAMP program, the value derived from appellate mediation by the court system occurs on several levels, from settlement of cases to conservation of judicial resources to more effective case management.<sup>52</sup>

Beyond the economy and efficiency gains seen by courts, ADR processes also offer parties numerous benefits and incentives to settle, including: cheaper and quicker methods of resolution compared to traditional legal avenues, a more flexible approach not bound entirely by the formalities of procedure or black-letter law, and a higher level of participation in the process, which frequently translates to a greater degree of satisfaction with the final outcome.<sup>53</sup> The availability of appellate mediation liberates the parties from the constraints of procedure and enables disputants to clarify the underlying issues, analyze the viability of their legal stance, and explore settlement options.<sup>54</sup> Congress has even based legislation on findings that

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<sup>51</sup> Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755, 756 (1986). Judge Kaufman described the CAMP program as “a model of judicial reform in an era when courts are bursting at the seams.” *Id.* The Judge further concluded: “In CAMP I foresaw the possibility, and now have observed the reality, of recovering some of the humanity the judicial system has lost in trying to keep pace with the nation’s explosion of litigation.” *Id.* at 764.

<sup>52</sup> See Becker, *supra* note 12, at 369 (“Experience has shown that appellate mediation endeavors create a potential for several important benefits, including a reduced number of cases for the appellate court to decide, fewer remands and secondary appeals, the streamlining of appeals through partial resolution of issues, the satisfaction of parties’ underlying needs and interests, and the reduction of the time a case spends on appeal.”); see also NIEMIC, *supra* note 19, at 3–4.

<sup>53</sup> See Thomas F. Ball III, *Appellate Mediation in the Fourth Circuit: An Idea that Works*, 9 S.C. LAW. 28, 30–31 (1997) (exploring a comprehensive list of considerations for settling on appeal); see also ABA, *supra* note 25, at 1.

<sup>54</sup> Participants in mediation are able to formulate potential outcomes that are either unavailable through litigation or are infeasible because of the procedures and constraints—discovery, evidentiary rules, etc.—inherent to the trial process. See Lieberman & Henry, *supra* note 45, at 429 (“[Parties] can search for creative solutions to the problem that gave rise to the dispute, and those solutions may be far more novel than any remedy a court has the power to provide.”); see also ABCs of ADR, *supra* note 3, at 1; Thomas Hitter, *What Is So Special About the Federal Circuit? A Recommendation for ADR Use in the Federal Circuit*, 13 FED. CIR. B.J. 441, 448 (2004) (“Mediation offers a

ADR “has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.”<sup>55</sup>

### B. *Current State of Circuit Mediation*

Prior to 1990, less than half of the United States Circuit Courts of Appeal had mediation programs in place.<sup>56</sup> Today, every circuit has implemented such a program to assist parties in identifying issues and settling disputes, while also decreasing the number of cases on crowded circuit dockets.<sup>57</sup> The thirteen circuit mediation programs now in existence<sup>58</sup> possess far more similarities than differences in terms of their objectives, structure, and operation, as they have all more or less stemmed from one another.<sup>59</sup>

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number of benefits. Since the parties do not have to conform to a legal definition, theory, or procedure, the discussions allow the parties to focus on their concerns and priorities, which provide an opportunity to address the fundamental issues of the dispute.”).

<sup>55</sup> See NINTH CIRCUIT STANDING COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, ADR GUIDEBOOK 11 (2003); see also *The Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–58).

<sup>56</sup> See NIEMIC, *supra* note 19, at 2–3.

<sup>57</sup> In 2004, the Federal Circuit was the only circuit without a formal appellate mediation program. Although the Federal Circuit’s local rule 33 does mandate settlement discussions between parties in all cases in which a party is not represented *pro se*, Rule 33 settlement discussions are conducted without the assistance of a neutral and without court involvement. FED. CIR. R. 33; see also NIEMIC, *supra* note 19, at 16. Many believe the extended absence of a Federal Circuit mediation program was a function of the Circuit’s unique nationwide jurisdiction in a variety of subject matters, including patents, government contracts, international trade, etc. See Pauline Newman, *The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821 (2005). In recent years, there has been a push for the development of a mediation program in the Federal Circuit. See, e.g., Gilbert J. Ginsburg, *The Case for a Mediation Program in the Federal Circuit*, 50 AM. U. L. REV. 1379 (2001); Hitter, *supra* note 54. As a possible response to such calls, the Federal Circuit has implemented an “Appellate Mediation Pilot Program.” The new program, which began formal operation in October 2005, is characterized by voluntary participation, an aspect now unique to only the Federal Circuit and the Eighth Circuit. See U.S. Court of Appeals for the Federal Circuit, Appellate Mediation Pilot Program Guidelines 1, <http://fedcir.gov/guidelines05.pdf> (last visited Feb. 22, 2006) [hereinafter *Federal Circuit Guidelines*].

<sup>58</sup> The “thirteen” includes the mediation programs of the D.C. Circuit and the Federal Circuit’s newly implemented appellate mediation program.

<sup>59</sup> See NIEMIC, *supra* note 19, at 5. Key departures do exist from circuit to circuit, especially with the advent of the Federal Circuit’s pilot program for voluntary mediation.

Practically every program carries a different title—most consisting of a combination of the words appeal, appellate mediation, settlement, and conference. Yet all are essentially forms of appellate mediation.<sup>60</sup>

Eligibility of a case for mediation upon appeal is determined, as would be expected, by the nature of the case. Two eligibility restrictions that are in place across the board are the exclusion of criminal appeals and *pro se* civil actions.<sup>61</sup> Mediation in criminal cases has traditionally been seen as against public policy with few exceptions—such as victim-offender programs—because the justice system exists primarily to determine guilt or innocence, not to meet somewhere in the middle.<sup>62</sup> This sentiment is gradually shifting, however, as a result of perceived flaws in the plea bargaining process.<sup>63</sup> Nevertheless, the justifications for looking toward mediation at the plea stage are simply inapposite in the context of a criminal appeal.<sup>64</sup> Cases brought up on appeal *pro se* are generally considered ineligible for mediation because of the fear that a *pro se* litigant might consider a mediator as either an advisor or as a court authority figure exerting pressure upon the litigant to settle.<sup>65</sup>

Because of the inherent difficulties in predicting the probability of successful mediation from one case to the next, participation in the mediation programs within some circuits is based solely on general eligibility

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*See generally Id.* Such differences between circuits, however, are not germane to the current discussion and represent mere formalities in the majority of cases.

<sup>60</sup> *See supra* notes 27–28 and accompanying text.

<sup>61</sup> *See NIEMIC, supra* note 19, at 5–6. The Third Circuit is actually the lone program that allows *pro se* mediation but does so through appointing temporary counsel for mediation representation only. *See Torregrossa, supra* note 39, at 1080 (discussing the Third Circuit’s “Pro Se Mediation Program”).

<sup>62</sup> *See* Richard Birke & Louise Ellen Teitz, *U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 189 (2002) (“Mediation in criminal cases was once considered anathema [sic]. However, during the 1980s, programs were started that allowed certain defendants to mediate with certain victims of crimes. These programs have proven effective in restoring the victim’s piece [sic] of mind and in imbuing on the offender a sense of responsibility for his actions.”).

<sup>63</sup> *See generally* Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563 (2005).

<sup>64</sup> *See Id.* at 594–95 (“Plea mediation would only be appropriate where plea negotiations are currently used, and for the same reasons—to efficiently resolve criminal cases without compromising the weighty requirements of the American justice system.”).

<sup>65</sup> *See NIEMIC, supra* note 19, at 6.

requirements;<sup>66</sup> in other words, if a case is eligible to be mediated then the case will be mediated.<sup>67</sup> However, some courts attempt to subjectively determine the cases most suited for the mediation process and subsequently select only those cases.<sup>68</sup> A few programs still randomize the selection process given the large volumes of mediation-eligible appeals.<sup>69</sup> Even in those cases not selected for mediation, however, most circuits will reconsider upon the request of the parties—where such requests predominantly constitute automatic admittance into the mediation program for a particular case.<sup>70</sup>

Differences do exist among the circuits as to the medium by which the mediation sessions are most frequently conducted.<sup>71</sup> Every circuit allows for telephone conferences, as opposed to in-person mediation. But while some circuits permit teleconferencing only under special circumstances, the large majority either permits such conferences in every case or has structured their programs around telephone conferences as the default method.<sup>72</sup> The choice

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<sup>66</sup> See *Id.* (“Some conference program managers believe it is difficult to predict from case documents alone which cases are likely to settle. This view has led some programs to schedule nearly all civil cases for a conference but has led others to select cases by random draw.”).

<sup>67</sup> Eligibility for mediation is most often the default status of an appeal, except for certain categories of cases that are excluded from most appellate mediation programs. See *supra* notes 61–65 and accompanying text. A categorical exclusion that is common among the appellate mediation programs is the ineligibility of actions involving a governmental agency primarily because it is often difficult to determine the authority of the government’s attorney to settle the case on behalf of the agency. See NIEMIC, *supra* note 19, at 6.

<sup>68</sup> See *Id.* (“Other program managers have developed criteria designed to select cases in which the prospects for mediation appear to be brightest.”). For example, this “discretionary” approach is currently in operation in the Eleventh Circuit where cases may be pulled from the program when appropriate. See KMC GUIDELINES, *supra* note 10, at 2 (“Eligible appeals are sorted by district and rotationally assigned to the circuit mediators. The circuit mediators review each assigned appeal before scheduling it for mediation and may remove an appeal from the mediation program based on a procedural reason or a discretionary reason.”).

<sup>69</sup> See NIEMIC, *supra* note 19, at 6.

<sup>70</sup> See *Id.* at 5 (“[C]ourts make exceptions if a party requests a conference or other circumstances warrant one.”).

<sup>71</sup> See *infra* Part IV.A.1 (addressing the use of in-person and telephone mediation).

<sup>72</sup> See generally NIEMIC, *supra* note 19 (outlining the major aspects of each circuit’s mediation program, including protocol for the use of in-person and telephone mediation). Visiting a circuit’s website or referencing the relevant local rule governing the mediation program for each circuit can provide more information about the specific procedures for the various circuits (e.g., 11TH CIR. R. 33-1).



of individual circuits to either favor telephone conferences or prefer in-person mediation is often a function of the circuit's specific geographical constraints (e.g., the size of the circuit and location of mediation centers). The shift toward a greater dependence upon telephone mediation has not been dictated solely by such constraints, however, but has evolved based on certain advantages teleconferencing naturally provides: "convenience, efficiency, and cost-effectiveness."<sup>73</sup>

### III. PILOT PROGRAM FOR PRIVATE MEDIATION

The arrival of private mediation in the Eleventh Circuit was effectuated in October of 2004 with the addition of Local Rule 33-1(g).<sup>74</sup> The implementation of the two-year pilot program, which permits the use of private-sector mediators, marked the first time a federal circuit has allowed such an option circuit wide.<sup>75</sup> Prior to the recent introduction of private

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<sup>73</sup> See NIEMIC, *supra* note 19, at 8. "Where the circuit boundaries encompass large states . . . a large proportion of the conferences take place over the telephone." In "geographically compact circuits," there is a greater extent of in-person mediation. "However, even in those programs, distant locations of participants or other factors may preclude in-person conferences, and teleconferences are scheduled as appropriate." *Id.*

<sup>74</sup> 11TH CIR. R. 33-1(g) provides:

(g) Use of Private Mediators:

- (1) Upon agreement of all parties, a private mediator may be employed by the parties, at their expense, to mediate an appeal that has been selected for mediation by the Kinnard Mediation Center.
- (2) Such private mediator (i) shall have been certified or registered as a mediator by either the State of Alabama, Florida, or Georgia for the preceding five years; (ii) shall have been admitted to practice law in either the State of Alabama, Florida, or Georgia for the preceding fifteen years and be currently in good standing; and (iii) shall be currently admitted to the bar of this court.
- (3) All persons while employed as private mediators shall follow the private mediator procedures as set forth by the Kinnard Mediation Center.
- (4) The provisions of this subsection (g) shall be in effect until September 30, 2006, and thereafter if re-authorized by order of this court.

<sup>75</sup> See ADRWorld, *supra* note 7, at 1 ("Lowell Garret, chief mediator for the Eleventh Circuit, said it marks the 'first time a federal appellate program has tried a program like this,' as circuit court mediators or court-appointed neutrals have handled all cases referred to mediation under federal appellate programs to date.").

The Second Circuit actually introduced a similar program in 2000, entitled the "Civil Appeals Pilot Mediation Program" (CAPMP). Memorandum from the United States Court of Appeals for the Second Circuit to All Counsel and Parties 1 (July 5, 2000) (on file with author). However, the Second Circuit's attempt at private mediation applied

mediation in the Eleventh Circuit, and at present when private mediation is not elected or permitted, eligible appeals are mediated by staff attorney neutrals with “extensive trial and appellate experience, as well as significant training and experience in mediation.”<sup>76</sup> This is predominantly the case among each of the circuit mediation programs, although the neutrals vary by title across circuits.<sup>77</sup> Should the parties elect private mediation, the chosen private-sector neutral generally manages the mediation process;<sup>78</sup> but the circuit mediator initially assigned to the appeal nevertheless retains some

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only to cases appealed from the District of Connecticut during the one-year pilot program. *See Id.* Further, and what distinguishes the program most significantly from the Eleventh Circuit’s, is the restriction on mediator selection: “Under the pilot program, while mediation will still be required, the Connecticut litigants can select from a pre-approved list of local private mediators in Connecticut or the CAMP program.” *Id.*

<sup>76</sup> NIEMIC, *supra* note 19, at 92; *see also* KMC GUIDELINES, *supra* note 10, at 1. *See generally* Kinnard Mediation Center, <http://www.ca11.uscourts.gov/offices/mediation.php> (last visited Feb. 22, 2006).

<sup>77</sup> “In almost all circuits, the mediators are employees of the court whose sole job is to mediate appellate cases.” Torregrossa, *supra* note 39, at 1067. Various titles assigned to the neutrals include: circuit mediator, staff counsel, settlement counsel, conference attorney, mediation attorney, settlement attorney, and settlement conference attorney. Nevertheless, they are all primarily attorneys with previous experience and training in mediation who are employed by the circuits as full-time mediators. *See* NIEMIC, *supra* note 19, at 10. In some courts, certain appeals are mediated by senior or retired state judges or by volunteer attorney-neutrals who satisfy the court’s requirements, although the majority of cases in those circuits still undergo mediation before staff attorney-neutrals. *See Id.*; *see also* ADRWorld, *supra* note 7, at 1 (“The U.S. Court of Appeals for the District of Columbia Circuit has a program where cases are handled on a *pro bono* basis by a roster of outside mediators selected by the court, but parties do not have the option of selecting mediators.”).

<sup>78</sup> *See* KINNARD MEDIATION CENTER, PRIVATE MEDIATOR PROCEDURES FOR MEDIATION OF APPEALS 1 (2004), <http://www.ca11.uscourts.gov/documents/pdfs/privmediator.pdf> [hereinafter KMC PROCEDURES] (“Persons employed as private mediators under the rule shall follow the private mediator procedures as set forth by the KMC . . . [P]rivate mediators employed under the rule are reminded that their conduct will reflect on the court. Therefore, their conduct should reflect the highest professional standards.”).

necessary dominion throughout the various stages of the mediation,<sup>79</sup> along with the chief circuit mediator.<sup>80</sup>

### A. *Reasons Behind the Change*

The development of private mediation out of the Eleventh Circuit was partially remedial in nature, addressing concerns by attorneys with experience navigating the appellate mediation process about the hardship created by geographical constraints.<sup>81</sup> These constraints had fostered a continued growth of telephone mediation, or teleconferencing.<sup>82</sup> The concern of participating attorneys revolved around the desire for greater in-person mediation.<sup>83</sup> Consequently, the emergence of private mediation would appear

<sup>79</sup> See *Id.* at 4 (“Even though the parties have decided to employ a private mediator to conduct the mediation of an appeal, the circuit mediator whose name appears on the court’s notice of mediation will remain assigned to the matter . . .”); KMC GUIDELINES, *supra* note 10, at 1 (“The private mediator will conduct the mediation under the procedures set forth by the KMC, and the assigned circuit mediator will provide assistance as specified in those procedures.”).

<sup>80</sup> See *Pilot Program*, *supra* note 8, at 5 (“While the neutral would manage the mediation, the court’s chief mediator . . . would oversee the process.”).

<sup>81</sup> See *Id.* (“The program came about with the encouragement of a number of attorneys who expressed interest in using private-sector neutrals so they could have more in-person mediation sessions.”). “Obviously, the geographic size of some judicial jurisdictions is a major obstacle to face-to-face mediations.” Ignazio J. Ruvoilo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 224 (2005).

<sup>82</sup> The initial mediation conferences are most often conducted over the telephone, except in cases where the parties are located in or around one of the Circuit’s mediation centers in Atlanta, Tampa, and Miami. See KMC GUIDELINES, *supra* note 10, at 3. The general rule of thumb that has emerged out of the Eleventh Circuit is that, absent special circumstances, mediation occurs via telephone unless the parties are within approximately seventy-five miles of one of the mediation centers. Telephone Interview with Lowell Garret, Chief Circuit Mediator, U.S. Court of Appeals for the Eleventh Circuit (Jan. 11, 2005) [hereinafter Interview].

<sup>83</sup> The parties do have the ability to request in-person mediation where all parties are not located near one of the centers, but limited resources often make such conferences infeasible, especially when cases involve multiple parties or the parties live in different states as would be common in federal cases based on diversity jurisdiction. See NIEMIC, *supra* note 19, at 89 (“If all parties agree that an in-person conference would be beneficial, counsel are encouraged to contact the [KMC] to discuss the possibility of scheduling a conference at a mutually agreeable location. Occasionally, at no expense to the parties, the circuit mediator travels to other locations in the circuit to conduct in-person conferences. The [KMC] travel budget is limited, however.”). Moreover, many attorneys who have preferred and would subsequently request in-person mediation would

to alleviate this problem by providing parties the opportunity to have mediation conducted face-to-face at a mutually convenient location.<sup>84</sup> However, while the lack of in-person mediation may have been the overt catalyst for change, according to the Chief Circuit Mediator for the Eleventh Circuit, “the real thrust of the change in the rule is to allow parties to do what they want or in essence giving the parties a sense of self-determination.”<sup>85</sup> The ability of parties to select mediators with subject-matter “expertise” was an additional justification provided by the Eleventh Circuit for utilizing private mediation, which contributes to the aggregate theme of giving parties more options in, and control over, their mediation process.<sup>86</sup>

### B. Procedures for Private Mediation

The general scheme established for private mediation in the Eleventh Circuit was constructed to deviate as little as possible from the normal operating procedures of the mediation program.<sup>87</sup> As indicated by the Chief Circuit Mediator, “[t]he Court feels that one way or another [the parties] are still going to talk about their case,” and the process is designed to facilitate effective mediation, not to bog down the private mediator, as well as the

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be forced to teleconference as the circuit mediators most often do not travel outside their respective cities, save exceptional circumstances. *See* Interview, *supra* note 82.

<sup>84</sup> *See* KMC PROCEDURES, *supra* note 78, at 8 (“Mediations are to take place in a location that is conducive to discussion, provides security so confidentiality may be maintained, and is convenient for the parties, all in a manner appropriate to the dignity of the court.”); *see also infra* Part IV.A.1 (discussing increased in-person mediation as a benefit of private mediation).

<sup>85</sup> Interview, *supra* note 82. “Ethical codes for mediators describe party self-determination as ‘the fundamental principle of mediation,’ regardless of the context within which the mediation is occurring.” Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3 (2001).

<sup>86</sup> *See* Interview, *supra* note 82 (“Even though circuit mediators are very experienced trial lawyers and mediators, they are generalists and now this rule allows parties to go outside and get an expert.”); *see also infra* Part IV.A.2 (discussing the concept of expert mediators).

<sup>87</sup> Compare KMC GUIDELINES, *supra* note 10, with KMC PROCEDURES, *supra* note 78 (the two publications outline the procedures for the appellate mediation program in general and for the new private mediation option, respectively). A chart detailing the different stages of the Eleventh Circuit’s mediation program within the general appeals process is contained in Appendix A of this Note.

parties, with excessive formalities.<sup>88</sup> The Eleventh Circuit's Kinnard Mediation Center (KMC) even provides a suggested blueprint of appropriate dialogue for mediation conferences that remains in place regardless of whether the mediation is conducted by a staff or private-sector neutral.<sup>89</sup> Even so, special procedures are naturally in place for circumstances where parties choose to elect the private mediation option.<sup>90</sup>

### 1. *Case Eligibility*

All fully counseled civil appeals are generally eligible for participation in the Eleventh Circuit's mediation program and mediation is typically mandated in such cases accordingly, although "certain eligible appeals... are not generally selected for mediation."<sup>91</sup> When private mediation is elected by the parties, however, an appeal that is otherwise eligible and selected to participate in mediation is subject to one significant restriction beyond those in place for all civil actions that come before the Eleventh Circuit.<sup>92</sup> Appeals that are specifically sent to mediation by the

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<sup>88</sup> Interview, *supra* note 82 ("If you look at the statistics of appellate mediation across the country, they may vary, but around one-third of the cases settle if they mediate, which is why the programs are designed to get the parties to sit down and negotiate.").

<sup>89</sup> See KMC PROCEDURES, *supra* note 78, at 5–6

The parties and the mediator may then discuss, either jointly or separately, and in no particular order, the following topics: (1) the legal issues and the appellate court's decision-making process regarding these issues (e.g., preservation of error, waiver, standards of review, etc.); (2) the history of any efforts to settle the case; (3) the parties' underlying interests, preferences, motivations, assumptions, and new information or other changes that may have occurred; (4) future events based upon the various outcome alternatives of the appeal; (5) how resolution of the appeal impacts the underlying problem; (6) cost-benefit and time considerations; (7) any procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand, etc.). The discussion is not limited to these topics and will vary considerably because each appeal has its own circumstances.

<sup>90</sup> See generally *Id.*

<sup>91</sup> *Id.* at 3; see also *supra* Part II.B (discussing case eligibility requirements and selection procedures across circuit programs). Prisoner, habeas corpus, and immigration appeals are excluded from mediation. See KMC GUIDELINES, *supra* note 10, at 1. "Certain categories of eligible but low-expectation appeals may be excluded from assignment to adjust the total universe of covered appeals to the capacity of the mediator staff to mediate cases." *Id.*

<sup>92</sup> See KMC PROCEDURES, *supra* note 78, at 1 ("Eleventh Circuit Rule 33-1(g) provides that upon agreement of all parties, a private mediator may be employed by the

court (i.e., a judge or judicial panel), through the mode of judicial selection, may not be privately mediated.<sup>93</sup> In other words, cases that are referred to mediation by a judge—as opposed to being selected by the circuit’s Mediation Center, which is the case for the vast majority of appeals—must mediate before a circuit mediator and therefore, the parties may not elect private mediation.<sup>94</sup> This eligibility exception of an otherwise qualified appeal most likely stems from the desire of the court to maintain heightened control over a mediation that the court has singled out for any of a number of possible reasons, though such reasons are not entirely clear.<sup>95</sup>

## 2. Selection of the Mediator

Parties who desire to employ a private mediator in lieu of mediation conducted by a staff mediator are required to submit a “Request for Use of a Private Mediator” form, which must be signed by all parties concerned, including the chosen private-sector mediator.<sup>96</sup> According to the rule establishing the Eleventh Circuit’s pilot program, the private mediator selected by the parties (1) must have been certified or registered as a mediator for the preceding five years, (2) must have been admitted to the practice of law for the preceding fifteen years and be currently in good standing, and (3) must currently be admitted to the Eleventh Circuit bar.<sup>97</sup>

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parties to mediate an appeal that has been selected for mediation by the Kinnard Mediation Center (KMC).”).

<sup>93</sup> The Eleventh Circuit has a distinct judicial selection process whereby an active or senior circuit judge, or panel of judges, may directly mandate that a specific case participate in the appellate mediation program. *See* KMC GUIDELINES, *supra* note 10, at 2; *see also* NIEMIC, *supra* note 19, at 88.

<sup>94</sup> *See* KMC PROCEDURES, *supra* note 78, at 3 (“Appeals specifically sent to mediation by the court may not be privately mediated.”).

<sup>95</sup> The court’s decision to send a case directly to staff mediation—effectively stripping the parties of the opportunity for private mediation in satisfaction of the court’s requirements—may be the result of various characteristics of a particular case, including the streamlining of specific issues, the history of the parties, and potential dilatory concerns. *See infra* Part IV.B.1 (discussing how the availability of private mediation effectively strips a court of some degree of control over the mediation process).

<sup>96</sup> *See* KMC PROCEDURES, *supra* note 78, at 4. This form can be found in Appendix B of this Note. “The completed and executed form must then be submitted to the KMC within ten days of the date of the notice of mediation.” *Id.*

<sup>97</sup> 11TH CIR. R. 33-1(g); *see supra* note 74 (providing the text of the rule). In contrast, there are no published requirements for Eleventh Circuit staff mediators, although there are presumably internal procedures/requirements at work. According to program documentation, “[t]he KMC’s circuit mediators are full-time employees of the

These formal standards constitute the only requirements upon private mediators to participate in the private mediation program,<sup>98</sup> as the Eleventh Circuit has yet to establish any training programs or require a certain degree of experience with either appellate practice or appellate mediation.<sup>99</sup> However, when private mediation is elected, the circuit mediator initially assigned to the appeal upon the court's notice of mediation remains assigned to the case throughout the mediation process as a matter of oversight and to assist the parties and the private mediator in whatever capacity necessary.<sup>100</sup>

#### IV. THE PRIVATE SECTOR AS A VIABLE SOLUTION

The very foundation of mediation as a form of alternative dispute resolution is not to act simply as the court system's Robitussin to remedy the severe docket congestion that threatens to paralyze the administration of justice in many of our nation's courthouses. Mediation is distinct from, and subsequently more successful than, most other forms of ADR because it offers the parties a degree of control over the resolution of their disputes;<sup>101</sup>

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Eleventh Circuit and have extensive trial and appellate experience as well as significant training and experience in mediation." KMC GUIDELINES, *supra* note 10, at 1; *see also supra* note 77 (addressing the makeup of staff mediators across circuit programs).

<sup>98</sup> However, the Eleventh Circuit does require the private mediator to apply the facilitative model of mediation. *See* KMC PROCEDURES, *supra* note 78, at 6 ("Because circuit mediation is based on the principles of self-determination by the parties and impartiality of the neutral, the private mediator is to apply the facilitative model of mediation.") (emphasis omitted); *see also supra* note 36 (discussing the facilitative approach). Additionally, mediators must "remain current with their state bar and state ADR agency licensing, certification, registration, and continuing education requirements to be eligible to perform Eleventh Circuit appellate mediations." KMC PROCEDURES, *supra* note 78, at 12.

<sup>99</sup> *See Id.* ("The KMC reserves the right to establish such training programs as it may deem necessary from time to time. Private mediators must remain current with their state bar and state ADR agency licensing, certification, registration, and continuing education requirements to be eligible to perform Eleventh Circuit appellate mediations.")

<sup>100</sup> *See infra* Part IV.B.1 (discussing the court's remaining elements of control over the mediation process when parties elect private mediation).

<sup>101</sup> *See* Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 879 (2002) ("[O]ne of the core values underlying ADR [is] disputant self-determination."). All too often, litigation, especially in the appellate context, is an all or nothing venture where potential outcomes are inherently limited. *See* HENRY BROWN & ARTHUR MARRIOTT, *ADR PRINCIPLES AND PRACTICE* 130 (2d ed. 1999) (The ideal endgame for mediation strives for what is "sometimes referred to as a 'win-win' outcome, as distinct from litigation, which is said to produce a 'win-lose' outcome."). Parties are at the mercy of what is sometimes an

control that is especially important in the context of court-annexed ADR.<sup>102</sup> Arguments by dissenters of mandatory mediation, claiming that the involuntary nature is contrary to the bedrock principles of mediation, should not be taken to their logical extreme.<sup>103</sup> Such arguments do, however, stress the importance of providing the highest degree of self-determination possible in a system where parties are stripped of the threshold choice of whether to enter settlement discussions.<sup>104</sup> Private mediation is offered as a measure to

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imperfect system. But mediation facilitates the opportunity for parties to resolve matters on their own terms. *See* Grillo, *supra* note 37, at 85 (“Mediation permits persons to speak for themselves and make their own decisions. This self-determination can be empowering. I have found that many say that they have chosen mediation so that they, and not a lawyer, will be in charge of their own destinies.”).

<sup>102</sup> As mediation has been institutionalized in the courts through court-annexed ADR, some concerns have arisen that “the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role.” Welsh, *supra* note 85, at 4.

<sup>103</sup> Some worry that the dynamic of self-determination, central to the mediation framework, is “fundamentally altered when mediation is imposed rather than sought or offered” and “[w]hen mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory.” Grillo, *supra* note 37, at 85. *But see supra* notes 35–37 and accompanying text (discussing why even mandatory mediation retains the basic foundation of voluntariness to the extent that settlement is never forced upon the parties). In fairness to Professor Grillo, her critiques of mandatory mediation primarily revolved around perceived dangers in the process for women and in the family law context more broadly. It is unclear if, and to what extent, such criticism would extend to mandatory mediation generally, especially at the appellate level. Nevertheless, it would seem that the introduction of private mediation has the potential to quell some of Professor Grillo’s concerns, which include: “First, the parties have not chosen or timed the process according to their ability to handle it. Second, they are not allowed to decide themselves how much their lawyers should participate, but instead are deprived of whatever protection their lawyers have to offer. Finally, they are not permitted to choose the mediator, and they often cannot leave without endangering their legal position even if they believe the mediator is biased against them.” Grillo, *supra* note 37, at 85.

<sup>104</sup> The newly revised Model Standards of Conduct for Mediators stress the importance of self-determination in the mediation process: “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. *Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.*” MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.A (2005), available at <http://moritzlaw.osu.edu/dr/msoc> (emphasis added); *see also* KMC PROCEDURES, *supra* note 78, at 6 (“[C]ircuit mediation is based on the principles of self-determination by the parties.”).



overcome a lack of empowerment in the process which can sometimes be an unwelcome side-effect of the docket medication that is mandatory mediation.<sup>105</sup> The following discussion will examine the primary benefits supporting the advent of private mediation, while attempting to address concerns that might predictably arise as the utilization of private mediation increases.

### A. Advantages Provided by Private Mediation

The value derived from permitting parties in court-annexed mediation to seek third-party neutrals from the private sector is potentially significant, the degree to which would clearly depend on the specific circumstances of an individual appeal.<sup>106</sup> In the context of the federal circuits or other appellate courts with relatively far-reaching jurisdictions, private mediation offers parties a greater opportunity to participate in mediation conferences in person, as opposed to over the telephone.<sup>107</sup> Additionally, because staff mediators in court mediation programs are traditionally “generalists,” as opposed to experts in a certain area of the law, private mediation allows parties to select a mediator with certain subject-matter expertise.<sup>108</sup> Finally,

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<sup>105</sup> See Interview, *supra* note 82 (“The real thrust of the change in the rule is to allow parties to do what they want or in essence giving the parties a sense of self-determination.”). In this context, “[e]mpowerment means the increase in the parties’ ability to make their own decisions and the corresponding reduction of their dependence on third parties including professional advisors.” BROWN & MARRIOTT, *supra* note 101, at 130. Mediation is possible “because the parties are directly involved in the process and retain control over whether they wish to settle and on what terms.” *Id.*

<sup>106</sup> While enabling parties to maintain a greater degree of control over their appeal through the selection of a private mediator would seem relevant in almost all cases, the application of the more tangible benefits of private mediation is not universal. Whether a particular case, and the parties involved, would benefit from an increased opportunity to conduct conferences in person, the ability to select an expert mediator, or the chance to participate in the mediation to a greater extent would vary significantly from case to case.

<sup>107</sup> The unwritten rule out of the Eleventh Circuit now dictates that if the parties are within seventy-five miles of a mediation center, mediation will be conducted in person; otherwise, the default procedure is for mediation via the telephone (“teleconferencing”). See Interview, *supra* note 82. The jurisdiction of the Eleventh Circuit, however, stretches across three relatively large states with mediation centers located in only three cities within just two of those states—Georgia and Florida. Consequently, “there are many other metro areas in three states where [mediation] would automatically be by telephone.” *Id.*

<sup>108</sup> Chances are that staff mediators, who are either experienced practitioners or mediators, have a certain degree of expertise in specific areas of law. However, given the

private mediation promotes greater levels of party participation and satisfaction as a function of enhancing the ability of parties to attend or participate in the mediation where such involvement might otherwise be impracticable, as well as cultivating heightened feelings of empowerment in the administration of the mediation.

### 1. *Increasing In-Person Mediation*

There is little question that the availability of private mediation increases the opportunity for mediation sessions to be conducted in-person, especially in the appellate mediation programs of the federal circuits where expansive jurisdictions are the norm.<sup>109</sup> In the larger of the federal circuits, including the Eleventh Circuit, the use of teleconferencing for conducting mediation sessions has increasingly become the default, and this has been at the expense of in-person mediation.<sup>110</sup> Even in the smaller circuits, where the majority of mediations still occur in person,<sup>111</sup> “distant locations of

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seemingly infinite scope of legal fields, the odds are remote that one of the few staff mediators in a court’s mediation program will be knowledgeable, and up-to-date, in a particular subject matter relevant to a specific case.

<sup>109</sup> The large scope of many of the federal circuits simply makes in-person mediation infeasible—at the very least, it makes participation via in-person mediation extremely inconvenient, which most often translates to the election of teleconferencing. See Ruvolo, *supra* note 81, at 224 (“Obviously, the geographic size of some judicial jurisdictions is a major obstacle to face-to-face mediations.”). Because the advent of private mediation is partially a response to the lack of in-person mediation, it would seem likely that private mediation would be conducted largely in-person, although the private mediation procedures of the Eleventh Circuit do indicate that the mediation can also be conducted over the telephone should the parties simply choose private mediation for the ability to select their own mediator, as opposed to taking advantage of in-person mediation. See KMC PROCEDURES, *supra* note 78, at 8 (“Mediations may be conducted in person or by telephone.”).

<sup>110</sup> See NIEMIC, *supra* note 19, at 8 (“Where the circuit boundaries encompass large states, as in the Fifth, Sixth, Ninth, and Tenth Circuits, a large proportion of the conferences take place over the telephone.”). In the Fourth Circuit, “[m]ore than 95% of the conferences are teleconferences.” *Id.* at 41. “About 90% to 95% of all conferences are conducted by telephone” in the Sixth Circuit. *Id.* at 54. “Given the geographic size of the [Eighth] [C]ircuit, approximately 50% of joint conferences are conducted by telephone.” *Id.* at 67. In the Tenth Circuit, “about 95% of the conferences are conducted by telephone.” *Id.* at 83.

<sup>111</sup> See *Id.* at 8 (“In the four most geographically compact circuits (First, Second, Third, and District of Columbia), most conferences are held in person.”). In the Second Circuit, initial conferences are held at the Staff Counsel’s Office at the court’s headquarters in New York. But “[w]here considerable distances or other substantial

participants or other factors may preclude in-person conferences, and teleconferences are scheduled as appropriate.”<sup>112</sup> Consequently, while the option to elect private mediation doesn’t ensure that parties will not have to travel at least some distance to mediate, the freedom to utilize private mediation increases the likelihood of parties locating a mutually convenient venue that will facilitate face-to-face interaction.<sup>113</sup>

Notwithstanding the ability of private mediation to bring parties together, there remains significant debate as to whether in-person mediation is more beneficial relative to teleconferencing and whether in-person mediation proves more “effective,” at least to the extent that the establishment of private mediation programs would be justified as a remedial measure.<sup>114</sup> Common sense would seem to initially dictate that negotiating face-to-face would better enable the parties to discover the genuine issues in dispute, or

reasons warrant, Staff Counsel may arrange for telephonic conferences with the appellant’s counsel initiating the call.” United States Court of Appeals for the Second Circuit, Civil Appeals Management Plan, <http://www.ca2.uscourts.gov/CAMP.htm> (last visited Feb. 22, 2005). As recognized by the D.C. Circuit in their website F.A.Q. section, “unlike the procedures in most other federal circuits, mediations in the D.C. Circuit are conducted in person. Occasionally arrangements can be made to conduct them by telephone or video-conference.” United States Court of Appeals for the District of Columbia Circuit, Appellate Mediation Program, <http://www.cadc.uscourts.gov/internet/internet.nsf/Content/Court+of+Appeals+Mediation+Program> (follow “Frequently Asked Questions” hyperlink; then follow “May mediations be conducted by phone?” hyperlink) (last visited Feb. 22, 2006) [hereinafter D.C. Program]. The First Circuit also prefers in-person mediation and the relatively compressed borders of the circuit’s jurisdiction makes such preference more feasible. *See* United States Court of Appeals for the First Circuit, Settlement Program, <http://www.ca1.uscourts.gov/campgeninfo.htm> (last visited Feb. 22, 2006) [hereinafter First Circuit Program] (“In special circumstances the conference may be conducted by telephone, but in-person conferences are preferred because experience demonstrates that in-person conferences are much more likely to produce positive results.”).

<sup>112</sup> *See* NIEMIC, *supra* note 19, at 8.

<sup>113</sup> The travel burden on the parties depends on numerous factors relating to the structure of the mediation, the number of parties, the location of the parties, and the chosen mediator. Presumably, many appeals could be mediated in-person without a great deal of inconvenience to any of the parties.

<sup>114</sup> “There are articles all over the block on the issue of whether telephone or in-person mediation is more effective. Usually the mediator that does telephone mediation says that is better and in-person mediators say in-person is better.” Interview, *supra* note 82. According to the Director of the Third Circuit’s appellate mediation program, “[w]hile the Program is not aware of any study analyzing whether more settlements are achieved by way of in-person mediations than by telephone conference, experience suggests that in-person mediations are preferable and more productive.” Torregrossa, *supra* note 39, at 1070.

interests behind the issues, while attempting to reach common ground.<sup>115</sup> Moreover, the greater the opportunity for utilizing in-person mediation through the private mediation mechanism, presumably the more likely the actual parties to an appeal will participate in the mediation, as opposed to only the attorneys.<sup>116</sup> This effect of promoting more party involvement in turn translates to a greater overall satisfaction with the process as well as the eventual outcome of the mediation and/or appeal.<sup>117</sup>

The general debate surrounding the differences between in-person and telephone mediation has relied more upon anecdotal accounts and statistical suggestions, rather than hard facts and empirical analysis.<sup>118</sup> There seems to be a split in the mediation programs of various courts as to the effectiveness of one method over the other.<sup>119</sup> Where some claim that experience demonstrates greater success with in-person mediation, others believe that

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<sup>115</sup> “Something as simple as a sincere facial expression can influence the course of a mediation. Decision makers should not underestimate the benefit of face-to-face contact. If parties do nothing more than come to appreciate one another’s humanity, a mediation has been a partial success. Telephone participation will not foster such a process.” Roger L. Carter, *Oh, Ye of Little Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 399.

<sup>116</sup> See *infra* Part IV.A.3 (discussing the issue of participation by parties during mediation).

<sup>117</sup> Whether or not actual party attendance at mediation sessions helps or hurts the proceedings, it is widely believed that some degree of party participation is beneficial, or even necessary, as a crux of the mediation institution—though most circuits only encourage rather than require such participation. *But see* Federal Circuit Guidelines, *supra* note 57, at 3 (“The court requires that counsel attend all sessions and that, at least one time during the process, counsel and the parties . . . meet face to face.”); KMC GUIDELINES, *supra* note 10, at 4 (Local Rule 33-1(c)(1) out of the Eleventh Circuit “requires that counsel must, except as waived by the mediator, have the client either physically present or available by telephone during the mediation.”).

<sup>118</sup> See Interview, *supra* note 82 (“If you ask ten lawyers the question of which method is better, you might get 10 different answers.”). The difficulty with compiling evidence to support either side of the debate is determining how exactly the issue is to be framed. What success means in the mediation context seems to escape any universal articulation, as mere settlement rates can be a very misleading indicator. See *infra* notes 124–125 and accompanying text. Perhaps the only true indicator of success should be the degree of satisfaction experienced by the parties.

<sup>119</sup> In actuality, the debate is not really “which method is better,” but instead, because of the natural presumption in favor of in-person mediation, the inquiry questions whether telephone mediation is as effective as in-person mediation. See Newman & Friedman, *supra* note 18, at 414 (“The geographic spread of the Sixth Circuit and its mediation program’s resultant reliance on telephone conferences posits another interesting question: Are telephone or video conferences as effective as live mediation?”).

experience has proven no discernable difference in the effectiveness of the two methods.<sup>120</sup> The Chief Circuit Mediator for the Eleventh Circuit, in response to an inquiry about the effectiveness of telephone mediation, stated: “Our internal figures would suggest that we are more successful with in-person mediation.”<sup>121</sup> Advocates for in-person mediation claim face-to-face interaction fosters a more collegial atmosphere conducive to settlement in the majority of cases.<sup>122</sup> However, proponents of telephone mediation not only argue that each method is on par with one another in terms of effectiveness but also justify teleconferencing for its efficiency and economy.<sup>123</sup>

Whether in-person mediation is generally more effective as compared to mediation via the telephone is dependant upon how one frames the definition of “effective” in this context.<sup>124</sup> There are various quantitative as well as

<sup>120</sup> First Circuit Program, *supra* note 111 (“In special circumstances the conference may be conducted by telephone, but in-person conferences are preferred because experience demonstrates that in-person conferences are much more likely to produce positive results.”); *see also* NIEMIC, *supra* note 19, at 34 (“The [Third Circuit] director encourages in-person mediations and most initial sessions are in-person.”). *But see* Donna Riselli, *Appellate Mediation at the First District Court of Appeal: How and Why it Works*, FLA. B.J., Jan. 2001, at 58, 60 (“Our experience [in Florida’s First District Court of Appeals] has demonstrated that there has been no appreciable difference in settlement rates between cases that are mediated in person and those that are mediated via telephone conference call.”); Michael J. Wilkins & Karin S. Hobbs, *Utah’s Appellate Mediation Office Opens January 1998: A New Option for Case Resolution at the Utah Court of Appeals*, 10 UTAH B.J., Dec. 1997, at 25, 27 (“[T]elephone conferences have been proven to be as effective and efficient as in-person conferences. In cases where an in-person conference would be useful, in-person conferences may be conducted.”); Ohio Tenth District Court of Appeals, Prehearing Conference Procedures, <http://www.franklincountyohio.gov/appeals/mediation.shtml> (last visited Feb. 22, 2006) (“Experience shows that telephone conferences have been equally effective at fostering settlements.”).

<sup>121</sup> Interview, *supra* note 82. Even though Chief Circuit Mediator Garret concluded that his experience with the court revealed greater success with in-person mediation, the answer was divulged with some reluctance, illustrating the difficulty in measuring success in mediation.

<sup>122</sup> *See* NIEMIC, *supra* note 19, at 8 (“Proponents of in-person conferences maintain that face-to-face interactions between the parties may contribute to the settlement efforts.”).

<sup>123</sup> *See Id.* (“Proponents of teleconferences note their convenience, efficiency, and cost-effectiveness.”); *see also* Wilkins & Hobbs, *supra* note 120, at 26–27 (“Telephone conferences are used primarily to make the process as inexpensive as possible.”).

<sup>124</sup> *See* NIEMIC, *supra* note 19, at 11 (“Any comparison should also take into consideration definitional problems, such as the difficulty of defining a *successful settlement*.” (emphasis added)).

qualitative approaches to analyzing the success of one method of mediation over another.<sup>125</sup> Perhaps the instinctual path would be to quantify the comparison by simply measuring the proportional settlement percentages of each method (i.e., empirically determining which method settles more cases). Effectiveness could also be measured through a substantive analysis of mediation results for each individual appeal. This would include looking not only to the quality and equity of a settlement but also the position of the parties post-mediation should settlement not be reached.

No matter how the success of in-person mediation is calculated relative to teleconferencing, empirical data is simply lacking<sup>126</sup> and would probably be a misleading determinative factor.<sup>127</sup> All that remains, therefore, are the conflicting opinions of courts and the preferences of neutrals with experience navigating the mediation process. In the end, while there is no definitive answer as to the effectiveness of telephone mediation in relation to in-person mediation, common sense would again dictate a justifiable presumption in favor of in-person mediation;<sup>128</sup> the mere fact that courts attempt to justify to the contrary suggests that this presumption holds water.<sup>129</sup> The bottom-line is

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<sup>125</sup> *See Id.* (“Programs should be measured primarily by the criteria set by the court for their success. Settlement rates will naturally be one important measure, but some programs have objectives in addition to settlement. Regardless of the criteria used, any comparison of program types would require full consideration of the differences among the programs, including variations in case mix among the courts.”).

<sup>126</sup> This author is not the only one awaiting legitimate comparative analysis. *See, e.g.,* Newman & Friedman, *supra* note 18, at 414 (“While this article does not address these issues [of effectiveness], they are interesting to consider nonetheless. The authors look forward with interest to the results of others’ scholarly investigation of this topic.”).

<sup>127</sup> The unique circumstance of each case often dictates the outcome of mediation, rendering futile the efforts of any legitimate qualitative or quantitative approach. *See* NIEMIC, *supra* note 19, at 11 (“Future studies also might address whether it is necessary or feasible to develop additional criteria for case selection, with an evaluation of whether certain case characteristics can reliably predict settlement potential.”).

<sup>128</sup> If for nothing else, the idea that in-person mediation is more effective takes account of the cognizable feeling that human nature dictates the need for face-to-face interaction in resolving disputes. *See Id.* at 8 (“Proponents of in-person conferences maintain that face-to-face interactions between the parties may contribute to the settlement efforts.”). Without any studies to show otherwise, this recognition of human nature is as good a starting place as any, and could possibly constitute a sufficient end.

<sup>129</sup> Various courts claim in their mediation program materials, without any substantiation, that telephone mediation is as effective as mediating in person. *See, e.g.,* United States Court of Appeals for the Seventh Circuit, The Settlement Conference Program, [http://www.ca7.uscourts.gov/conf\\_aty/Scoprgm.htm](http://www.ca7.uscourts.gov/conf_aty/Scoprgm.htm) (last visited Feb. 22, 2006) (“Because the resources of the settlement conference program are limited, in-person conferences cannot routinely be held throughout the Circuit. Experience indicates that

that many attorneys prefer conducting mediation sessions in person, and private mediation provides greater opportunity to do so.<sup>130</sup>

## 2. Mediators with Subject-Matter Expertise

An additional consideration by the Eleventh Circuit in adopting private mediation was the ability of parties to select a mediator with expertise in a particular area of law relevant to the parties' dispute.<sup>131</sup> While the qualifications of staff mediators are often well beyond many in the private sector, primarily as a result of sheer experience, circuit neutrals are necessarily "generalists," adapting their practice to the wide array of cases that come before them.<sup>132</sup> It is simply infeasible for the courts to either expect staff mediators to develop extensive knowledge in multiple areas of law—while also keeping up-to-date on the ever-changing legal landscape—or to hire enough mediators with differing expertise as to cover the entire spectrum of appeals.<sup>133</sup>

The importance of subject-matter expertise in a mediator varies case-by-case, program-to-program.<sup>134</sup> While experienced "generalist" mediators are

telephone conferences are generally as effective as in-person conferences in fostering settlements.").

<sup>130</sup> Some courts have even criticized the effectiveness of telephone mediation. In *Nick v. Morgan's Foods, Inc.*, the court believed that "[e]ven a conscientious decision-maker cannot absorb the full impact of the ADR conference when they are not present for the discussion. The absent decision-maker cannot participate in good faith in the ADR conference without being present for the conference." 99 F. Supp. 2d 1056, 1063 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (8th Cir. 2001).

<sup>131</sup> See Interview, *supra* note 82 ("If the lawyers want a mediator with certain expertise, they now have that opportunity. This was certainly a consideration in the change."). "Parties in private mediation select the mediator and can opt for a neutral with specific expertise in the subject matter of the dispute in an effort to maximize the mediator's ability to recognize the parties' positions and their ability to reach a compromise." JOHN W. COOLEY, *MEDIATION ADVOCACY* 9 (1996).

<sup>132</sup> See COOLEY, *supra* note 131, at 9 ("Even though the circuit mediators are very experienced trial lawyers and mediators, they are generalists and now [private mediation] allows parties to go outside and get an expert.").

<sup>133</sup> See Brazil, *supra* note 5, at 779–80 ("A court that elects to offer ADR services to a wide range of cases, and that wants its pool of neutrals to reflect a roughly parallel breadth of experience, is likely to find the in-house model wanting.").

<sup>134</sup> See *Id.* at 779 ("How important subject matter expertise or experience in particular kinds of cases is to a program will depend on a number of factors, including how analytically active the court wants its neutrals to be and the range and kind of cases served."). *But see* Stephanie A. Henning, Note, *A Framework for Developing Mediator*

often well-equipped to handle the mediation of basic civil disputes,<sup>135</sup> court programs that process an infinite variety of cases, such as the appellate mediation programs of the federal circuits, often confront cases in which expert knowledge would be extremely advantageous, if not necessary for effective mediation.<sup>136</sup> Even where the potential need for an expert mediator is not dire, not addressed, or even when such need is unknown, the practical default in any mediation setting is—all other things being equal—that a mediator with some level of subject-matter expertise would be beneficial.<sup>137</sup>

Navigating the complexities of many appeals, as a function of the applicable law, often proves to be a very formidable task for all those concerned.<sup>138</sup> This can lead the parties who are forced to mediate through mandatory court-annexed programs, especially those victorious below, to internally demand a resolution that traces what would be provided under the

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*Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 221 (1999) (“[A] substantive knowledge base [is] essential for effective mediation.”).

<sup>135</sup> See BROWN & MARRIOTT, *supra* note 101, at 148 (“[A] competent general mediator of civil/commercial disputes could effectively mediate on a range of issues (as a competent general litigator could deal in litigation with a range of issues).”).

<sup>136</sup> See *Id.* at 333 (“[T]he position in practice is that many fields of activity require the mediator to have substantive knowledge in addition to process expertise.”). *But see* Henning, *supra* note 134, at 221. Mediation practitioners caution that too much substantive knowledge can close a mediator’s mind to innovative ideas. *Id.*

<sup>137</sup> There are other factors that can make retaining an expert mediator advantageous. For instance, “a mediator chosen for his or her personal expertise in the subject matter might be able to speed up negotiations by making it unnecessary for the parties to have to explain certain basic concepts that he or she already understands.” Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution*, 47 EMORY L. REV. 1289, 1337 (1998). The American Arbitration Association also suggests “substantive knowledge is helpful both because it saves time when the parties do not need to educate the mediator, and it aids in evaluation of the claims of disputants.” George H. Friedman & Allan D. Silberman, *A Useful Tool for Evaluating Potential Mediators*, 9 NEGOT. J. 313 (1993). *But see* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 699–700, 699 n.264 (2002) (Referencing original empirical research on court-connected general civil mediation in Ohio courts, the author concludes based on the limited data set that subject-matter expertise was “not related to settlement or to participants’ perceptions.” However, recognizing that the findings were “counter to attorneys’ intuition” because “most felt that substantive expertise was an important mediator qualification,” the author did call for further research on the interaction between various mediator characteristics and participants’ perceptions, as well as settlement.).

<sup>138</sup> See Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 614 (2002) (“[T]he subject matter and context of most appellate mediation is heavily law based.”).



law;<sup>139</sup> even though mediation is equipped and known for its legal flexibility in dispute resolution.<sup>140</sup> The underlying theme is that parties, and their counsel, are better equipped than the court in many instances to decide what formula would work best in the mediation of their individual appeal. While the need for a mediator with expertise may not be pressing in all cases, the introduction of private mediation allows the parties to decide when an expert mediator is necessary or beneficial to the resolution of their dispute and to retain such mediator accordingly.<sup>141</sup>

### 3. *Greater Participation in the Process*

The essence of incorporating self-determination into the framework of appellate mediation is the facilitation of control and a sense of empowerment in the administration and outcome of the mediation.<sup>142</sup> Private mediation has the ability to foster self-determination by providing additional channels for participation in the process on two levels. First, by allowing parties to choose the mediator should they elect private mediation, the parties are immediately involved in the process.<sup>143</sup> This translates into a feeling by the parties that

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<sup>139</sup> The fact is that most cases, especially by the time they reach the appellate stage, are not as simple as “the defendant was negligent.” Appellees who “won” at the trial level are likely to resist settling in many instances where the law provides a specific resolution that might not appear equitable through basic “meet in the middle” mediation. An expert mediator most often possesses the ability to better understand the law and the positions of the parties, which can subsequently lead to a settlement that would normally not occur but one that is still satisfactory to all parties concerned.

<sup>140</sup> See ABCs of ADR, *supra* note 3, at 1 (“A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy.”).

<sup>141</sup> See BROWN & MARRIOTT, *supra* note 101, at 333 (“some parties may feel more comfortable with a competent mediator with a specialist knowledge and experience in the field of activity of their dispute”).

<sup>142</sup> See Bingham, *supra* note 101, at 880 (“self-determination includes procedural justice notions of a disputant’s perceptions of control and fairness”); Grillo, *supra* note 37, at 85 (“Mediation permits persons to speak for themselves and make their own decisions. This self-determination can be empowering.”); see also KMC PROCEDURES, *supra* note 78, at 6 (“[C]ircuit mediation is based on the principles of self-determination by the parties.”).

<sup>143</sup> It is important for parties to be able investigate the mediator’s “personality, demeanor and experience” because “the parties are better able to prepare and plan for the mediation when they know what kind of mediator” will be running the show. MILLENNIUM, *supra* note 26, at 34.

they possess legitimate control over their stake in the outcome.<sup>144</sup> Furthermore, for repeat players in the litigation and appellate process, the ability to select a mediator from the private-sector pool can enable parties to choose a neutral with whom they have had prior experience and thus ensure a particular level of comfort through confidence and expectation.<sup>145</sup>

Promoting party attendance at mediation conferences is a second and more appreciable benefit of private mediation. Although parties are generally encouraged to attend mediation sessions with their counsel, most courts do not require such attendance.<sup>146</sup> Subsequently, as a result of the current state of mediation in the circuits, even where counsel decides to conduct the mediation in person by traveling to a mediation center, it can be very difficult to secure actual party attendance.<sup>147</sup> With private mediation, conferences can be held locally, or at least in locations more convenient to all parties, which

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<sup>144</sup> Many commentators believe that “the opportunity for party choice in selecting the mediator should be maximized. The importance of party choice is two-fold. It permits parties to select a mediator whom they believe to be right for their particular dispute and it gives them a greater stake and degree of confidence in the mediation process.” John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant’s Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 842 (1999).

<sup>145</sup> This can also be the case for infrequent litigants should they happen to know a qualified mediator or are referred to such mediator by someone whose opinion they value. A potential drawback of any party selecting a mediator with whom they are familiar or have an established relationship would be the proverbial stacking of the deck against their adversary. This concern, which presumably exists even within a court’s in-house mediation program, although to a lesser extent, is at least partially remedied by the co-selection of a mediator by all parties concerned. Of course, this presumes full disclosure, which is a presumed staple of all ADR processes.

<sup>146</sup> According to Rule 33 of Federal Appellate Procedure, the individual circuits must determine when it is “appropriate” to either allow the actual parties, as opposed to just counsel, to attend the mediation conferences or to require attendance. FED. R. APP. P. 33. Although FRAP 33 does not require party attendance, it does mandate that the attorneys “consult with their clients and obtain as much authority as feasible to settle the case.” *Id.* The response by the large majority of circuit courts has been to strongly encourage attendance by parties during the mediation but few require participation. See NIEMIC, *supra* note 19, at 9 (“In many programs, the clients...are strongly encouraged to attend.”). The response by the Eleventh Circuit is mandatory party attendance, except when the assigned circuit mediator waives such requirement. See KMC GUIDELINES, *supra* note 10, at 4 (“[Local] Rule 33-1(c)(1) requires that counsel must, except as waived by the mediator, have the client either physically present or available by telephone during the mediation.”).

<sup>147</sup> Some courts don’t even allow clients to participate “without prior permission from the mediator—a concept that runs against the grain of much popular thinking in the context of private ADR.” Dick, *supra* note 17, at 50.

inherently cultivates a greater likelihood that the parties will attend at least initial, if not subsequent, mediation sessions.<sup>148</sup>

Similar to the debate of in-person vs. telephone mediation, there is also some controversy over the utility of having clients present during mediation conferences.<sup>149</sup> Some mediators and a significant attorney contingent feel that proceeding without clients can be more effective because “having clients there invites posturing.”<sup>150</sup> Many still believe, however, that client participation is vital to the mediation process, even without accounting for the benefits to the parties themselves.<sup>151</sup> Regardless of whether securing

<sup>148</sup> “Where a court or a private organization controls the mediation process, the parties generally do not have the right to choose the location of the mediation.” MILLENNIUM, *supra* note 26, at 14.

<sup>149</sup> See RAU, *supra* note 30, at 270 (“A key issue in appellate ADR is whether clients should attend, and there is disagreement on this point between the programs.”). “One area of debate concerns the effect of the client’s participation on the client’s own interests. For each potential advantage trumpeted, a corresponding risk or potential disadvantage waits to be sounded . . .” Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewin Co. v. Joseph Oat Corp.*, 69 Wash. U. L.Q. 1059, 1099 (1991) (The author goes on to enumerate over a dozen reasons why client attendance and participation can prove advantageous, though each reason carries a negative aspect that may coincide.).

<sup>150</sup> Dick, *supra* note 17, at 50 (“Surveys of counsel who have participated in the mediation program reveal that 70 to 80 percent of them prefer to proceed without the clients being present.”). Some court mediators even find “it ‘harmful’ to have clients attend the settlement conference” because “attorneys can’t openly discuss the real strength of their case with the clients present.” *Id.*

<sup>151</sup> There is a sentiment that persists among most in the ADR community that “[h]aving the human beings whose dispute is being discussed is extremely useful in building trust and getting at the real meat of the issue.” *Id.*; cf. Wissler, *supra* note 137, at 699 (“Settlement was more likely in cases in which parties and attorneys spoke more during mediation. Parties who said they talked more during the session were more likely to say the mediation process was fair than were parties who talked less, but they also felt more pressured by the mediator to settle. By contrast, parties who said their attorneys talked more during mediation felt the process was more fair and felt *less* pressured by the mediator to settle than did parties whose attorneys spoke less.”).

A previous director of the D.C. Circuit’s appellate mediation program revealed that “in several cases, ‘the client’s presence was clearly the decisive factor in reaching a settlement.’” *Id.* The current mediation program in the D.C. Circuit strongly urges all parties to attend each mediation session. See United States Court of Appeals for the District of Columbia, Appellate Mediation Program Brochure 5, <http://www.cadc.uscourts.gov/internet/internet.nsf/Content/VL+-+Mediation+-+CA+Mediation+Brochure> (last visited Feb. 22, 2006). The new appellate mediation program out of the Federal Circuit actually requires “that counsel attend all sessions and that, at least one time during the process, counsel and parties . . . meet face to face.” U.S.

party attendance during mediation is shown to produce “better” results, it would be hard to argue against the increased satisfaction of the parties with the overall process—notwithstanding the outcome—when they are involved in, and are able to see the inner workings of, their own mediation.<sup>152</sup>

## B. *Private Mediation Concerns*

Alongside the benefits made possible by private mediation exist questions about the administration of the alternative process. Whenever an organization chooses to outsource any activity, there is a certain degree of control that is necessarily lost as a result of relinquishing authority. This loss of control in the context of court-annexed mediation extends beyond simple oversight obstacles. Allowing the parties to select the mediator, without any significant regulation, presents problems of mediator quality. Furthermore, the costs of electing private mediation can be a substantial deterrent when traditional court mediation in the federal circuits is offered to parties free of charge. While many of these concerns are legitimate, there are considerations that have the opportunity to lessen their perceived impact.

### 1. *Loss of Court Control*

The development of appellate mediation programs was certainly not a direct response to parties looking elsewhere for their dispute resolution. In fact, prior to the advent of appellate mediation in the federal circuits, the idea of ADR at the appellate level was not well received in many corners of the legal community.<sup>153</sup> Appellate mediation was primarily introduced to remedy the increasingly overcrowded circuit dockets and preserving court control

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Court of Appeals for the Federal Circuit, Appellate Mediation Pilot Program Guidelines 3, <http://fedcir.gov/guidelines05.pdf> (last visited Feb. 22, 2006).

<sup>152</sup> “[O]ne cannot ignore the salutary effect personal participation may have on the parties to cases selected for mediation. Involving the client directly in the process ensures that the party, who after all bears the risk and expense of appeal, has been afforded a cathartic opportunity to be heard.” Ruvolo, *supra* note 81, at 224. Justice Ruvolo, Associate Justice on the California First District Court of Appeals, explained that participant surveys during their court’s recent pilot appellate mediation program “express[ed] satisfaction with the feature of the process allowing for the client’s direct participation in the resolution of their cases in a nonadversarial setting.” *Id.* at 225. According to Justice Ruvolo, this direct participation “undoubtedly enhances public appreciation of the justice system.” *Id.*

<sup>153</sup> See *supra* notes 11–17 and accompanying text (addressing the somewhat counterintuitive nature of mediation in our nation’s courts of appeals).

may not have been a serious consideration during the developmental years.<sup>154</sup> However, the administration of these programs today demands at least some degree of court oversight to ensure process quality and efficiency.<sup>155</sup>

The design of the Eleventh Circuit's private mediation program has incorporated various elements to curtail the extent of control loss, including the primary measure of keeping a staff mediator assigned to every appeal.<sup>156</sup> Certain aspects of the mediation process remain under the control or oversight of the assigned circuit mediator when the parties opt for private mediation, including: (1) only the assigned circuit mediator may authorize time extensions during mediation (e.g., for filing briefs); (2) the private mediator communicates directly with the assigned circuit mediator regarding the conduct of the mediation; and (3) upon the assigned circuit mediator's request, the private mediator must report the status of the mediation.<sup>157</sup> Furthermore, the private mediator must immediately report to the assigned circuit mediator upon conclusion of the mediation with a "Private Mediator's Report," divulging the terms of the concluded mediation.<sup>158</sup> An additional and interesting approach taken by the Eleventh Circuit, in an attempt to maintain control over cases in which the court feels special control is warranted, prevents parties from electing private mediation in "[a]ppeals specifically sent to mediation by the court."<sup>159</sup>

<sup>154</sup> The principal objective of court-annexed mediation in American courts has always been "to achieve settlements or, failing that, to streamline litigation at both first instance and on appeal." BROWN & MARRIOTT, *supra* note 101, at 85.

<sup>155</sup> The sheer number of appeals that enter the circuits every year makes formal control imperative. Further, given the complexities and unique nature of the appellate process that many attorneys and mediators are simply untrained to navigate, at least some court supervision enables for the fair administration of justice and protection of the parties. *See Id.* at 333 ("There is a truism that, given the choice between process expertise and substance expertise, one would always choose to engage as a mediator someone who is skilled in the mediation process rather than someone who is an expert in the subject-matter of the dispute.").

<sup>156</sup> "Even though the parties have decided to employ a private mediator to conduct the mediation of an appeal, the circuit mediator whose name appears on the court's notice of mediation will remain assigned to the matter and is available to answer questions by the private mediator and parties and provide other assistance as needed." KMC PROCEDURES, *supra* note 78, at 4.

<sup>157</sup> *See Id.* at 4-10.

<sup>158</sup> *See Id.* at 10. A copy of the "Private Mediator's Report" form can be referenced in Appendix C of this Note.

<sup>159</sup> *See Id.* at 3. Judicial selection is a method of referring a case to mediation by a judge or judicial panel; such practice is common across the circuits. *See supra* notes 93-

Some loss of court control with private mediation is inevitable, as the court's chief method of managing the process—the assigned circuit mediator—is largely removed from the inner workings of the mediation. This is not an entirely undesirable consequence, however, because there is naturally an inverse relationship between levels of court control and the degree of self-determination reserved to the parties.<sup>160</sup> Even so, as seen with the measures utilized by the Eleventh Circuit, steps can certainly be taken to ensure that the court maintains a sufficient level of involvement in the administration of the mediation.<sup>161</sup>

## 2. *Quality of the Private Mediator*

At its most basic level, mediation is “a form of assisted negotiations, with the presence of a mediator included to facilitate settlement” between two adversely positioned parties.<sup>162</sup> Consequently, the quality of the third-party neutral chosen to mediate an appeal—whether a court-appointed staff mediator or a private-sector mediator selected by the parties—is invariably vital to the success of the overall process and final outcome of the mediation.<sup>163</sup> Determining specific qualifications that adequately speak to the

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94 and accompanying text (discussing judicial selection in the Eleventh Circuit and how it relates to private mediation).

<sup>160</sup> In other words, the more control relinquished to the parties during the mediation process, the less control reserved by the court.

<sup>161</sup> The Eleventh Circuit has published an information booklet, “Private Mediator Procedures for Mediation of Appeals,” primarily for use by counsel and mediators when the parties elect private mediation. See generally KMC PROCEDURES, *supra* note 78.

<sup>162</sup> Lester, *supra* note 63, at 567 n.14. Mediation is commonly characterized as “facilitated negotiation.” Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 964 (1998).

<sup>163</sup> See Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 12 (2001) (“[I]t is clear that the quality of the neutral is the most important factor in determining the success of the ADR process.”); see also BROWN & MARRIOTT, *supra* note 101, at 328 (“Many factors affect the quality of the mediation process. The model of mediation, the Code of Practice upon which it is based and the techniques and strategies used by the mediator: all of these are highly relevant. But arguably one of the biggest single factors is the quality of the mediator.”); Riselli, *supra* note 120, at 59 (“[T]he court recognized that the quality of the mediator was a critical factor in the success or failure of mediation programs.”).

ability, experience, and overall quality of the mediator, however, is far from an exact science.<sup>164</sup>

There are many aspects of mediator quality that courts must take into consideration when establishing requirements for a particular program.<sup>165</sup> Generally, there are three primary areas of concern: entrance requirements, training, and evaluation.<sup>166</sup> Although courts have unbridled authority to establish such requirements for in-house neutrals, the ability to do the same for private-sector mediators proves a more difficult endeavor.<sup>167</sup> For their newly adopted private mediation program, the Eleventh Circuit is effectively silent on matters of training for and evaluation of private mediators, focusing instead on matters of mere licensing and certification.<sup>168</sup> While these basic requirements may appear minimally restrictive, the qualifications eliminate a great deal of prospective mediators from the possibility of mediating in the Eleventh Circuit's private mediation program.<sup>169</sup>

<sup>164</sup> See Rack, *supra* note 138, at 615 (“To the best of my knowledge, there still are no specific objective education, training, experience, or subject matter expertise criteria that have been shown to predict high quality or success in mediators.”).

<sup>165</sup> See generally *Id.* (examining issues of mediator qualifications, training, and evaluation in the context of the federal circuits and more specifically, the Sixth Circuit Court of Appeals).

<sup>166</sup> This is an oversimplification of the various areas of quality control that have been attempted or are currently utilized in court mediation programs. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE 203* (1994) (“Quality control methods include: initial selection of individuals to become mediators; mediator training and education; testing and evaluation of competencies of the mediator, which may also be included in a certification process; regulation by a certification or licensing procedure; enactment of standards of conduct which must be followed; and establishment of liability.”).

<sup>167</sup> As is the norm for appellate mediation programs, administrators of the Eleventh Circuit's appellate mediation program “report that the [staff] circuit mediators have extensive trial and appellate experience, as well as significant training and experience in mediation.” See NIEMIC, *supra* note 19, at 92.

<sup>168</sup> Eligibility to participate as a neutral in the Eleventh Circuit's private mediation program requires the potential mediator to have been certified or registered as a mediator for five years, admitted to the practice of law for fifteen years, in good standing in their respective state, and admitted to the Eleventh Circuit. 11TH CIR. R. 33-1(g)(2).

<sup>169</sup> The entrance requirements for a mediator in the Eleventh Circuit's private mediation program are actually relatively strict in comparison to the hiring qualifications required by other federal circuits for staff mediators. See, e.g., Rack, *supra* note 138, at 614–15 (Beyond requiring a law degree and good legal analytical skills, “[i]n the Sixth Circuit, all other education, experience, and training qualifications are negotiable.”). “ADR programs take a variety of approaches in seeking to promote or assure neutrals' quality. A few are quite selective. Others place relatively low, or even no, formal hurdles

Because the correlative relationship between mediator quality and a mediator's qualifications is limited,<sup>170</sup> most courts and commentators focus on the issue of training as a means of ensuring at the very least mediator competence, recognizing a potential distinction between competence and quality.<sup>171</sup> In the unique context of federal appellate mediation, training

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before would-be listees . . .” Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 324. Most notably, the requirements of the Eleventh Circuit eliminate the possibility of non-lawyer mediators who are common in many dispute areas as a function of their subject-matter expertise. *But see* Henning, *supra* note 134, at 209 (“The field of mediation should not be limited to lawyers. Not only are there great disadvantages in terms of limiting the diversity of mediators available to disputants and restricting the innovation and development of the field of mediation, but also some of the purported advantages of a law degree requirement do not hold up under scrutiny.”).

<sup>170</sup> Just as forty years of practicing law does not necessarily breed an effective mediator, someone with relatively little experience in the law isn't assured of mediator mediocrity. The nexus between entrance requirements and mediator quality is simply too suspect for exclusive application. *See* Rack, *supra* note 138, at 615–16 (“To the best of my knowledge, there still are no specific objective education, training, experience, or subject matter expertise criteria that have been shown to predict high quality or success in mediators. Thus, rigid application of qualifications based on such criteria probably only creates a false sense of security and makes the selection process easier and faster; it will not assure high quality mediation and might, in fact, cause a court to exclude its best candidate.”); *see also* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 357 (1996) (“The SPIDR Commission on Qualifications, after careful deliberation on this matter, ‘found no evidence that formal academic degrees, which obviously limit entry into the dispute resolution field, are necessary to competent performance as a neutral.’”).

<sup>171</sup> “A significant component in the establishment of both ethical and excellent practice is the development of high-quality training . . . programs.” MOORE, *supra* note 170, at 355. Robert Rack, Sixth Circuit Chief Mediator, highlights the importance of training for mediators in court-annexed mediation:

Mediator training in a court program serves several important purposes. First, and most obviously, it shortens the new mediator's learning curve with respect to prove efficiencies and efficacies of certain mediation procedures, techniques, and styles. It also facilitates uniformity in the way the court's mediations are organized and conducted. Whether substantive or procedural, standardized practices can be useful in giving predictability and a sense of comfortable familiarity to the bar and in permitting more efficient management of the program's operations. Finally, in-house training provides a new mediator with understanding of the procedures and sensibilities of the court. This is extremely important in a court-based program . . .

Rack, *supra* note 138, at 616. In contrast, “the need for supervision or evaluation of mediators generally can be viewed as less critical than it might be for other professionals



would seem the most appropriate method for addressing the concern of mediator competence, as there is “impressive evidence” that mediation training is a vital ingredient toward enhancing the mix of quality mediators.<sup>172</sup> Under the current procedures for the Eleventh Circuit’s private mediation program, there is no training scheme in place; nevertheless, the possibility of establishing future training programs has not escaped the court’s consideration.<sup>173</sup>

It is very difficult to assess the need for, and the potential success of, mediation training in the Eleventh Circuit’s private mediation program because the program remains in its infant stages.<sup>174</sup> Should private mediation become more abundant in the circuits, it would seem likely that courts would begin establishing training programs. In the absence of any such training regime, the court must rely upon its initial eligibility requirements and the judgment of the parties who select the mediator.<sup>175</sup> Consequently, while

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and practitioners since the voluntary nature of mediation outcomes reduces the risk that mediator ineptitude or malfeasance can do significant harm to anyone.” *Id.* at 619.

<sup>172</sup> MOORE, *supra* note 170, at 357 (“[W]ell designed training programs, which stress the specific skills and techniques of mediation . . . are of critical importance in attaining competence.”); *see also* Rack, *supra* note 138, at 616–18 (discussing the important role of training in circuit mediation). *But see* Wissler, *supra* note 137, at 699 (The author conducted research on civil mediations in Ohio courts and determined that based on the empirical data from post-mediation assessment that “the hours of mediation training [and] whether that training involved role play” did not impact the likelihood of settlement and did not affect participants’ perceptions of the mediation. The only mediator qualification determined to be significant for settlement purposes was sheer experience (“more than sixteen years”), though such experience was “not related to parties’ or attorneys’ assessments of mediations.”).

<sup>173</sup> “The KMC reserves the right to establish such training programs as it may deem necessary from time to time. Private mediators must remain current with their state bar and state ADR agency licensing, certification, registration, and continuing education requirements to be eligible to perform Eleventh Circuit appellate mediations.” KMC PROCEDURES, *supra* note 78, at 12.

<sup>174</sup> Lowell Garret, the Eleventh Circuit’s Chief Mediator, communicated optimism about the prospects of their new program, but indicated that it was “too early to come up with a real evaluation of the program.” Interview, *supra* note 82.

<sup>175</sup> “In the private sector, there is a good argument that consumers in the marketplace will learn how to select good mediators and avoid bad ones, and that large investments in procedures to certify and discipline private mediators is unnecessary.” Rack, *supra* note 138, at 619. *But see* McCrory, *supra* note 144, at 843 (“The interests of some litigants may suffer because they are not knowledgeable regarding the importance of selecting a qualified mediator who is appropriate for their dispute. Conversely, experienced litigants will have an advantage.”). Though the idea of leaving the responsibility of selecting a quality mediator primarily in the hands of the parties may

training programs may later prove to be desirable, the current state of private mediation simply enables the parties to select their own mediator with nominal constraint, as they would through traditional private-setting mediation.<sup>176</sup>

### 3. *Shifting Costs*

The viability of private mediation in the federal circuits is perhaps most threatened by the costs associated with retaining a mediator from the private sector.<sup>177</sup> When parties mediate in-house through use of circuit mediators, the service is for the most part “available to appellate litigants at no charge,” as “each court of appeals funds the administration” of their respective programs.<sup>178</sup> According to the terms of the Eleventh Circuit’s private mediation program, however, should parties elect private mediation, “the cost of the mediator is borne by the parties without any method of reimbursement.”<sup>179</sup> Consequently, private mediation shifts the primary cost

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seem questionable at times, the bottom line remains that traditional private-setting mediation is always available to the parties whether or not court-annexed mediation is also in place. *See supra* note 29 (describing traditional private-setting mediation as the voluntary use of a private-sector mediator by the parties where the court is not involved in the process). In such circumstances, the parties have complete license to select any individual to mediate their appeal, regardless of qualifications, experience, or training.

<sup>176</sup> Some argue that “[f]reedom of party choice might be used as a rationale for setting minimal qualification requirements for mediator [eligibility] and employing a caveat emptor approach to selection.” McCrory, *supra* note 144, at 843.

<sup>177</sup> The Second Circuit first introduced a private mediation program in 2000. *See supra* note 75 (discussing the Second Circuit program). The pilot program, which was not circuit-wide and only allowed selection from a list of pre-approved mediators, failed primarily because parties preferred the free service provided by the court mediators, rather than incurring the expense of employing a private mediator. (Materials for the Second Circuit’s abandoned program are on file with the author.)

<sup>178</sup> NIEMIC, *supra* note 19, at 11. There are, however, negligible costs incurred by the parties for phone calls and travel to designated mediation centers for in-person mediation which are not reimbursed by the courts. *Id.* The fee-free approach of the federal circuits is not followed by the majority of federal district courts. *See* Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers*, in *MEDIATION AND OTHER NON-BINDING ADR PROCESSES* 258 (Alan Scott Rau et al. eds., 2d ed. 2002). As of the mid-90s, “of the forty-one courts offering attorney-based mediation, only nine provide that service pro bono.” *Id.*

<sup>179</sup> 11TH CIR. R. 33-1(g)(1) (emphasis added). “The private mediator shall bill the parties based upon the rates and terms previously agreed to by the mediator and parties . . . . The parties are solely responsible for any billings by the private mediators.

burden from the court to the parties, keeping in mind that many parties already seeking mediation in the private sector would be able to utilize the private mediation framework to satisfy the court's formal and mandatory program requirements.

Although the choice of electing private mediation and incurring the associated costs lies with the parties, potential concerns about the significant cost disincentives of private mediation are legitimate.<sup>180</sup> Parties might, for various reasons, conclude that the added cost of private mediation simply outweighs their perceived benefits and are subsequently unwilling to bear the brunt of the cost for what is mandatory mediation when the alternative is free of charge.<sup>181</sup> In some instances, parties might simply be unable to pay the costs, in which case the disincentive created by the expense of private mediation effectively becomes a lack of choice.<sup>182</sup> The economist's response to this scenario might be to view the survival of private mediation as a market exercise. In other words, private mediation will only remain viable if enough parties consider the costs to be offset by equal or greater benefits.

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Neither the court nor the KMC will aid in the enforcement of the terms and conditions of the contract, including the collection of any outstanding fees, costs, and expenses." KMC PROCEDURES, *supra* note 78, at 11.

<sup>180</sup> The costs of travel for in-house mediation conducted in person, for both attorneys and the clients, can be significant. If private mediation is elected, however, and subsequently enables parties to meet face-to-face at a local venue, the cost savings could rival or surpass the expense of hiring the private mediator.

<sup>181</sup> But "[t]here is evidence that litigants do not object to paying reasonable user fees for a quality program." McCrory, *supra* note 144, at 829. In many mediation programs of the federal district courts, "[i]nterestingly, there appears to be little relationship between whether fees are assessed and whether the referral to ADR is mandatory or made only with party consent." Plapinger & Stienstra, *supra* note 178, at 259. Nevertheless, the now defunct Second Circuit pilot program for private mediation, which failed partially because parties "had to pay for it as opposed to doing it free through Staff Counsel," illustrates the importance of cost calculations in the mediation equation. E-mail from Elizabeth Cronin, Director of Legal Affairs and Senior Staff Attorney, United States Court of Appeals for the Second Circuit, to Robert Rack, Chief Circuit Mediator, United States Court of Appeals for the Sixth Circuit (June 7, 2005) (on file with author); *see also supra* notes 75, 177 (discussing the abandoned pilot program out of the Second Circuit).

<sup>182</sup> In recognition that not all parties have the means to afford mediation, various federal district courts "include special provisions in their rules regarding low-income or indigent parties, generally waiving the fee altogether." *Id.* This is of course because, unlike the circuits, these district courts do not provide in-house mediation at no or little cost to the litigants. Therefore, without subsidization, mediation would be a luxury unfortunately out of the indigent party's reach. This quandary begs the question of whether circuit subsidization of private mediation is a viable option. *See infra* Part V (addressing financing options for private mediation).

This Darwinian approach is flawed under the circumstances, however, because it fails to account for participants who are unable to afford private mediation (regardless of whether it would prove beneficial), while assuming that parties always know what is best for their appeal, or from a less paternalistic posture, that parties are sufficiently informed.<sup>183</sup>

In reality, the dilemma posed—i.e., why pay for something when I can get it for free?—is not as dire as it may sound, at least not from an institutional perspective. Offering the option of private mediation does not in any way detract from the circuit's mediation program as a whole; it simply provides an additional and relatively inexpensive channel for dispute resolution.<sup>184</sup> Whether this alternative channel is attractive to parties who had not considered the benefits associated with mediation in the private sector or to those already seeking private-sector mediation that would now be able to do so in satisfaction of the court's mandatory mediation framework, the point is that the parties should be fully informed and permitted to make the choice for themselves. But if private mediation is going to flourish as a viable alternative, perhaps cost should not factor into the equation to such an extent.<sup>185</sup> Although exploring the feasibility of administering a program where private mediation is subsidized by the circuits is beyond the scope of this Note, it is certainly a consideration to be addressed at some future juncture.<sup>186</sup>

## V. RECOMMENDATIONS FOR FURTHER DEVELOPMENT

Because the Eleventh Circuit's private mediation program remains in its pilot stage, the lack of empirical and anecdotal evidence renders incomplete

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<sup>183</sup> An efficient market approach always "requires consumers to be well-informed, so that they are better able to assess the kind of assistance they need . . ." Pou, *supra* note 169, at 335.

<sup>184</sup> Because the costs associated with mediation preparation can be significant, "[t]he cost of mediation is likely to be only a fraction of the total costs to litigants participating in mandated mediation." McCrory, *supra* note 144, at 827. The total time actually spent in mediation only averages two to three hours. "Thus, in a routine case, the litigants' cost of participation in the mandated process could easily reach . . . over and above any fee charged for mediation services." *Id.*

<sup>185</sup> The failure of the Second Circuit's attempt at private mediation suggests that cost is a very significant consideration for parties, as would be expected. See *supra* note 177.

<sup>186</sup> Suggestions for court subsidization of private mediation and the possibility of mediators conducting mediation pro bono are discussed in Part V.

any attempt for a clear evaluation of the program as it currently exists.<sup>187</sup> The experiences of other state and federal courts, however, are valuable in providing some insight into various facets of different mediation programs. Although many questions will undoubtedly be answered as results from the pilot program are compiled and hanging chads plucked, this Note has identified some concerns that will inevitably take center stage when deliberation over the future of private mediation begins. The following will explore potential measures to address cost issues with private mediation as well as briefly examining the possibility of developing training programs for private-sector neutrals to establish eligibility to mediate through a circuit's private mediation program.

When looking for alternative structures for court mediation programs, classical models of court-connected ADR provide a good starting point as they initially focus on the administration and funding of varied approaches.<sup>188</sup> One ideal method, which would result in only nominal costs for both parties and courts, is the use of volunteer mediators from the private sector who provide their services pro bono.<sup>189</sup> Some courts employ this method as the primary structure of their mediation program.<sup>190</sup> Under this volunteer model, as applied to private mediation in the circuits, the court

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<sup>187</sup> See Interview, *supra* note 82 (“It is a little too early to come up with a real evaluation of the program. We don’t have any real comprehensive statistics at this point.”). The unavoidable lag time in the publication process promises that this Note will be published well after its substantive completion. Accordingly, by the time this Note reaches the shelves, the two-year pilot program will be nearing end and some initial evaluation should be available.

<sup>188</sup> Five common models that courts use “for delivering ADR services” include: (1) court establishes a full-time in-house program, (2) court contracts with nonprofit groups to administer the program, (3) court directly pays private-sector neutrals or mediation firms, (4) court administers program where private-sector neutrals serve pro bono, and (5) court refers parties to private-sector mediators who are compensated by the parties. See Brazil, *supra* note 5, at 747–50.

<sup>189</sup> See *Id.* at 748 (discussing the volunteer method of court-annexed mediation). There are many potential advantages of using volunteer mediators beyond the cost savings, including “prestige for the program . . . bar involvement, geographic diversity, and specialized knowledge.” See Becker, *supra* note 12, at 372. However, some possible disadvantages include “limitations on availability, lack of quality control, difficult recruitment/exclusion issues, experience spread thin, need to provide training, administrative burden, and immunity concerns.” *Id.*

<sup>190</sup> Both the D.C. Circuit and the Federal Circuit use the volunteer method where a mediator is selected—by the court—from a list maintained by the court and the mediator renders her services free of charge. See D.C. Program, *supra* note 111, at 3; Federal Circuit Guidelines, *supra* note 57, at 2. The Federal Circuit does not require mediation, however, unlike the other twelve circuits. *Id.* at 1.

would maintain a list of mediators that they deem qualified who are willing to provide mediation free of charge—or it could simply be left up to the parties to find their own pro bono mediator.<sup>191</sup> A potential difficulty in this method for the large circuits is maintaining a list of quality mediators in so many locales, but courts could still solicit volunteer mediators in major metropolitan areas where the court does not have a mediation center.

Another possible solution is a variation on the outsourcing model where instead of directly financing private mediation, the court could reimburse parties a certain percentage of costs incurred from privately mediating.<sup>192</sup> The overall costs of such an approach could be mitigated to some extent by requiring parties—if reimbursement is to be available—to utilize nonprofit organizations that would charge the court below market rates.<sup>193</sup> While court subsidization of any kind might prove difficult because of finite resources, creating a fee-wavier system for parties who are unable to afford the private mediation option would be an important and equitable gesture.<sup>194</sup> Should a party qualify for the waiver, the court would offer to pay a set amount for the mediator's services, though such payment would not necessarily cover the entire cost of the mediation.<sup>195</sup>

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<sup>191</sup> Although the new pilot appellate mediation program out of the Federal Circuit is voluntary, the circuit does permit a form of private mediation whereby the parties “jointly propose a mediator not on the list” and the mediator “agrees to serve pro bono.” *Id.* at 2. Of course, this begs the question why a party would participate in a voluntary mediation program, only to select their own pro bono mediator. It would seem that the benefit of the program is to have free mediation from someone on the court's list, since it is presumably difficult to retain a mediator at no cost. If the parties find a mediator not on the list who is willing to serve pro bono, why involve the court at all?

<sup>192</sup> Any structure under which the court pays for outside mediation would inevitably create an additional strain on court resources. Unlike programs that are based solely on outsourcing, the circuits have successful in-house programs already in place. Attempting to maintain the in-house program while also financing private mediation may prove infeasible under the current funding allocation for circuit mediation. However, if the use of private mediation were to expand significantly, court would require less in-house mediators on their payroll, subsequently freeing up resources for the private mediation program.

<sup>193</sup> See Brazil, *supra* note 5, at 747–48. This same approach could be used where the parties pay the costs, rather than the court. This would alleviate some of the burden on parties when selecting private mediation.

<sup>194</sup> Many federal district courts have fee waiver systems in place where low-income or indigent parties are spared some or all of mediation fees normally. Plapinger & Stienstra, *supra* note 178, at 259.

<sup>195</sup> In federal district courts that provide cost measures for low-income or indigent parties, in order to provide the mediation service, some courts “require those selected from the court's roster to serve pro bono for a specified number of hours or cases.” *Id.*

Development of training programs to ensure some control of mediator quality seems to be a feasible recommendation to improve private mediation. Courts could accomplish this goal through a certification program whereby only those neutrals who have completed the requisite training with the circuit will be able to participate in the private mediation program.<sup>196</sup> Many institutional ADR authorities, however, suggest that the greater the party control over the process of the mediation, and specifically the selection of the mediator, the less restrictions the court should place on the parties during the selection process.<sup>197</sup> Still, it is a widely held belief that some level of training is important, if not necessary.<sup>198</sup>

The possibilities for constructing training programs are numerous, but must always take judicial resources into account. A variation of the mandatory certification system would be to develop voluntary training programs where the court would from time to time offer training sessions—with some cost assessed to participants. Mediators who successfully complete the training could be placed on a roster of “approved” mediators that would be supplied to parties, who would not be required to choose an “approved” mediator. This framework might be less costly for the courts to administer and would leave the ultimate decision of selecting the private-sector neutral in the hands of the parties.

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<sup>196</sup> This could, however, create a potential burden on the court. “Courts that require parties to mediate and provide lists of mediators to choose from may feel some responsibility to assure the competence of the mediators on those lists—especially if the parties are paying the mediators.” Rack, *supra* note 138, at 619.

<sup>197</sup> See KOVACH, *supra* note 166, at 204 (“A report entitled The Commission on Qualifications was published in 1989 and provided general recommendations. The Commission, striving to reach an appropriate balance between competing concerns, adopted [as a] central principle[ ] . . . that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be . . .”).

<sup>198</sup> See Henning, *supra* note 134, at 215–23 (discussing the development of training programs). It nevertheless remains difficult to determine what constitutes sufficient training. “While most of the mediation community agrees that some training is essential, there is substantial disagreement as to how much training is enough.” *Id.* at 215; see also Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 346 (2003) (“Forty or sixty hours of mediation training and observations of two or three mediation sessions, do not, in and of themselves, ensure that a person could be relied upon to mediate competently and consistently.”).

## VI. CONCLUSION

The call for development of private mediation in the Eleventh Circuit may have come primarily from attorneys who desired greater opportunities for in-person mediation, but the underlying theme behind the private mediation concept is promoting self-determination—giving the parties more choice. The concept of self-determination lies at the heart of the qualitative and even procedural foundation for mediation of disputes at all stages of litigation. However, mandatory mediation is just that, mandatory. Settlement may not be forced upon the parties, but the prospect of settlement is.<sup>199</sup> Mediation demands a sense of voluntariness, not just in the outcome, but also in the means to that desired end we call settlement.<sup>200</sup> Although it remains uncertain how the various facets of the Eleventh Circuit's experiment will play out over the course of the pilot program,<sup>201</sup> what is clear nonetheless is that the use and importance of mandatory court-annexed mediation is increasing exponentially and the struggle to maintain party empowerment in the process should guide courts to explore new possibilities, such as the advent of private mediation. The use of private mediation significantly reinforces the promise of self-determination in the administration of mandatory court mediation regimes, a promise that will continue to be vital in a process that from the outset is by its very nature involuntary.

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<sup>199</sup> See *supra* notes 101–07 and accompanying text (discussing the essential relationship between mediation and the concept of self-determination, while also addressing concerns about the effect of mandatory mediation on this relationship).

<sup>200</sup> While the Model Standards of Conduct for Mediators have long recognized the crucial nexus between self-determination and the mediation process, this recognition has focused on the “outcome” aspect of mediation because this was considered the bastion of voluntariness, especially in the growing arena of mandatory mediation in the courts. See *supra* note 104 (referencing the self-determination language of the newly revised Model Standards). But the recent revision of the Model Standards addresses this shortcoming, emphasizing that self-determination has a place in all phases of mediation, moving away from the previously outcome-oriented approach: “There are two significant changes proposed to the 1994 Version. First, the 1994 Version focuses exclusively on exercising self-determination with respect to outcome; it is silent with regard to such matters as mediator selection, designing procedural aspects of the mediation process to suit individual needs, and choosing whether to participate in or withdraw from the process. The Model Standards (September 2005) extends the scope of self-determination to these other areas.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Reporter’s Notes § V.C (2005), available at <http://moritzlaw.osu.edu/dr/msoc> (emphasis added).

<sup>201</sup> The private mediation program of the Eleventh Circuit is a two-year pilot project scheduled to sunset on September 30, 2006, barring an order of the court re-authorizing the program. 11TH CIR. R. 33-1(g)(4); see *supra* note 74 (providing the text of the rule).

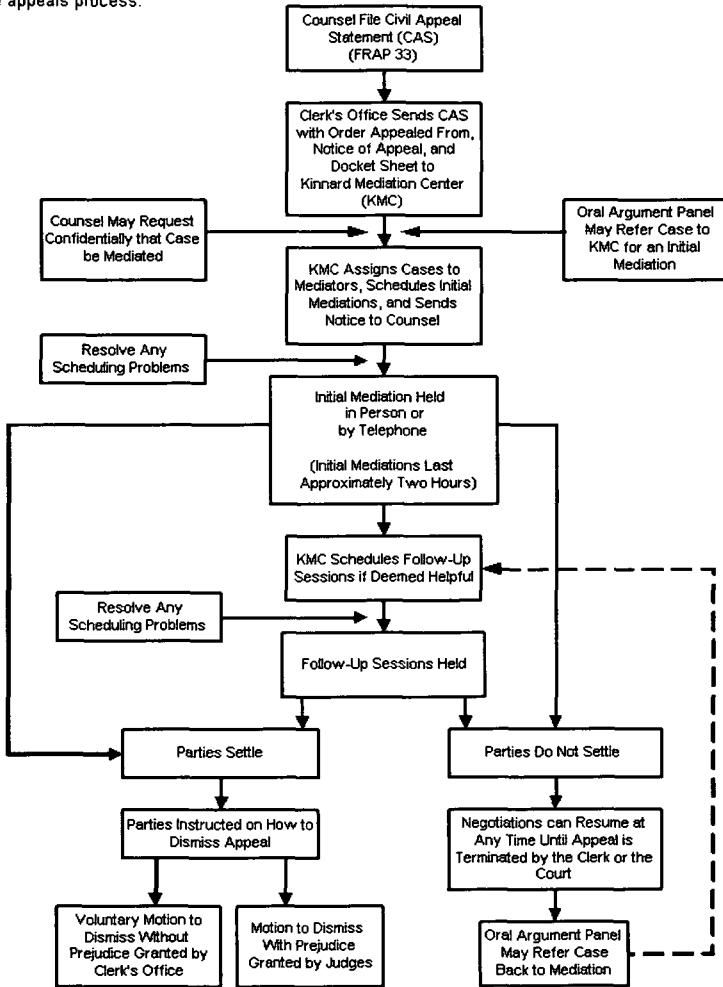


Appendix A\*

CIRCUIT MEDIATION PROCESS

U.S. Court of Appeals - 9/1/02

The fact that a case is in the mediation program does NOT stop the appeals process.



\* Kinnard Mediation Center, Circuit Mediation Process, <http://www.ca11.uscourts.gov/offices/kmcflow.php> (last visited Mar 6, 2006).

Appendix B\*

**Request for Use of a Private Mediator**

Appeal Caption \_\_\_\_\_

Appeal Number(s) \_\_\_\_\_

The undersigned parties in the above-captioned appeal(s) agree to employ the services of the private mediator identified below for the purpose of conducting a mediation. The parties are aware of the requirements for use of a private mediator as set forth in Eleventh Circuit Rule 33-1.

\_\_\_\_\_  
(Signature of Counsel for Appellant)

\_\_\_\_\_  
(Signature of Counsel for Appellee)

Acceptance by Private Mediator: \_\_\_\_\_ accepts the employment by the parties to conduct a mediation in the above-captioned appeal(s). Further, the mediator represents to the court that he or she:

- (1) Has been certified or registered as a mediator by either the State of Alabama, Florida, or Georgia for the preceding five years. State of certification and certification date: \_\_\_\_\_.
- (2) Has been admitted to practice law in either the state of Alabama, Florida, or Georgia for the preceding fifteen years and is currently in good standing. State and date of admission: \_\_\_\_\_.
- (3) Is currently admitted to the bar of this court.

Further, the undersigned mediator represents that he or she has read the "Private Mediator Procedures for Mediation of Appeals" and agrees to follow the procedures set forth therein.

\_\_\_\_\_  
(Signature of Mediator)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Fax)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Email)

*Please fax this completed form to the Kinnard Mediation Center 404-335-6270, within ten days of the date of the court's notice of mediation.*

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\* KINNARD MEDIATION CENTER, PRIVATE MEDIATOR PROCEDURES FOR MEDIATION OF APPEALS 13 (2004), <http://www.ca11.uscourts.gov/documents/pdfs/privmediator.pdf>.

Appendix C\*

**Private Mediator's Report**

Appeal Caption \_\_\_\_\_

Appeal Number(s) \_\_\_\_\_

Mediator \_\_\_\_\_

Mediation Conferences \_\_\_\_\_  In Person  Telephone  
\_\_\_\_\_  In Person  Telephone  
\_\_\_\_\_  In Person  Telephone  
\_\_\_\_\_  In Person  Telephone  
\_\_\_\_\_  In Person  Telephone  
\_\_\_\_\_  In Person  Telephone

Total \_\_\_\_\_ In Person \_\_\_\_\_ Telephone \_\_\_\_\_

Who was lead counsel in the mediation for each side? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Full Settlement  Partial Settlement  Impasse Date: \_\_\_\_\_

If a settlement was reached, please describe the terms: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Do you have any suggestions for the improvement of the mediation program? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Please fax this completed form to the Kinnard Mediation Center, 404-335-6270,  
within one week after the mediation is concluded.*

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\* KINNARD MEDIATION CENTER, PRIVATE MEDIATOR PROCEDURES FOR MEDIATION OF APPEALS 14 (2004), <http://www.ca11.uscourts.gov/documents/pdfs/privmediator.pdf>.

