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APPELLATE SETTLEMENT CONFERENCE PROGRAMS: A CASE STUDY¹

Susan A. FitzGibbon²

I. INTRODUCTION

The 1990s may be the decade in which the courts bring alternative dispute resolution "in house." Professor Owen Fiss' nightmare that private settlement will rob courts of cases for the dispensation of justice and the furtherance of societal goals³ has become Professor Carrie Menkel-Meadow's foreboding that the courts will "co-opt" and drain the life from true alternative dispute resolution (ADR) processes.⁴ It may be argued that appellate court-sponsored settlement programs dodge both of these criticisms because parties have had a day in court, the process is a form of mediation, and the settlement is thus final only if the parties agree to settle and because appellate settlement programs may in fact provide a much-needed education for attorneys about the workings and benefits of ADR.

Of course, mediation by an appellate court differs from private mediation in several important aspects. In private mediation the parties, with or without the aid of agents who may — but need not be — attorneys, develop the essential facts without formalities, hopefully in a fast, friendly, and cooperative process. If they settle with the aid of a mediator, whom they not only choose but also control because he or she is only a product of their agreement, they do so without any of the "trappings" of power. In private mediation, settlement within a range of outcomes considered tolerable by the parties may be and often is the primary goal

1. The author wishes to thank Judge Harold L. Satz, Judge Carl R. Gaertner, and Judge Paul J. Simon of the Missouri Court of Appeals, Eastern District, for their invaluable assistance in making this Article possible. Judge Satz and Judge Gaertner shared their Settlement Records as well as their thoughts with the author. The author is also grateful to each of these judges and to Eighth Circuit Settlement Director John H. Martin for excellent comments on an earlier draft of this Article. The author also especially thanks Professor Theodore J. St. Antoine for going so thoroughly through the Article and making most valuable comments.

The author also wishes to thank Jan Shelley and Edward P. Radetic for their able research assistance in this project and Jobst P. Vandrey for his assistance in putting the data on computer and generating the statistics and tables.

2. Associate Professor of Law, Saint Louis University School of Law; B.A., Barat College; J.D., Saint Louis University.

3. See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984).

4. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991).

of the particular parties and includes the desire to avoid litigation along with the expenses of litigation.⁵

By contrast, in mediation prompted and conducted by an appellate court, the parties, or at least one of them, had originally decided to resort to court, i.e., had decided against settlement. Generally, the parties have gone through discovery, pretrial preparation, and trial.⁶ Rules of evidence were observed and rulings on motions as well as the outcome of trial were dictated by rules of law. One or both parties decided to appeal because they lost. At the moment of appeal, the parties are likely to be decidedly less friendly than they were before litigation commenced.

In the majority of cases, the ground for appeal will be an alleged error of law, and presumably the appellate court's function is to correct the error by properly applying law without *de novo* examination of facts. To the extent that the expense of litigation is a motivation of private settlement, the major expense of litigation has already been incurred. On the other hand, the appellate court may remand a case for trial or a new trial, and some cases may be particularly ripe for settlement.

The pivotal question raised by appellate court-sponsored settlement is whether it is a *sui generis* exercise of the court's authority or whether it is a true, voluntary process (so that if there is a settlement it is by a *real* agreement of the parties). Needless to say, Missouri law and the body of law which governs administration of justice in general does not allow for formal appellate decisionmaking by a single judge. Consequently, appellate court-annexed mediation will always have the appearance of voluntary settlement. The question is what is the nature of that process.

The current call for court-annexed ADR is inescapable. The Civil Justice Reform Act of 1990,⁷ the Report of the Federal Court Study Committee,⁸ former Vice-President Quayle's Agenda for Civil Justice Reform in America,⁹ and the Conference of Court Administrators' ADR Committee Report on Use of Dispute

5. It is, however, noteworthy that informal discussions with attorneys involved in private mediation of employment discrimination cases, such as age discrimination and sexual harassment cases, reveal the strong preference for the private mediator to be a judge or an attorney with trial experience in these cases. Such preference arguably implies preference for "rights mediation," which is also likely to be a prevalent feature of appellate court-annexed mediation. See *infra* notes 190-202 and accompanying text.

6. The parties will not have been through trial if the appeal arises from, for example, a summary judgment motion.

7. 28 U.S.C. §§ 471-482 (1988 & Supp. 1991).

8. See FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); see also Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123 (1992).

9. This Agenda is outlined in former Vice President Dan Quayle's address to the Annual Meeting of the American Bar Association in August 1991. See Mark Hansen, *Quayle Raps Lawyers; ABA President's Response Spurs Complaints, Compliments*, 77 ABA J. 36 (Oct. 1991).

Resolution Alternatives in the Courts,¹⁰ all exhort courts to consider seriously offering alternative means of dispute resolution. Of course, the idea is not new; Professor Frank E.A. Sander suggested the multi-door courthouse concept at the Pound Conference in 1976.¹¹ But since the Pound conference,¹² which essentially marked the beginning of the current ADR movement, the focus of the ADR movement has shifted from the causes of dissatisfaction with the administration of justice (i.e., reasons to avoid courts), to causes for satisfaction with private alternative processes (i.e., reasons to prefer ADR),¹³ to current attempts of courts to offer preferable alternative dispute resolution processes in addition to traditional litigation and appellate processes.¹⁴

While the majority of reform plans, studies, and legislation focus on court-annexed alternatives to trials,¹⁵ appellate courts face similar problems of increasing caseloads and accompanying delays in case resolutions.¹⁶ A widely used alternative to full appellate review is the settlement conference.¹⁷ In 1976

10. 2 World Arb. Rep. 22-24 (Jan. 1991); see also COURTS IN TRANSITION: THE REPORT OF THE COMMISSION ON THE FUTURE OF VIRGINIA'S JUDICIAL SYSTEM 30 (1989) ("To offer the most effective, responsive and appropriate methods for resolving disputes, our justice system must be able to offer alternative dispute resolution programs along with adjudication."); Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 352 & n.28 (1992).

11. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 111-34 (1976). The roots of the idea pre-date the Pound Conference. Anthropology Professor Laura Nader has noted that the multi-door courthouse idea is similar to the court structure of Mexican Zapotec Indians. See generally LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990). And, as early as 1913 in the United States, some state courts had established "conciliation" branches to provide a more accessible, cheaper, and "warm" method of resolving small cases. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986).

12. The actual title of the 1976 Pound Conference was "The National Conference on the Causes of Dissatisfaction with the Administration of Justice." See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 79-80 (1976).

13. See, e.g., Andrew W. McThenia & Thomas L. Shaffer, *For Conciliation*, 94 YALE L.J. 1660, 1660-61 (1985).

14. See STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION 241-97 (2d ed. 1992) (exemplifying this trend).

15. See, e.g., Folberg et al., *supra* note 10, at 343.

16. See, e.g., John W. Winkle, III, *Preappeals Programs in American Courts*, 13 JUST. SYS. J. 142, 142-43 (1988) (many appellate settlement programs were established in response to "identifiable delay problems" and share the goal of expediting disposition of appeals).

17. The author found 19 active appellate settlement programs in intermediate appellate courts in 12 states. The state appellate courts which have settlement programs include: California Court of Appeals (1st, 2d, 3d, 4th, 5th, and 6th Districts) (operating under CAL. SUP. CT. R. 19.5); Connecticut Appeals Court (operating under CONN. PRAC. BOOK § 4103 (1992)); Georgia Court of Appeals (operating under GA. CT. APP. R. 52); Indiana Court of Appeals (operating under IND. CT. APP. R. 2); Kentucky Court of Appeals (operating under KY. R. CIV. P. 76); Maryland Court of Special Appeals (operating under MD. R. 8-205); Missouri Courts of Appeals (Eastern, Western, and Southern Districts) (operating under MO. SUP. CT. R. 84.02); New Jersey Superior Court, Appellate Division (no formal rule); Ohio Court of Appeals, 10th District (operating under OHIO CT. APP., 10TH DIST., R. 15); Pennsylvania Commonwealth Court (no formal rule); Texas Court of Appeals,

1st District (operating under TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-.073 (West Supp. 1993)); Washington Court of Appeals (operating under WASH. CT. APP. R. 5.5).

In addition, there are also active appellate settlement programs in the federal courts of appeals for the First, Second, Third, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits. These programs are operated under the authority of FED. R. APP. P. 33.

The author requested program information from all the settlement programs in the intermediate appellate state courts listed as active in the Institute of Judicial Administration (IJA) survey of 1989. See INSTITUTE OF JUDICIAL ADMIN., NEW YORK UNIV. SCH. OF LAW, IJA SURVEY, 1989 (1989) (on file with the author). This inquiry yielded much of the information used as a basis for comparison in this Article. Programs listed as active by the IJA study for which information was not obtained are: Colorado Court of Appeals; Florida Court of Appeals, 4th District (since abandoned); and New York Supreme Court, Appellate Division (1st, 2d, and 4th Departments).

Alternative methods for expediting the appellate docket include the use of scheduling orders and monitoring procedures. See RITA M. NOVAK & DOUGLAS K. SOMERLOT, DELAY ON APPEAL: A PROCESS FOR IDENTIFYING CAUSES AND CURES 205-06 (1990). The Ninth Circuit has experimented with "Appeals Without Briefs" where attorneys were required to submit short statements of cases rather than full briefs prior to oral argument. See Winkle, *supra* note 16, at 147-48. Also, the New Mexico Court of Appeals has created a Summary Calendar under which cases are decided without transcripts, briefs, or oral argument. See Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86 (1991). Other state appellate courts, attempting to keep abreast of burgeoning caseloads, have, *inter alia*, added judges, added law clerks and staff attorneys, and curtailed opinion publication and/or oral arguments. See Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 284-90 (1989).

For additional discussion of the operation and effectiveness of other appellate settlement programs, see the following sources: JOE S. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROGRAM (1990); JAMES B. EAGLIN, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS (1990); JERRY GOLDMAN, AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION (1977); JERRY GOLDMAN, INEFFECTIVE JUSTICE, EVALUATING THE PREAPPEAL CONFERENCE (1980); INSTITUTE OF JUDICIAL ADMINISTRATION, DISPUTE RESOLUTION IN THE APPELLATE COURTS, IJA REPORT (1990-1991); DAVID C. STEELMAN & JERRY GOLDMAN, THE SETTLEMENT CONFERENCE: EXPERIMENTING WITH APPELLATE JUSTICE (1986); Arthur Birnbaum & Stephen Ellman, *Pre-Argument Settlement Process in an Intermediate Appellate court: The Second Department Experience*, 43 BROOKLYN L. REV. 31, 43 (1976); Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343 (1992); Jerry Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform?*, 2 St. Ct. J. 3 (1978); Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedure Reform*, 78 COLUM. L. REV. 1209 (1978); Bertram D. Janes et al., *The Appellate Settlement Conference Program in Sacramento*, 56 CAL. ST. B. J. 110 (1981); Irving R. Kaufman, *Must Every Appeal Run the Gamut? The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986); Irving R. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974); Wendy Cole Lascher, *Appellate Settlements*, 13 LOS ANGELES LAW. 46 (Aug.-Sept. 1990); William C. Mack, *Settlement Procedures in the U.S. Courts of Appeals: A Proposal*, 1 JUST. SYS. J. 17 (1975); Donald L. Manfred, *Settlement in Appellate Court*, 41 J. MO. B. 507 (1985); John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, 40 J. MO. B. 251 (1984); John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, 69 JUDICATURE 312 (1986); Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43, 77-84 (1982); Benjamin Morris, *The Appellate Settlement Conference: A Procedure Whose Time Has Come*, 62 A.B.A. J. 1433 (1976); Robert W. Rack, Jr., *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 U. TOLEDO L. REV. 921 (1984); John W. Winkle, III, *Preappeals Programs in American Courts*, 13 JUST. SYS. J. 142 (1988); Teresa A. Generous & Katherine D. Knocke, Note, "CAMP"ing is on the Rise: A Survey of Judicially Implemented Pre-Argument Conference Programs

— the year of the Pound Conference — the Missouri Court of Appeals for the Eastern District inaugurated its preargument settlement program.¹⁸ This Article will describe and evaluate the Settlement Program of the Missouri Court of Appeals for the Eastern District. It should be stressed at the outset that the settlement rate achieved in the program compels the conclusion that the program has been an unqualified success, particularly given the limited resources allocated to the program and the minimal regulatory constraints of the program. The analysis will use the accepted conceptual framework of mediation as the basis of inquiry into the program.

II. BACKGROUND

The Missouri Court of Appeals for the Eastern District (MCA/ED) is one of three¹⁹ district courts comprising the Missouri Court of Appeals, which has general jurisdiction in all cases except those few cases within the exclusive jurisdiction of the Missouri Supreme Court.²⁰ Based in one of the state's largest metropolitan centers, St. Louis, the Eastern District has 14 judges responsible for cases appealed from 26 counties with a total population of approximately 2.2 million.²¹ Although the MCA/ED is an intermediate court, the decisions it renders are final unless the case is transferred to the Missouri Supreme Court.²²

in the United States Circuit Courts of Appeals, 1987 MO. J. DISP. RESOL. 89 (1987); Note, *The Minnesota Supreme Court Pre-Hearing Conference: An Empirical Evaluation*, 63 MINN. L. REV. 1221 (1979).

For purposes of clarity, where sources listed above are referred to later in this Article, the source is cited again in full citation format.

18. Judge Harold L. Satz, Settlement Docket, at 1 (Dec. 8, 1986) (internal court document, on file with the author).

19. The Western and Southern districts of the Missouri Court of Appeals also have settlement programs, but each is quite different from that of the Eastern District. For example, the Southern District program is voluntary, while the MCA/ED program is mandatory. The Western District includes almost all civil cases in its program, while the MCA/ED program has a case-screening process.

20. See MO. CONST. art. V, § 3. This section provides:

The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Id.

The court of appeals also has original jurisdiction over remedial writs. See OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1989, at 113 [hereinafter MISSOURI JUDICIAL REPORT 1989].

21. OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1990, AT 31, 33, 119-20 [hereinafter MISSOURI JUDICIAL REPORT 1990].

22. Only a small percentage of cases are transferred to the Missouri Supreme Court annually. For example, in fiscal year 1990, the Missouri Supreme Court granted approximately 63 of 655 transfer motions. MISSOURI JUDICIAL REPORT 1990, *supra* note 21, at 9.

The problems of increased filings in the MCA/ED prompted the establishment of the Settlement Program under the auspices of then-Chief Judge Gerald M. Smith. Judge Joseph G. Stewart served as the first Settlement Judge from 1976 to 1978; Judge Stewart suggested the Settlement Conference program to the MCA/ED after hearing about similar programs at a meeting of appellate judges.²³ Judge Robert G. Dowd then served as Settlement Judge from 1978 to 1982. When Judge Harold L. Satz became the Settlement Judge in 1982, he formalized the program and created a number of forms for use in the process.²⁴ Judge Satz also wrote a procedural outline of the program for internal use based on his experience with the program and on the structure of the program as established.²⁵ Judge Satz served as the Settlement Judge until 1986. Judge Carl R. Gaertner then served as the Settlement Judge from 1986 to 1989. The current Settlement Judge, Judge Paul J. Simon, has served as the Settlement Judge since 1990.²⁶

III. SETTLEMENT PROGRAM OVERVIEW

A brief description of the Eastern District's Settlement Program will set the stage for discussion and analysis of its components.²⁷ An active judge of the court, who is released from one-half to two-thirds of the usual case load, administers the program, conducts the settlement conference, and performs post-conference follow-up work. Within approximately one week of the filing of an appeal,²⁸ the Settlement Judge screens the most recently filed civil cases (with

23. Interview with Judge Joseph G. Stewart, Appellate Judge, Missouri Court of Appeals, Eastern District, in St. Louis, Mo. (Aug. 7, 1992).

24. Interviews with Judge Harold L. Satz, Appellate Judge, Missouri Court of Appeals, Eastern District, in St. Louis, Mo. (May 24, 1990; May 21, 1992; Dec. 30, 1992) [hereinafter Satz Interviews]. Copies of the forms which Judge Satz created are on file with the author.

25. *Id.*

26. Judge Satz, Judge Gaertner, and Judge Simon provided the author much information and insight into the MCA/ED program in a number of personal interviews. Accordingly many of the citations which follow will refer to those interviews. The author interviewed Judge Satz on May 24, 1990, May 21, 1992, and December 30, 1992. *See supra* note 24. The author interviewed Judge Gaertner on August 2, 1990. Interview with Judge Carl R. Gaertner, Appellate Judge, Missouri Court of Appeals, Eastern District, in St. Louis, Mo. (Aug. 2, 1990) [hereinafter Gaertner Interview]. The author interviewed Judge Simon on May 26, 1992, and August 12, 1992. Interviews with Judge Paul J. Simon, Appellate Judge, Missouri Court of Appeals, Eastern District, in St. Louis, Mo. (May 26, 1992; Aug. 12, 1992) [hereinafter Simon Interviews].

27. The following description is based upon the following sources: Harold L. Satz, *Secrets of a Settlement Judge*, ST. LOUIS COUNTIAN, April 30, 1988, at 1, 4 [hereinafter Satz, 1988 *Secrets*]; Satz Interviews, *supra* note 24; Gaertner Interview, *supra* note 26; Simon Interviews, *supra* note 26; Harold L. Satz, *Secrets of a Settlement Judge* (July 16, 1986) (unpublished descriptions, on file with the author) [hereinafter Satz, 1986 *Secrets*]; Judge Harold L. Satz, Settlement Docket (Dec. 8, 1988) (internal court document, on file with the author) [hereinafter Satz, 1988 Settlement Docket].

28. The study of the MCA/ED program revealed that the average time from filing an appeal to notice of settlement conference is 19 days. *See infra* p. 110 (Table IV).

some exceptions) to determine matters appropriate for settlement.²⁹ The Settlement Judge screens the cases by reviewing a one-page statement of the case and either the motion for new trial or a list of issues to be raised on appeal, all of which the MCA/ED requires the appellant to file with the notice of appeal.³⁰

During the screening process, the Settlement Judge evaluates the settlement possibilities of each case and makes notes of his³¹ impressions. An underlying assumption of the MCA/ED settlement program is that the trial disposition places the case in a completely new light and that, viewed in this light, new opportunities for settlement exist.³² For each case selected for settlement, the judge creates and maintains a settlement file, which is kept completely separate from the court's regular records.³³ In cases selected for the settlement docket, the judge notifies the attorneys of record by letter that the case has been set for a settlement conference in the judge's chambers at court within the subsequent three to four weeks.³⁴

The letter explains that the purpose of the conference is to attempt to settle the case. While attorneys are invited to bring their clients along, the notice states that clients will not be present during the settlement conference unless all parties agree to their attendance. If a client is not present at the court, he or she should be available by telephone.³⁵ The notice also explains that the Settlement Judge will be disqualified from any further participation in the case if it does not settle.³⁶ The notice further advises the attorneys that the court may suspend preparation of the trial transcript.³⁷ If the transcript has been filed, the court may suspend the deadline for the filing of briefs while the case is in the settlement process.

29. See *infra* notes 79-102 and accompanying text (discussing case coverage and selection).

30. MO. CT. APP. E.D. R. A.01(a); see *infra* note 44.

31. The author will use the masculine gender when referring to the Settlement Judge throughout this Article because, to date, all of the MCA/ED Settlement Judges have been men.

32. Satz, 1988 Settlement Docket, *supra* note 27, at 1. By the time a case is eligible for the MCA/ED settlement program there likely will have been at least three previous attempts to settle it — before, during, and after trial. *Id.* at 6.

33. The Settlement Files contain "copies of the notices of appeal, statements of the case, lists of issues or motions for new trial," and the judge's notes about the case. Satz, 1986 Secrets, *supra* note 27, at 3. The Settlement Judges also maintain Settlement Notebooks which list the case caption, conference date, and additional notes by the judge regarding the case and follow-up on progress toward settlement.

34. Satz, 1988 Settlement Docket, *supra* note 27, at 2. The study revealed that an average of 26 days elapsed between the notice and conference. See *infra* p. 111 (Table V). Copies of sample settlement letters of Judge Satz and Judge Simon are on file with the author.

35. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26; Satz, 1988 Settlement Docket, *supra* note 27, at 2.

36. Although not stated in this letter, the Settlement Judge also may not discuss the case with other members of the court. See Satz, 1988 Settlement Docket, *supra* note 27, at 2.

37. After the settlement conference, Judge Satz, during his tenure as Settlement Judge, notified the court reporter to halt preparation of the transcript if it appeared there was a chance that the case would settle. Satz, 1986 Secrets, *supra* note 27, at 1. Judge Simon asks counsel to advise him whether they want the transcript stopped. Simon Interviews, *supra* note 26.

In the conference, the Settlement Judge serves as mediator to facilitate settlement between counsel. The Settlement Judge attempts to determine whether room for settlement exists and to generate offers acceptable to the clients. To this end, the Settlement Judge may present a personal evaluation of the issues of the case as well as his view of how the court is likely to decide the case.³⁸

Throughout the conference, the Settlement Judge acts to diffuse tension and conflict between the sides and may also explore underlying factors and interests that may help or hinder settlement.³⁹ The Settlement Judge may "caucus" with the attorneys, i.e., hold separate individual meetings with them for more candid discussion of the case.⁴⁰ Most conferences last one-half hour, although, in more complex matters, the judge may schedule an hour-long conference.

After the conference, if counsel orally settled during the conference or if the possibility of settlement exists, the Settlement Judge retains the case on the settlement docket. If not, the Judge returns the case to the court's regular active docket. Subsequently, the Settlement Judge will follow-up on the cases still on the settlement docket to determine whether the attorneys have reduced their agreement to writing (if the case has settled) or to determine the status of the attorneys' progress toward settlement.⁴¹ If a case does not settle eventually, the Settlement Judge decides when to return it to the active docket.

With this brief sketch of the process in mind, this Article will now focus on analysis of its individual components.

IV. AUTHORITY FOR THE SETTLEMENT CONFERENCE

Missouri Supreme Court Rule 84.02 serves as the authority for the settlement conference program.⁴² It provides that in civil appeals the courts may hold a conference to "explore with the parties the possibility of settlement."⁴³ The MCA/ED has only one other rule applicable to the settlement program. Local Rule A.01⁴⁴ requires the appellant to file a one-page statement of the case and

38. How the conference is conducted will depend upon the settlement judge. See *infra* notes 186-95 and accompanying text.

39. Satz, 1986 Secrets, *supra* note 27, at 4.

40. See *infra* notes 206-15 and accompanying text.

41. To assist the parties further in processing their settlement, Judge Satz has developed a number of form motions and orders which the parties may use to dispose of the case. Copies of these sample forms are on file with the author.

42. See MO. SUP. CT. R. 84.02. Article 5 section 5 of the Missouri Constitution of 1945 empowers the supreme court to "establish rules of practice and procedure for all courts" with certain restrictions. MO. CONST. art. V, § 5.

43. *Id.* The rule provides in part: "At a conference in a civil appeal the court may, *inter alia*, examine its jurisdiction and explore with the parties the possibility of settlement." *Id.* This rule also serves as authority for the settlement programs in the Southern and Western districts.

44. Local Rule A.01 provides:

Required Supplement to Notice of Appeal

In addition to any Procedure Form required by Supreme Court rule, the following documents shall be filed with the notice of appeal in the trial court and forwarded to the

either a list of issues to be raised on appeal or a copy of the motion for new trial.⁴⁵ Furnishing this information facilitates the screening by the Settlement Judge of cases for the settlement program. It is, however, noteworthy that the MCA/ED did not adopt Local Rule A.01 in conjunction with the establishment of the Settlement Program; rather it implemented the rule to gain information for assigning cases to its accelerated docket.⁴⁶

The decision not to have more formal rules for the settlement program was a conscious one.⁴⁷ The absence of additional rules contributes to the flexibility of the process and, according to Judge Satz, allows all involved to follow the dictates of common sense.⁴⁸ The lack of rules governing the process also avoids problems of enforcing such rules for non-compliance. A corollary to the decision to have no rules is the absence of sanctions for attorney non-compliance with the process.⁴⁹ While the MCA/ED Settlement Program has no sanctions *per se*, it must be noted that the court believes that it has the inherent power to issue an order requiring attendance at a Settlement Conference.⁵⁰ Even without rules or express sanctions, the court has enjoyed excellent cooperation in the program from the bar.⁵¹

The MCA/ED is one of the very few state appellate settlement programs with essentially no formal rules (aside from Rule A.01) governing the process.⁵² Settlement conference rules in other states range from simple⁵³ to elaborate⁵⁴

Court of Appeals or shall be sent directly to the Clerk of the Court of Appeals within seven (7) days of the filing of the notice of appeal.

(a) Civil Appeals, Including Post Conviction.

(1) a brief statement or description of the case not to exceed one typewritten page. Any monetary awards shall be set forth.

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

(3) a copy of the motion for new trial if filed or if not filed, a listing of the issues expected to be raised on appeal; . . .

MO. CT. APP. E.D. R. A.01(a)(1)-(3).

45. *Id.*

46. Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26.

47. Satz, 1988 *Secrets*, *supra* note 27, at 4; Satz, 1988 Settlement Docket, *supra* note 27, at 6.

48. Satz, 1988 *Secrets*, *supra* note 27, at 4; Satz, 1988 Settlement Docket, *supra* note 27, at 6.

49. Satz Interviews, *supra* note 24. For a full discussion of sanctions, see *infra* text accompanying notes 119-26.

50. Satz Interviews, *supra* note 24. In only one instance did the court issue a show cause order to an attorney who failed on multiple occasions to attend scheduled conferences. *Id.* In that case, which predated the period studied herein, the Settlement Judge returned the matter to the active docket and did not pursue settlement after considering the response of the attorney. *Id.*

51. See Satz, 1988 Settlement Docket, *supra* note 27, at 6.

52. The Southern and Western districts of Missouri, the Commonwealth Court of Pennsylvania, and the New Jersey Supreme Court, Appellate Division also have no formal rules. State appellate courts which do have settlement conference rules include: California Court of Appeals; Connecticut Appeals Court; Georgia Court of Appeals; Indiana Court of Appeals; Kentucky Court of Appeals; Maryland Court of Special Appeals; Ohio Court of Appeals, 10th District; Texas Court of Appeals, 1st District; and Washington Court of Appeals, Division 1. See *supra* note 17.

53. See, e.g., CONN. PRAC. BOOK § 4103.

54. See, e.g., CAL. SUP. CT. R. 19.5.

and cover a wide spectrum of topics including the filing of a prehearing statement of the case,⁵⁵ the purpose of the conference,⁵⁶ the notice and timing of conferences,⁵⁷ how attorneys and/or parties may request or be ordered to the conference,⁵⁸ how parties may opt out of the conference,⁵⁹ who must or may attend the conference,⁶⁰ suspension of the briefing schedule,⁶¹ who presides at the conference,⁶² the disqualification of the conference judge from participating in the merits of the appeal,⁶³ the confidentiality of conference discussions,⁶⁴ assessment of costs of the process,⁶⁵ and sanctions.⁶⁶

Obviously, written rules which spell out the process may assist attorneys and parties in understanding and preparing for a settlement conference. But, as will be seen, the absence of rules does not mean that certain procedures and safeguards do not exist in the Eastern District of Missouri program. The MCA/ED's lack of rules lends the appearance of simplicity and informality to the program, which is perhaps more inviting to attorneys who are already otherwise restricted by an overwhelming variety of procedural rules (such as the Federal Rules of Civil Procedure and Federal Rules of Evidence).⁶⁷

55. See, e.g., CAL. SUP. CT. R. 19.5(a); IND. CT. APP. R. 2(c)(1); KY. R. CIV. P. 76.03(3); MD. R. 8-205(b).

56. See, e.g., CAL. SUP. CT. R. 19.5(a); GA. CODE ANN. § 24-3652(I) (Harrison 1990); IND. CT. APP. R. 2(c)(2); KY. R. CIV. P. 76.03(8); MD. R. 8-206(b).

57. See, e.g., CAL. CT. APP., 2D DIST., R. 2; CAL. CT. APP., 4TH DIST., R. 4(d).

58. See, e.g., CAL. SUP. CT. R. 19.5(a); GA. CODE ANN. § 24-3652(II)(c); KY. R. CIV. P. 76.03(7).

59. See, e.g., CAL. CT. APP., 3D DIST., R. 9; GA. CODE ANN. § 24-3652(II)(c).

60. See, e.g., CAL. CT. APP., 3D DIST., R. 7; CAL. CT. APP., 4TH DIST., R. 4(f)(4); N.H. SUP. CT. R. 12-B(2); S.D. CODIFIED LAWS ANN. § 15-26B-5 (Michie Supp. 1992).

61. See, e.g., CAL. SUP. CT. R. 19.5(a); CONN. PRAC. BOOK § 4103; GA. CODE ANN. § 24-3652(III)(c); KY. R. CIV. P. 76.03(14).

62. See, e.g., CAL. SUP. CT. R. 19.5(a); CONN. PRAC. BOOK § 4103; GA. CODE ANN. § 24-3652(V), (VI); KY. R. CIV. P. 76.03(5).

63. See, e.g., CAL. SUP. CT. R. 19.5(b); KY. R. CIV. P. 76.03(13).

64. See, e.g., CAL. SUP. CT. R. 19.5(c); CONN. PRAC. BOOK § 4103; GA. CODE ANN. § 24-3652(IX); KY. R. CIV. P. 76.03(10); MD. R. 8-206(d).

65. See GA. CODE ANN. § 24-3652(VI)(a)(vii)(3).

66. See, e.g., CAL. CT. APP., 3D DIST., R. 4; CONN. PRAC. BOOK § 4103; IND. CT. APP. R. 2(c)(4); KY. R. CIV. P. 76.03(12); MD. R. 8-206(e).

67. The elaborate rules in some appellate settlement programs and the increasing formality of the labor arbitration process has prompted Professor Theodore J. St. Antoine to question whether dispute resolution processes inevitably become more formal over time to meet the expectations of consistent treatment.

V. PURPOSE OF THE SETTLEMENT CONFERENCE PROGRAM

The MCA/ED established its Settlement Program in response to the increased number of appeals filed.⁶⁸ The program aims only to settle cases, thus reducing the number of cases submitted for full appellate review.⁶⁹ In seeking only to settle cases, the MCA/ED program serves both the court's interest in efficiency and the parties' interest in a fair and efficient resolution of the dispute. The MCA/ED program offers litigants the opportunity of a preferable dispute resolution procedure which may produce a settlement acceptable to the parties in less time than a full appeal would consume and, in many cases, without the expense of a transcript, briefs, and oral argument.⁷⁰ Additional goals of other appellate settlement programs include to clarify and to narrow the issue on

68. Appellate court congestion and delay problems have prompted a variety of pre-appeal programs. John W. Winkle, III, *Preappeals Programs in American Courts*, 13 JUST. SYS. J. 142, 142 (1988). Overall, filings in all three Missouri Courts of Appeals rose from 1,552 in 1975 to 1,805 in 1976, representing a 16 percent increase in new case filings. OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1976, at 11. From 1983 through 1990, total filings in the MCA/ED ranged from a low of 1,155 in 1984 to a high of 1,533 in 1989. MISSOURI JUDICIAL REPORT 1989, *supra* note 20, at 27 (Table 11); OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1984, at 31 (Table 27) [hereinafter MISSOURI JUDICIAL REPORT 1984]. Civil filings in the MCA/ED for this period ranged from a low of 846 in 1983 to a high of 1262 in 1989. OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1983, at 35 (Table 28) [hereinafter *Missouri Judicial Report* 1983]; MISSOURI JUDICIAL REPORT 1989, *supra* note 20, at 27 (Table 11).

69. Gaertner Interview, *supra* note 26; Satz, 1988 Settlement Docket, *supra* note 27, at 1. Other appellate settlement programs which seek only to settle cases include the following courts: the Missouri Court of Appeals for the Western District, *see* Harold L. Lowenstein & William C. Martucci, *Conferences, Motions, and Sanctions*, in 1 MO. APPELLATE PRACTICE AND EXTRAORDINARY REMEDIES § 7.4 (Missouri Bar Ass'n ed., 4th ed. 1989); Pennsylvania Commonwealth Ct., telephone interview with Susan Kuba, Executive Secretary of the Pennsylvania Commonwealth Court (May 4, 1993); Texas Court of Appeals, 1st Judicial Circuit, *see* Frank G. Evans & Bruce Ramage, *Alternative Dispute Resolution at the Appellate Level*, APPELLATE ADVOC., TEX. ST. B. APPELLATE PRAC. & ADVOC. SEC. REP., Winter 1988, at 3; Eighth Circuit Court of Appeals, *see* Teresa Generous & Katherine D. Knocke, Note, "CAMP"ing is on the Rise: A Survey of Judicially Implemented Pre-Argument Conference Programs in the United States Circuit Courts of Appeals, 1987 MO. J. DISP. RESOL. 89, 99; *see* CAL. CT. APP., 3D DIST. R. 7.

70. Gaertner Interview, *supra* note 26; Simon Interviews, *supra* note 26.

appeal⁷¹ and to assist in case management⁷² by, for example, disposing of minor procedural motions⁷³ and resolving questions of jurisdiction.⁷⁴

The decision to focus only on facilitating settlement in the MCA/ED program may be driven in part by the fact that an active judge of the court, whose time has been described as "the most expensive resource in the courthouse,"⁷⁵ screens the cases and conducts the conferences and follow-up work. The possibility of completely removing the case from the court's docket compensates for the Settlement Judge's release time from working on active docket appeals, arguably more than the possibility of case simplification would. In view of this and the settlement rate of 41 percent for the period of time studied for this Article,⁷⁶ the exclusive goal of settlement appears to be a rational and efficient choice. While in some programs with broader goals the settlement attorney is not an active judge,⁷⁷ it is noteworthy that a number of programs employing active judges to conduct the conferences still pursue broader goals.⁷⁸

VI. CASE COVERAGE AND SELECTION

In the MCA/ED, the Settlement Judge selects cases for the program by category and by screening. Criminal cases, juvenile cases, cases in which child custody is the sole issue, and most *pro se* matters are automatically excluded from

71. See, e.g., CAL. CT. APP., 4TH DIST., R. 4; CAL. CT. APP., 5TH DIST., R. 2; GA. CODE ANN. § 24-3652(I); IND. R. APP. P. 2; KY. R. CIV. P. 76.03(5); MD. R. 8-206(b); OHIO CT. APP., 10TH DIST., R. 15; WASH. R. APP. P. 5.5(g); State of Connecticut, Office for Appeals, Pre-Argument Form Letter (on file with the author) [hereinafter Connecticut Pre-Argument Form Letter]; see also INSTITUTE OF JUDICIAL ADMIN., NEW YORK UNIV. SCH. OF LAW, IJA SURVEY, 1989 (1989) (on file with the author) [hereinafter IJA SURVEY]; Generous & Knocke, *supra* note 69, at 89 (discussing the 2d, 6th, and 9th federal circuits).

72. See, e.g., GA. CODE ANN. § 24-3652(I); IND. R. APP. P. 2; KY. R. CIV. P. 76.03(5); MD. R. 8-206(10); OHIO CT. APP., 10TH DIST., R. 15, § 4; Connecticut Pre-Argument Form Letter, *supra* note 71; see also Generous & Knocke, *supra* note 69, at 89 (discussing the 2d, 6th, and 9th federal circuits).

73. See, e.g., Irving R. Kaufman, *Must Every Appeal Run the Gamut? — The Civil Appeals Management Plan*, 95 YALE L. J. 755, 756, 758 (1986) (discussing the Second Circuit Court of Appeals program); see also JAMES B. EAGLIN, *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS I* (1990).

74. See, e.g., JOE S. CECIL, *ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT 80* (1990); Generous & Knocke, *supra* note 69, at 99 (describing the 9th Circuit Court of Appeals program).

75. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 423 (1982).

76. See *infra* notes 287-91 and accompanying text.

77. In the Second Circuit, for example, the settlement judges are staff attorneys. See Generous & Knocke, *supra* note 69, at 96. In the Sixth Circuit, the settlement judges are independent directors and conference attorneys. See *id.* at 97. In the Ninth Circuit, they are mostly senior staff attorneys. See *id.* at 100.

78. See, e.g., CAL. CT. APP., 3D DIST., R. 7; CAL. CT. APP., 4TH DIST., R. 8(e); CAL. CT. APP., 5TH DIST., R. 2(g); IND. CT. APP. R. 2(c)(2); MD. R. 8-206(a)(2).

the settlement process.⁷⁹ Almost all appellate settlement programs categorically exclude criminal matters,⁸⁰ which for due process reasons may be viewed as cases inappropriate for the mediation process.⁸¹ Juvenile matters and cases which only involve child custody are also deemed to require full adversarial appellate review in part because these cases raise the State's concerns for the best interests of the child. Matters in which a party is acting *pro se* are often automatically excluded from appellate settlement program coverage because that party lacks legal training and thus may not be equipped to participate in the process on the same level as an attorney.⁸² In addition, *pro se* litigants often mistakenly believe that a settlement judge or settlement attorney somehow represents and authoritatively speaks for the court, and this misperception of the role of the neutral mediator completely upsets the balance and purpose of mediation.⁸³

The Settlement Judge screens other civil cases by reviewing the Rule A.01 statement of the case and either the motion for new trial or the list of issues to be raised on appeal to determine whether they are appropriate for the settlement program.⁸⁴ The value of case screening by the Settlement Judge lies in his unique ability to evaluate settlement possibilities on the basis of substantive and procedural expertise as well as his experience on the bench and in the settlement process. In screening cases, the Settlement Judge considers the type of case, the particular issues on appeal, and even the personalities of the attorneys of record. For example, cases routinely (but not categorically) deemed too problematic for

79. Satz, 1988 Settlement Docket, *supra* note 27, at 1; Satz 1986 Secrets, *supra* note 27, at 1-2. Judge Satz categorically excludes *pro se* cases. Satz, 1988 Settlement Docket, *supra* note 27, at 1; Satz 1986 Secrets, *supra* note 27, at 1-2. Judge Simon, the current settlement judge, will, on rare occasions, schedule a case for settlement in which one party is acting *pro se*. Simon Interviews, *supra* note 26. As previously noted, Missouri Supreme Court Rule 84.02 only authorizes settlement conferences in civil cases. See, *supra* note 43.

80. See, e.g., CAL. SUP. CT. R. 19(a); see also Generous & Knocke, *supra* note 69, at 98 (discussing the 6th Circuit's approach). The author found only one exception: The Rhode Island Supreme Court preargument conference program does not automatically exclude criminal matters. See R.I. SUP. CT. R. 16(h).

81. Cf. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 683-716 (1981) (criticizing the use of plea bargaining as a form of dispute resolution to relieve overburdened court dockets). However, the widespread use and acceptance of plea bargaining belies the conclusion that criminal cases are not appropriate for out-of-court settlement processes.

82. See, e.g., EAGLIN, *supra* note 73, at 15. Judge Simon also noted that when he has selected for settlement a case with a *pro se* litigant, the opposing counsel sometimes raised a similar concern for the *pro se* litigant's ability to handle the process. Simon Interviews, *supra* note 26. On the other hand, Professor St. Antoine observed that in all likelihood a *pro se* litigant would be far more comfortable participating in an informal settlement conference than in presenting an oral appellate argument. It should also be noted, however, that *pro se* litigants are often not encouraged to present oral arguments.

83. See EAGLIN, *supra* note 73, at 15 n.15. In the 6th Circuit program, *pro se* litigants also often sought legal advice from the Settlement Attorney. See *id.*

84. The mediator may also be the catalyst for getting the parties to come to the table to mediate in environmental disputes. See, e.g., Bruce Stifel & Neil G. Sipe, *Mediation of Environmental Enforcement: Overcoming Inertia*, 1992 J. DISP. RESOL. 303, 321-24.

the settlement program include: injunctions, zoning cases, cases requiring an ordinance or resolution of a legislative or corporate body, and cases brought by attorneys who never settle.⁸⁵

The decision categorically to exclude some cases and to screen the rest also represents a conscious process choice among alternatives by the MCA/ED. Review of other appellate settlement programs reveals that some include *all* civil cases,⁸⁶ while other programs include *most* civil cases with exceptions⁸⁷ for, *inter alia*, constitutional issues⁸⁸ and cases involving administrative agencies.⁸⁹ In some programs, cases are assigned at random from all of the civil cases filed.⁹⁰ Other programs, like that administered by the MCA/ED, engage in a screening process.⁹¹

One advantage of programs with a flat rule stating which cases will go to the settlement program is that it gives parties advance notice of the duty to mediate.⁹² However, a disadvantage of programs which routinely mandate settlement conferences in most civil cases is that they run the risk of promoting frivolous appeals by parties seeking one last shot at either a better result or

85. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26. John H. Martin, Settlement Director of the Settlement Program of the Eighth Circuit Court of Appeals, also screens cases and gives careful consideration to past experiences with attorneys and law firms regarding their degree of cooperation in the settlement program. Telephone interview with John H. Martin, Settlement Director of the Eighth Circuit Court of Appeals Settlement Program (Oct. 5, 1992) [hereinafter Martin Interview].

86. *See, e.g.*, GA. CODE ANN. § 24-3652(I)(b); IND. R. APP. P. 2(c)(2); OHIO CT. APP., 10TH DIST., R. 15(1).

87. *See, e.g.*, CAL. CT. APP., 3D DIST., R. 9; CAL. CT. APP., 4TH DIST., R. 4 (excluding appeals concerning a ward of the court status, adoptions, and actions to declare a minor free of parental custody). In addition, New Jersey excludes adoptions, parental rights cases, landfill closings, and constitutional questions. *See* BARUCH S. SEIDMAN, MANUAL OF PROCEDURE FOR THE CIVIL APPEALS SETTLEMENT PROGRAM (rev. ed. 1988) 1. Some programs specifically exclude habeas corpus matters. *See, e.g.*, EAGLIN, *supra* note 73, at 15; Donald L. Manford, *Settlement in Appellate Court*, 41 J. MO. BAR 507, 507-08 (1985);

88. *See, e.g.*, SEIDMAN, *supra* note 87, at 1-2; *see also* Evans & Ramage, *supra* note 69, at 4.

89. *See, e.g.*, Generous & Knocke, *supra* note 69, at 97 (discussing the Third Circuit's program.)

90. The Sixth and Tenth Circuits exclude cases involving *pro se* and prisoner civil rights cases and then conduct a random selection from civil cases filed. *See* EAGLIN, *supra* note 73, at 15; telephone interview with David W. Aemmer, Settlement Director for the Tenth Circuit Court of Appeals (June 3, 1992) [hereinafter Aemmer Interview].

91. *See, e.g.*, John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, 69 JUDICATURE 312 (1986).

92. Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL 287, 300 (1992).

harassing the other side.⁹³ Because parties are not assured of selection for the settlement program, this problem is not likely to arise in the MCA/ED.

The late Judge Irving R. Kaufman, who pioneered the Civil Appeals Management Plan (CAMP) in the Second Circuit Court of Appeals, criticized the screening of cases for the settlement docket on two grounds: (1) he was not convinced that different types of cases have different settlement rates;⁹⁴ and (2) he believed that screening somehow conflicts with the concept of "even-handed administration of justice."⁹⁵

The MCA/ED based the decision to screen cases on the experience of the judges involved in the settlement program who concluded that some cases are less amenable to a mediated settlement.⁹⁶ For example, zoning cases may be deemed inappropriate for a mediated settlement because the general public interest in zoning decisions requires a public process and a written, reasoned resolution, while cases requiring an ordinance or resolution of a body are not conducive to mediation because one side essentially lacks authority to settle. In his classic analysis of mediation, Lon Fuller also concluded that, for process reasons, certain types of disputes are appropriate for a mediated resolution while others are not.⁹⁷ ADR commentator and District of Columbia Circuit Judge Harry T. Edwards has

93. See Arthur Birnbaum & Stephen Ellman, *Pre-Argument Settlement Process in an Intermediate Appellate Court: The Second Department Experience*, 43 BROOKLYN L. REV. 31, 43 (1976); Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedure Reform*, 78 COLUM. L. REV. 1209, 1239 (1978); .

Another criticism of programs which broadly mandate settlement in most civil cases is that time and effort may be needlessly expended on cases which would otherwise settle. This criticism may apply as well to any mandatory settlement program. The MCA/ED has, at least to a limited extent, avoided this problem by not requiring cases which are essentially settled to go through the settlement process. See *infra* note 281.

94. See Kaufman, *supra* note 73, at 763 & n.41; see also Birnbaum & Ellman, *supra* note 93, at 36-37 (evaluating the settlement program of the Appellate Division, Second Judicial Department of the New York State Supreme Court, the authors found that even cases deemed problematic for settlement such as cases raising constitutional questions, injunctions, and cases in which the government is a party, benefitted from the settlement conference).

95. Kaufman, *supra* note 73, at 763. The Sixth and Tenth Circuits have reached similar conclusions. See EAGLIN, *supra* note 73, at 17; Aemmer Interview, *supra* note 90. Kaufman has asserted: "It is my view that reduction of the screening process has engendered a more even-handed administration of justice, extinguishing any notion that the court 'hand-picks' cases for settlement." Kaufman, *supra* note 73, at 763.

96. Cf. CECIL, *supra* note 74, at 94 (exclusion of social security and immigration appeals from settlement program based on experience of little success in settling these types of cases).

97. See Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 SO. CAL. L. REV. 305, 330 (1970). Fuller asserts that mediation should not be used in cases in which "the underlying relationship [is] such that it is best organized by impersonal act-oriented rules" and that mediation cannot be used if the problem presented is not "amenable to solution through mediational process." *Id.*

similarly asserted that certain cases, such as those raising public law issues, should not be resolved in mediation.⁹⁸

Recent recommendations by the Society of Professionals in Dispute Resolution (SPIDR) further support the decision to screen cases from the process. In its Report on Mandatory Dispute Resolution and Settlement Coercion, SPIDR recommended a case-by-case selection procedure for mandatory ADR programs to avoid problems of bringing inappropriate cases to the process.⁹⁹ It may be concluded that screening cases provides a workable means for the MCA/ED to exclude from the settlement process cases raising issues better resolved by full appellate review and cases which, for a variety of process reasons, are unlikely to be settled in mediation.

Judge Kaufman's concern that parties will somehow perceive bias or unfairness from the selection for the settlement program is unpersuasive. While a broad rule which includes most civil cases in the settlement program may alleviate fear that cases have been "hand picked" for settlement, the interests of efficiency (particularly in a program administered by an active judge as opposed, e.g., to one administered by staff attorneys¹⁰⁰), the integrity of the Settlement Judge and the program, as well as the foregoing criticisms of overinclusive settlement programs¹⁰¹ would seem to outweigh this criticism of the screening

98. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671, 677-80 (1986). Edwards asserts that such public law cases "include constitutional issues, issues surrounding existing government regulation, and issues of great public concern." *Id.* at 671.

99. See Society of Professionals in Dispute Resolution, *Dispute Resolution as it Relates to the Courts: Mandated Participation and Settlement Coercion*, 46 ARB. J. 38, 46 (Mar. 1991) [hereinafter SPIDR]. This report provides: "Procedures for compulsory referrals should include, to the extent feasible, case assessment by a person knowledgeable about dispute resolution procedures and should provide for timely considerations of motions for exclusion." *Id.*; see also Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1103 (1990) (recommending a selection procedure which categorizes cases for inclusion in mediation programs with the availability of "fine tuning" to screen out other cases which may be inappropriate for settlement). One commentator has also concluded that distinctions must be drawn by case types for ADR case selection. See Milton Heumann, *Comments on Managing Negotiated Justice*, 12 JUST. SYS. J. 114, 117 (1987).

Further support for the propriety of screening appellate cases for settlement may be found in the ABA Standards for Appellate Caseload Reduction, which recommend early differentiation among cases to determine the kind and extent of attention required. See AMERICAN BAR ASS'N COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.50(b) (1977); NATIONAL CENTER FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING 60-61 (1990) (recognizing that factors such as the type of case and the type of trial court proceeding relate to the amount of time needed to process appeals).

100. The Second Circuit program is administered by staff attorneys. Kaufman, *supra* note 73, at 757.

101. Owen Fiss asserts that all cases are better left for judicial resolution, but he seems especially wary of structural reform cases being decided outside of courts. See Fiss, *supra* note 3, at 1084-90. Interestingly, Judge Kaufman has to a certain extent rebutted criticisms that "ADR will hamper the evolution of public morality by removing disputes from the reach of judicial rulemaking" by noting that federal court-annexed arbitration programs exclude certain cases, e.g., those involving complex

procedure. A rule requiring mediation of all civil cases also may create the appearance of "just another mandatory step" in the appellate process, and thus actually detract from both the voluntary nature of the process and from truly active rather than mechanical participation of attorneys in the process.

Judicial selection of cases for the settlement conference conducted by the Settlement Judge and the requirement of attorney participation in the process, which the next section addresses in detail, represent the most visible factors distinguishing the MCA/ED process from private mediation in which the parties agree to attempt to resolve a dispute in mediation.¹⁰²

VII. MANDATORY PROCESS AND PROCEDURAL SAFEGUARDS

Once a case is selected for settlement, the MCA/ED mandates participation of attorneys in the settlement conference.¹⁰³ Although the MCA/ED process is in that sense mandatory, it is particularly noteworthy that the Settlement Judges perceive it as an invitation to attorneys which creates an opportunity to settle and as an offer to assist in that effort rather than as an order that suggests that the attorneys must settle or should settle the matter.¹⁰⁴ The Settlement Judges are also mindful of the fact that counsel and the parties have probably tried to settle the case earlier in the process, and they appreciate the cooperation of counsel in making another attempt at settlement.¹⁰⁵ Attorneys are encouraged in the MCA/ED program to bring their clients to court during the conference or to have them available by telephone,¹⁰⁶ but clients are only allowed to attend the settlement conference if all parties so agree.¹⁰⁷ Once the Settlement Judge selects a matter for the settlement docket, attorneys may only "opt out" of the procedure if both (or all) sides convince the Settlement Judge that no possibility of settlement exists and that the conference would simply be a wasted effort.¹⁰⁸

or novel legal issues, from the process. Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REV.* 1, 30-31 (1990). These exemptions represent a categorical screening process.

102. Cf. GOLDBERG ET AL., *supra* note 14, at 4-5.

103. Satz, 1986 Secrets, *supra* note 27, at EX 1-HS; Simon Interviews, *supra* note 26.

104. The fact that a number of cases in the settlement program do not settle is well-known to members of the bar, so attorneys have no fear that refusal to settle will somehow place them in an unfavorable light with the court.

105. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26.

106. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26.

107. See Settlement Conference Letter of Judge Harold L. Satz, Appellate Judge, Missouri Court of Appeals, Eastern District (on file with the author) [hereinafter Satz Settlement Letter]; Settlement Conference Letter of Judge Paul J. Simon, Appellate Judge, Missouri Court of Appeals, Eastern District (on file with the author) [hereinafter Simon Settlement Letter].

108. Satz Interviews, *supra* note 24. Judge Simon may take a case off the settlement docket at the request of one attorney but only after he consults with the other attorney. Simon Interviews, *supra* note 26.

So long as one side is amenable to attending the settlement conference, the other attorney(s) will be required to attend.¹⁰⁹ The availability of an "opt out" procedure comports with SPIDR's recommendation that mandatory court-annexed ADR programs provide "consideration of motions for exclusion."¹¹⁰ Consequently, the program also has essential features of voluntary ADR processes.

While the majority of cases processed by the MCA/ED program are there because the Settlement Judge mandates the procedure, the program does permit attorneys to "opt in" to the settlement process.¹¹¹ If one attorney is interested in utilizing the settlement process, he or she may request that the case be set for a conference; upon request, the Settlement Judge will refrain from disclosing the fact that only one attorney requested inclusion on the settlement docket.¹¹² This is significant because it is believed that attorneys may hesitate to suggest settlement because their case may then be perceived as weak.¹¹³

A number of state appellate settlement programs also employ mandatory procedures with provisions for attorneys to request inclusion in the settlement process.¹¹⁴ The majority of state programs are mandatory,¹¹⁵ and very few offer settlement conferences on a purely voluntary basis.¹¹⁶

In evaluating any mandatory dispute resolution procedure, one must first distinguish mandatory participation in the process, which occurs in the MCA/ED program, from "coercion to settle once participation has begun."¹¹⁷ Obviously, coercing parties to settle and thus depriving them of their right to judicial dispute resolution is inherently unfair and conflicts with the basic concept of

109. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26. As previously noted, the MCA/ED believes it has inherent authority under Rule 84.02 to issue an order requiring attendance of attorneys in the settlement program. See *supra* notes 42-52 and accompanying text.

110. See SPIDR, *supra* note 99, at 46.

111. Satz Interviews, *supra* note 24; Gaertner Interview, *supra* note 26.

112. Satz, 1988 Settlement Docket, *supra* note 27, at 6; Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26.

113. See *infra* note 139 and accompanying text (discussing an attorney's fear of his or her case appearing weak).

114. See, e.g., CAL. CT. APP., 3D DIST., R. 3(b); CAL. CT. APP., 4TH DIST., R. 4(b); CAL. CT. APP., 5TH DIST., R. 2(c); IND. CT. APP. R. 2(c)(1); KY. R. CIV. P. 76.03(5).

115. See, e.g., CONN. PRAC. BOOK § 4103; MD. R. 8-206(a); OHIO CT. APP., 10TH DIST., R. 15; TEXAS CIV. PRAC. & REM. CODE ANN. 154.021 (West 1987); WASH. R. APP. P. 5.5(g) (defining mandatory); Lowenstein & Martucci, *supra* note 69, §§ 7.3-4 (outlining Missouri Court of Appeals, Western District, program); SEIDMAN, *supra* note 69, at 6 (discussing New Jersey program); Kuba Interview, *supra* note 69 (explaining that Pennsylvania's program is also mandatory).

116. For example, in the Missouri Court of Appeals, Southern District, the attorneys must advise the court in writing that a genuine possibility of settlement exists. See Settlement Conference Letter of the Missouri Court of Appeals, Southern District (copy on file with the author); see also GA. CODE ANN. § 24-3652(II)(C) (providing for a purely voluntary procedure).

117. See SPIDR, *supra* note 99, at 39.

mediation.¹¹⁸ Such coercion would simply represent an extra-constitutional decisionmaking by the appellate court, a deprivation of the "day in court" as that term has been commonly understood. The MCA/ED program merely mandates attendance at the conference; no one is required to settle.

But, particularly in mandatory settlement programs, concern exists for more subtle forms of pressure to settle which may emanate from the position of the person recommending or conducting the settlement procedure or from the existence of deterrents to participation in the judicial process. The most obvious deterrent is the possible imposition of a sanction for non-compliance with the settlement process. Assessment of costs¹¹⁹ against parties who proceed to judicial resolution after the settlement process or reports from the mediator to the judicial decisionmaker(s) on the settlement process¹²⁰ equally detract from the voluntary nature of the process and also may hinder subsequent participation in the judicial process by instilling at least a fear of adverse consequences for the party who refuses to settle.

The MCA/ED program has no express provision for the imposition of sanctions¹²¹ for non-compliance with the settlement process, imposes no costs, as such,¹²² on the parties, and bars the Settlement Judge from communicating with the court about cases on the settlement docket. Thus, these forms of coercion are not issues in the MCA/ED program. Under other settlement program rules, sanctions, including dismissal of the appeal, may be imposed for failure to attend the settlement conference,¹²³ for failure to file a conference

118. See, e.g., *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) ("pressure tactics to coerce settlement simply are not permissible"); NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION LAW POLICY AND PRACTICE* 234 (1989) (defining fairness as the preservation of the parties' choice to settle); Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heilman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1113 (1991).

119. For example, court-annexed arbitration programs in nine pilot federal district courts "provide that litigants who reject the arbitration award, and then do not receive a more favorable judgment, are to pay an amount equal to the arbitrators' fees." BARBARA S. MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* 39-40 (1990).

120. See, e.g., SPIDR, *supra* note 99, at 43 (discouraging court-annexed settlement procedures involving reports or recommendations by a mediator to the court which may lead the parties to conclude that the mediator will affect the judicial resolution of the matter). For a description of a settlement program which allowed transmission of the settlement/preargument conference judge's evaluation of the case to the rest of the court, see George M. Scott & David J. Moskal, *The Prehearing Conference — Perhaps Your Only Opportunity to Present Oral Argument to the Minnesota Supreme Court*, 7 WM. MITCHELL L. REV. 283, 298 (1981). The program has since been abandoned.

121. As previously noted, the only possible "sanction" in the MCA/ED program is the possible issuance of an order requiring an attorney to attend the process. In the history of the MCA/ED program, the use of this possible sanction has been virtually non-existent. See *supra* notes 49-51 and accompanying text.

122. This assertion of "no costs" excludes the cost of the time spent preparing for and participating in the conference.

123. See, e.g., CAL. CT. APP., 3D DIST., R. 7; CAL. CT. APP., 4TH DIST., R. 4(f); CAL. CT. APP., 5TH DIST., R. 2(g); CONN. PRACT. BOOK § 4103. Lowenstein & Martucci, *supra* note 69, § 7.4 (printing the Standard Order of the Missouri Court of Appeals, Western District).

statement (or other documents),¹²⁴ or for failure to comply with the order embodying the results of the parties' agreement at the prehearing conference.¹²⁵ In one program "appropriate" sanctions may be assessed against attorneys who are grossly unprepared for or unreasonably uncooperative in the settlement conference.¹²⁶

The MCA/ED decision not to impose sanctions for various types of non-compliance with the Settlement Program conforms to the principle of program flexibility, avoids enforcement problems, and alleviates concerns for coercive process. The absence of express sanctions further demonstrates a certain degree of confidence in and respect for members of the bar (and, impliedly, also for the parties) who are being "invited" to cooperate with the court and to assist in yet another attempt to settle the case. Another possible advantage is that attorneys may view and approach a settlement process without sanctions in a more positive and, therefore, genuinely cooperative manner. This is another feature which the MCA/ED program shares with voluntary ADR processes.

Concern for a different "subtle" form of undue coercion arises from the fact that an active judge of the court mandates attorney attendance and conducts the settlement conference. As commentators Nancy H. Rogers and Craig A. McEwen have noted, "a party may feel considerable pressure to accept the settlement recommended by the judge who will [decide] the case if it is not settled."¹²⁷ Procedures designed to insure "the integrity of the process"¹²⁸ serve to eliminate these concerns. The MCA/ED program disqualifies the Settlement Judge from participating in any way in the merits of the case,¹²⁹ bars any communication concerning the case between the Settlement Judge and other members of the court,¹³⁰ and requires maintenance of separate settlement files.¹³¹ Thus, participants in the MCA/ED program should have no fear that either their failure to settle or their settlement discussions will influence the ultimate judicial resolution of their case.

Many commentators agree that disqualification of the Settlement Judge and restricted communication procedures provide adequate safeguards for parties who

124. CAL. CT. APP., 3D DIST., R. 4; CAL. CT. APP., 4TH DIST., R. 4(d), (e); *see also* Lowenstein & Martucci, *supra* note 69, § 7.4.

125. *See* KY. R. CIV. P. 76.03(12).

126. *See* IND. CT. APP. R. 2(c)(4).

127. ROGERS & MCEWEN, *supra* note 118, at 79.

128. *See* Satz, 1988 Settlement Docket, *supra* note 27, at 5.

129. *Id.*

130. *Id.* In addition, the fact that a case has been on the settlement docket is not disclosed to the other members of the court. Some programs further provide that the settlement conference discussions may not be raised in any subsequent proceedings in the appeal (except for other settlement proceedings). *See, e.g.*, CAL. SUP. CT. R. 19.5(c). Other programs provide that opinions expressed by the Settlement Judge may not be raised in subsequent judicial proceedings. *See* Letter from the Missouri Court of Appeals, Western District, to Attorneys 2 (June 21, 1990) (on file with the author).

131. Satz, 1988 Settlement Docket, *supra* note 27, at 5. Aside from the Settlement Judge's files and notebooks, there is no record of the settlement conference proceedings. *See* SEIDMAN, *supra* note 87, at 7.

are required to participate in settlement conferences,¹³² and a number of settlement programs follow similar procedures.¹³³ In addition to dispelling the fear that participants will feel that they have no choice but to settle, these procedures also generate confidence in the process by creating an atmosphere in which the attorneys may speak freely and actively pursue settlement. Obviously, any chance for success in mediated settlement negotiations requires serious participation and effort by the attorneys which will not occur unless they can trust the process and the mediator.¹³⁴

Finally why has the MCA/ED implemented a settlement program which provides for mandatory, albeit "invited," attendance rather than voluntary, party-initiated attendance? The answer is clearly related to the main purpose of the settlement program from the point of view of the court — to reduce the number of cases requiring full appellate process. For all of the publicity, popularity, and alleged superiority of ADR methods, to the large part of the general public and to many attorneys¹³⁵ it remains an unknown in comparison with the judicial system.¹³⁶ The small number of cases in which the attorneys "opt in" to the

132. See, e.g., Resnick, *supra* note 75, at 433-35 (judicial impartiality may be preserved in pre-trial settlement conferences by prohibiting "a judge who manages pretrial preparation or attempts unsuccessfully to mediate disputes from later adjudicating contested issues"); see also WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* 5-6, 84-99 (1985); Menkel-Meadow, *supra* note 4, at 40 ("mandatory settlement conferences . . . may become quite acceptable if the judicial officer attending the conference will not also be ruling on the evidence at trial").

133. See CAL. SUP. CT. R. 19.5(b), (c) (providing for automatic disqualification of the settlement judges from participation in the merits of a case); KY. R. CIV. P. 76.03(13) (same); MD. R. 8-206(f) (same); Manford, *supra* note 91, at 509 (discussing a similar approach taken by the Missouri Court of Appeals, Western District). The Washington Court of Appeals provides for the exclusion of the Settlement Judge from deciding the merits of the case at the judge's initiation or at the request of any party. See WASH. R. APP. P. 5.5(j); see also N.H. SUP. CT. R. 12-B(5).

Obviously the disqualification issue is not an issue in programs in which the conference is not conducted by a judge eligible to participate in the merits of the case. See OHIO CT. APP., 10TH DIST., R. 15 (which can be run by a conference attorney or a judge); TEX. CIV. PRAC. & REM. CODE ANN. § 154.051 (West 1987); Generous & Knocke, *supra* note 69, at 92-99 (discussing D.C. Cir., 2d Cir., 6th Cir., & 8th Cir. programs).

134. See, e.g., NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* § 2.02, at 11-12 (1987) ("Mediators traditionally enter disputes with little authority, so their ability to help bring about settlements . . . depends, in part, upon the willingness of the parties to accept the mediator. Mediators typically gain this acceptance by gaining the parties' trust . . ."). Similarly, Leeson & Johnston assert that there are two components to confidentiality in mediation: non-disclosure of information and establishment of a good rapport with the mediator, i.e., an atmosphere of trust. See SUSAN M. LEESON & BRYAN M. JOHNSTON, *ENDING IT: DISPUTE RESOLUTION IN AMERICA* 133 (1988).

135. The exceptions are those who arbitrate or mediate under, for example, a union contract or rules of trade associations.

136. In support of this proposition one might (unscientifically) compare the number of trials portrayed on television's "L.A. Law" with the number of mediations, arbitrations, mini-trials, and other forms of alternative dispute resolution portrayed. Judge G. Thomas Eisele, a strong critic of mandatory ADR (mainly at the trial level) would disagree with this proposition that a voluntary settlement program would be underutilized because attorneys and parties are still unfamiliar with ADR

MCA/ED program suggests that the settlement program would not be routinely utilized to attempt settlements if the process were available on a purely voluntary basis.¹³⁷ In addition, underlying assumptions of appellate settlement programs include concerns that attorneys either have fewer opportunities to pursue appellate settlement negotiations¹³⁸ or that they avoid suggesting settlement for fear of appearing to have a weak case.¹³⁹

A particular benefit of a mandatory settlement program such as the MCA/ED is that the Settlement Judge initiates the process, thus creating the opportunity for the attorneys to stop thinking like adversaries and to seriously consider settlement while also avoiding the appearance of weakness on the part of either lawyer. Judicial initiation of the process also offers a "face saving" opportunity to settle for a party or attorney who has previously contended that they would never settle this case. It may perhaps even be suggested that in some cases, hopefully in a minimum number of cases, the mandatory settlement program may promote the client's interest vis-a-vis an unscrupulous or inadequate attorney.¹⁴⁰ For

processes. He believes that if court-annexed ADR were purely voluntary, the majority of parties would not use it because the safeguards of the judicial procedures offer a preferable dispute resolution process. See generally G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 74 JUDICATURE 34 (1991).

137. Review of MCA/ED settlement program records from June 1983 through June 1989 revealed only three cases in which counsel requested that the case be placed on the settlement docket. In all likelihood, attorneys "opted in" to the settlement program in other cases as well but this information was not listed in the settlement file or on the Settlement Judge's notebook sheet for the case. Obviously if an attorney confidentially requested placement on the settlement docket, the Settlement Judge respected that confidence.

138. See, e.g., EAGLIN, *supra* note 73, at 12, 40 (almost 80 percent of attorneys surveyed stated that they would not have pursued settlement absent the court's settlement program). However, evaluating the Second Circuit's Civil Appeals Management Plan, Commentator Goldman conducted a survey of attorneys which revealed that "roughly half of the respondents . . . talked to their adversaries about settlement possibilities." Goldman, *supra* note 93, at 1235-37. Even if counsel do consult one another about settlement in half of the appellate cases, it may still be concluded that a mandatory settlement conference, and particularly one conducted by an active judge, will in many cases provide a different and perhaps a more serious, less adversarial opportunity to achieve settlement.

139. "[T]oo many lawyers view the suggestion of compromise as an admission of weakness and therefore delay the initiation of negotiations with the hope that the onus of suggesting settlement will fall on opposing counsel." Edwards, *supra* note 98, at 670; see also BRAZIL, *supra* note 132, at 1, 44 (1985); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 767 (1989). But the validity of this assumption has been challenged. In evaluating the appellate settlement programs in the Connecticut Supreme Court, the Pennsylvania Superior Court, and the Rhode Island Supreme Court, commentators Steelman and Goldman found that attorney surveys revealed that this fear of appearing weak rarely was the reason that attorneys failed to initiate appellate settlement negotiations. See DAVID C. STEELMAN & JERRY GOLDMAN, *THE SETTLEMENT CONFERENCE: EXPERIMENTING WITH APPELLATE JUSTICE* 101-03, 113-14, 123-24 (1986).

140. For example, it has been noted at the pretrial level that in some cases attorneys may be unwilling "to convey to their clients adequate information bearing on the desirability and terms of settling a case in lieu of pressing forward to trial." *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657 (7th Cir. 1989) (en banc) (Posner, J., dissenting).

instance, it may be an obstacle to the artificial prolonging of a case by the attorney in order to obtain more billing hours, or it may force greater communication between the attorney and the client about the issues in the case. In sum, MCA/ED can only be assured of greater efforts to settle cases if the program is mandatory. In this context, it is noteworthy that at least one study has demonstrated that cases in which mediation was mandated settled at approximately the same rate as cases in which the parties chose to mediate.¹⁴¹

VIII. THE ACTIVE JUDGE AS MEDIATOR

In the MCA/ED, an active judge of the court serves as the Settlement Judge. The role of the Settlement Judge is that of a neutral mediator who assists the parties in reaching a settlement. The Settlement Judge generally follows a procedure, similar to that in private mediation, of explaining the process, allowing each side to present his or her view of the issues on appeal, and finally of exploring with counsel the options for settlement.¹⁴²

Unlike private mediation, in the MCA/ED and in most appellate settlement programs, the parties have no choice as to the mediator.¹⁴³ In mandatory mediation programs which designate the mediator, there is no marketplace quality control of the process generated by party selection of the neutral.¹⁴⁴ Consequently, commentators Rogers and McEwen have asserted that additional safeguards to insure fair process are necessary.¹⁴⁵ The MCA/ED safeguards are that the mediator is an active judge of the court who must maintain a reputation for fairness in order for the settlement program to flourish¹⁴⁶ and that the Settlement Judge works primarily with attorneys, who are less likely to be intimidated or coerced in the process than the individual parties might be.

Of course, as with private mediation, judges have varying degrees of skill and develop a reputation which either enhances the process or, in the worst-case scenario, makes it a wasteful part of the litigation process. To date, this worst-case scenario has been described in the literature only sporadically and anecdotally

141. See Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 MAINE L. REV. 237, 252 (1981). Mandatory programs have the advantage of assuring that parties get to the settlement table. Noting that mandatory programs do not appear to reduce the rate of settlement, Rogers and McEwen suggested that such programs may produce more or faster settlements. See ROGERS & MCEWEN, *supra* note 118, at 47. (Rogers and McEwen also commented on the general success of mandatory mediation programs. See *id.* at 59.)

142. See, e.g., LEESON & JOHNSTON, *supra* note 134, at 136-42; Satz, 1988 Settlement Docket, *supra* note 27, at 3.

143. See, e.g., CAL. SUP. CT. R. 19.5(a); GA. CODE ANN. § 24-3652(V); IND. CT. APP. R. 2(c)(2). Cf. S.D. SUP. CT. R. 1361 (conference conducted by retired judge or member of the bar but a party may object and obtain one change of neutral); TEX. CIV. PRAC. & REM. CODE ANN. § 154.051 (West 1987) (conference conducted by panel of three attorneys, but parties may object and obtain a substitute).

144. ROGERS & MCEWEN, *supra* note 118, at 59.

145. *Id.*

146. See *infra* note 164 and accompanying text.

and is more associated with a trial judge who pushes settlement in a case which he or she would ultimately try.¹⁴⁷ Finally, it should be stressed that one of the oldest and most successful institutional mediation processes in the country, interest mediation of collective bargaining agreements by the Federal Mediation and Conciliation Service (FMCS), is a mediation process which can be viewed as quasi-mandatory because in practice it prompts the parties who are unable to reach agreement to seek the FMCS mediator's assistance.¹⁴⁸

In private mediation, selection of a neutral decisionmaker is generally based upon, *inter alia*, the neutral's experience, personal qualities, subject matter expertise, and "capacity to appreciate the dynamics" of the dispute.¹⁴⁹ At the appellate level, such experience and expertise must include an understanding of and familiarity with appellate procedure. Consequently, any neutral selected would likely be an attorney. This is not necessarily true at the trial level where the real alternative to a mediated settlement is an "unassisted" settlement because less than 10 percent of cases filed go to trial.¹⁵⁰ Because the "alternative" to an appellate settlement is more likely to be resolution of the appeal by the court, a judge's assessment of how the case may fare in the appellate process is of particular significance. Arguably, if given a choice of neutrals to conduct the mediation, attorneys seeking to settle an appellate case would *choose* an active appellate judge for his or her unique experience in the judicial resolution of such matters,¹⁵¹ and, importantly, in the current thinking and working of this court.

To date, no special training in mediation has been required of the active judges who choose to serve as the MCA/ED Settlement Judge. While some appellate settlement programs require mediation training,¹⁵² others do not.¹⁵³ In the MCA/ED program, the combination of the Settlement Judge's experience practicing law and, by necessity, the art of negotiation and compromise as well

147. See, e.g., ROGERS & SALEM, *supra* note 134, at 235; Resnick, *supra* note 75, at 386-91.

148. See 29 U.S.C. § 158(d)(3) (1988) (duty of party seeking to terminate or to modify collective bargaining agreement to notify Federal Mediation and Conciliation Service and any state mediation agency within thirty days after notice to the other party of the existence of dispute); 29 U.S.C. § 173(b) (1988) (FMCS "may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce").

149. See, e.g., Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125, 129 (1988); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 VT. L. REV. 85, 91-97 (1981).

150. See, e.g., BRAZIL, *supra* note 132, at 43; GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 1-2, 10 (1983). States whose trial court programs provide for mediators who are not attorneys include Missouri and Texas. See MO. SUP. CT. R. 17; TEX. CIV. PRAC. CODE ANN. & REM. § 154.052 (West 1987).

151. An interesting comparison may be drawn from the mediation of collective bargaining grievances. In a program designed by Professor Stephen B. Goldberg to resolve labor contract disputes more quickly, members of the National Academy of Arbitrators who have vast experience arbitrating labor disputes serve as mediators. See *infra* note 213.

152. See IJA SURVEY, *supra* note 71.

153. See *id.*

as his experience on the bench clearly provide an argument that these qualities compensate for any lack of training in mediation or that these are qualities which make a good mediator. For example, before their appointments to the Missouri Court of Appeals, the three most recent Settlement Judges had practiced law for from 12 to 24 years, and two of the judges had also served as trial judges for approximately 10 years each.¹⁵⁴ In addition, each of these judges had served on the appellate bench for nearly four years before becoming the Settlement Judge.¹⁵⁵ With such backgrounds, each Settlement Judge was well able to analyze legal issues, stimulate discussion, engage in problem solving, and run a productive meeting. It is interesting to note that the first MCA/ED Settlement Judge, Judge Stewart, has served as private mediator and early neutral evaluator since his retirement from the bench.¹⁵⁶ From all of this, it is fair to conclude that while training in mediation may be beneficial to the neutral who conducts the settlement conference, it need not be a prerequisite to the position.

In the MCA/ED, the Settlement Judge may offer a personal evaluation of the case, a prediction as to the outcome of the appeal, and an opinion of how the rest of the court would view the case.¹⁵⁷ In light of the fact that the majority of appellate opinions are unanimous,¹⁵⁸ it would seem that the opportunity to have a case evaluated by an active judge of the court would prove invaluable either to fashion a settlement or to prepare briefs and oral arguments. While a settlement attorney appointed by and also very familiar with the thinking of the court might be equally capable of offering such assessments,¹⁵⁹ counsel (and their clients) are more likely to credit the opinion of a judge.¹⁶⁰ Moreover, studies have

154. Prior to appointment to the Missouri Court of Appeals, Judge Gaertner practiced law for 24 years and served as Circuit Judge for 10 years; Judge Satz practiced law for 12 years and served as Circuit Judge for nine years; and Judge Simon was in private practice for 19 years, during which time he also held political office. See SECRETARY OF STATE'S OFFICE, STATE OF MISSOURI, 1991-92 OFFICIAL MANUAL OF THE STATE OF MISSOURI 180, 182, 183 (Steven N. Ahrens ed., 1991).

155. Judge Gaertner was appointed to the MCA/ED in 1982 and served as Settlement Judge from 1986 to 1989; Judge Satz was appointed to the MCA/ED in 1978 and served as Settlement Judge from 1982 to 1986; and Judge Simon was appointed to the MCA/ED in 1979 and has served as Settlement Judge since 1990. See *id.*; see also Satz Interviews, *supra* note 24; Gaertner Interview, *supra* note 26; Simon Interviews, *supra* note 26.

156. Judge Stewart, who served as Settlement Judge from 1976 to 1978, has been affiliated with Corporate Dispute Resolution, Inc., which provides private mediation, early neutral evaluation, and arbitration services.

157. Satz, 1988 Settlement Docket, *supra* note 27, at 3.

158. See, e.g., *Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit, Panel Discussion, Effectiveness of Judicial Review in Agency Cases*, 134 F.R.D. 321, 449 (1990) (remarks of Professor Schuck) (stating that the national average of consensus as measured in terms of unanimous appellate decisions is about 86 percent).

159. In the Eighth Circuit, for example, the first settlement director, the Honorable Charles B. Blackmar was an experienced labor arbitrator and law professor who left the job to join the Missouri Supreme Court. The current settlement director, John H. Martin, was formerly a mediator for FMCS for 10 years and has been with the court since 1983.

160. See, e.g., Note, *The Minnesota Supreme Court Prehearing Conference: An Empirical Evaluation*, 63 MINN. L. REV. 1221, 1231 (1979).

shown that attorneys prefer to have judges conduct settlement conferences¹⁶¹ and believe that judicial involvement may improve the chances of settlement.¹⁶² In addition, an attorney who has overestimated the chance of success on appeal or the risk of retrial may be better able to "save face" in suggesting a settlement to the client if it comes with the recommendation of an active judge of the court.

Assignment of an active judge to the settlement docket prompts criticism on grounds that the process will be coercive and inefficient. As previously noted, many of these fair process questions are resolved by procedures ensuring the disqualification of the judge from participation in deciding the merits and ensuring the confidentiality of the process.¹⁶³ In addition to alleviating concern for coercive process, disqualification of the Settlement Judge from the merits of the case also permits the judge to pursue settlement vigorously with counsel uninhibited by the possibility of having subsequently to rule on the merits.¹⁶⁴

Aside from fair process concerns relating primarily to cases which do not settle, court-annexed settlement programs raise a different question of fairness within the settlement process: Will the Settlement Judge, motivated by the desire for a caseload reduction and a high percentage of settled cases, exceed the authority of a true mediator and force the parties into settlement?¹⁶⁵ Recognizing this concern, the commentary to the ABA Model Code of Judicial Conduct Canon 3(B)(8) provides: "A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."¹⁶⁶

It must be noted that this concern is not peculiar to active judges. Senior judges and staff attorneys who serve as settlement conference neutrals may also feel that the success of the program or their personal success in this role depends on the number of cases which settle. Thus, in trying to achieve a better settlement rate, they too may abuse their role as mediator and attempt to coerce settlements. It is likely, however, that such strong-arm tactics could be more effectively and destructively employed by an active judge.

161. *Id.* at 1252.

162. *See, e.g.,* BRAZIL, *supra* note 132, at 43-46 (85 percent of attorneys surveyed agreed that judicial involvement in pre-trial settlement discussions was "likely to improve significantly the prospects for achieving settlement").

163. *See supra* notes 127-30 and accompanying text.

164. It is noteworthy that the evaluation of the Rhode Island Supreme Court settlement program attributed part of the reason for that program's mixed results to the fact that active judges who conducted the settlement conference were not automatically disqualified from hearing the case on the merits and consequently, the settlement judges were reluctant to push for settlement. STEELMAN & GOLDMAN, *supra* note 139, at 43-44, 81.

165. Resnick raises this concern more specifically in the context of judicial pretrial management; she notes that "judicial management may be teaching judges to value these statistics, such as the number of case dispositions, more than they value the quality of their disposition." Resnick, *supra* note 75, at 380.

166. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(8) cmt. (1990). Canon 3(B)(8) provides that a "judge shall dispose of all judicial matters promptly, efficiently and fairly." *Id.* Canon 3(B)(8).

While this concern is valid, it may be exaggerated. A judge who employed undue pressure in the settlement process would quickly gain a reputation which would make most attorneys wary of and resistant to the settlement efforts of that judge and the process, thus sabotaging the judge's effectiveness and goals of the program.¹⁶⁷ The MCA/ED settlement program emphasis on respect for attorneys and cooperation with the bar, evidenced, *inter alia*, by the Settlement Judge's admonition that the first step in the conference procedure is to "make the attorneys comfortable,"¹⁶⁸ by the absence of express sanctions and by the disqualification and confidentiality procedures, indicates that at the very least the MCA/ED design is that the Settlement Judges are more concerned with fair process and good relations with the bar than settlement rates.¹⁶⁹ Moreover, at the trial level, attorneys may fear judicial retribution in other cases if they fail to accede to a judge's pressure to settle in a particular case.¹⁷⁰ Such fears are diminished at the appellate level because there is far less need for contact with and cooperation from the court (e.g., no discovery). Further, because MCA/ED cases are generally decided by decision of the majority of a three-judge panel,¹⁷¹ the odds are that the actual merits of a different appeal will outweigh one judge's possible animosity towards an attorney who refused to settle a previous case in the settlement program.¹⁷² Thus, at the appellate level attorneys who fail to settle should have little fear of retribution in subsequent cases.

Assigning an active judge of the court to manage the settlement program and conduct settlement conferences also prompts efficiency considerations. In the MCA/ED program, the Settlement Judge receives one-half to two-thirds of release

167. See, e.g., BRAZIL, *supra* note 132, at 119. Comments accompanying attorney responses to the question "What makes a judge successful as a settlement facilitator?" include the following representative example: "In my experience the judge who is imperious and threatening is the least effective and inspires the party resisting settlement to resist further. Moreover, in a broader sense, such tactics do not inspire much confidence in the judge or the system." *Id.*

168. See Satz, 1988 Settlement Docket, *supra* note 27, at 3; Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26.

169. See *infra* note 286 and accompanying text (explaining that the MCA/ED program only counts as settled cases which settled as a result of some involvement of the Settlement Judge).

170. See, e.g., Tornquist, *supra* note 139, at 753.

Even if sanctions are not used, judicial coercion may exist. Lawyers know that the judge will make many future decisions regarding the case. Lawyers also know that they may represent clients in other cases before that same judge in the future. Many of the future decisions of the trial judge are within the pure discretion of the court. Even if judges do not exercise their power against lawyers who do not follow their settlement recommendations, the perception of that power remains with attorneys and parties. Therefore, a judge who expresses an opinion about the value of a case, coupled with the suggestion that the parties settle for that figure, wields real and apparent power.

Id.

171. See MO. SUP. CT. R. 84.15.

172. See, e.g., THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS 114 (1978) ("[O]ther than in the ordinary bargaining process described so far, there is no sign on these courts that any judge has enough influence to force another to phrase opinions (or, for that matter, vote) against his will.").

time to run the settlement program.¹⁷³ If the program yields more settled cases annually than a judge would normally handle in one-half to two-thirds of a year it would then seem to be successful. However, a variety of factors make this calculation quite difficult.¹⁷⁴ Moreover, such calculations fail to take account of other intangible benefits of the program such as a settled case will not be retried, attorneys receive the benefit of the judge's evaluation of the case even if it does not settle, and the conference offers the judge and the attorneys a unique opportunity to meet and to interact, which is particularly significant in view of the growing number of practicing attorneys.¹⁷⁵

Employment of retired judges¹⁷⁶ or staff attorneys¹⁷⁷ are the two main¹⁷⁸ "efficient" alternatives to assignment of an active judge¹⁷⁹ to settle cases. A settlement program conducted by someone other than an active judge obviates the need for release time and for disqualification of the judge from hearing the case on the merits. But confidentiality concerns still must be addressed because the settlement program is sponsored by the court, even if an active judge does not mediate the cases.¹⁸⁰

Another asserted benefit of using retired judges or staff attorneys or neutrals which, however, has not been demonstrated, is that attorneys and clients may be more candid in a settlement process which is not conducted by an active judge, and they may be even more candid if the process is conducted by someone who

173. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26; Gaertner Interview, *supra* note 26.

174. Whether a case may have settled without the program and the fact that judges not only write individual opinions but also participate in preparation of opinions of their assigned panel are but two factors which complicate this assessment. See, e.g., NOVAK & SOMERLOT, *supra* note 98, at 193. But see *infra* notes 292-93 and accompanying text.

175. See, e.g., Galanter, *supra* note 11, at 262 (suggesting that one reason for active judicial participation in settlement negotiations is that even in particular locations and in specialized fields, the number of lawyers has grown so that "more of their negotiations are with strangers and create a demand for an honest broker").

176. Jurisdictions whose settlement programs employ primarily retired judges include Connecticut (also employs active judges), Georgia, New Jersey, and Pennsylvania, see IJA SURVEY, *supra* note 71; and the Third Circuit, see Generous & Knocke, *supra* note 69, at 97.

177. Jurisdictions whose settlement programs employ primarily staff attorneys or settlement directors include Ohio (10th District Court of Appeals), see IJA SURVEY, *supra* note 71, Second Circuit, Sixth Circuit, Eighth Circuit, and Ninth Circuit, see Generous & Knocke, *supra* note 69, at 95-101, and Tenth Circuit, Aemmer Interview, *supra* note 90.

178. Other programs are conducted by experienced attorneys, and some, such as the Missouri Court of Appeals, Western District, use active and retired judges. See IJA SURVEY, *supra* note 71. Others, including Kentucky, utilize conference attorneys or active judges, while still others, including South Dakota, use retired judges or members of the bar. See *id.* Texas uses three pro bono attorneys. See *id.*

179. Other programs conducted by active judges include California Courts of Appeal (2d, 3d, 4th, & 5th Districts); Indiana, Maryland, and the Rhode Island Supreme Court. See *id.*

180. For example, there are confidentiality provisions in all of the U.S. Court of Appeals Settlement Programs run by Settlement Director/staff attorneys. Interview with John H. Martin, Settlement Director of the Eighth Circuit Court of Appeals Settlement Program, in St. Louis, Mo. (Jan. 22, 1993) [hereinafter Martin Interview].

is not a judge at all.¹⁸¹ In reality, one suspects that the degree of candor in the settlement conference depends more on the style, personality, and reputation of the mediator than on his or her relationship to the court.¹⁸² The asserted possible benefit of increased candor may be offset by counsel's increased skepticism of the case evaluation offered by someone other than an active judge of the court. As previously noted, attorneys have expressed a preference for judicial involvement in settlement,¹⁸³ which is obviously based upon the judge's status, experience, and expertise. Attorneys may also have more leverage to convince a client to settle if a judge of the court has recommended settlement.¹⁸⁴

Programs employing retired judges to conduct settlement conferences have the advantage of a neutral who, on one hand, has the experience, expertise, and stature of a judge and, who, on the other hand, is not a drain on the resources of the court. However, the possible disadvantages of a retired rather than an active Settlement Judge is that attorneys may perceive active judges as being more in tune with the current thinking of the court than senior judges are and that the reputations of senior judges tend to fade after they retire from the bench. Thus, it may be argued that because of their judicial status and experience, active judges may be more effective mediators in appellate court-annexed settlement programs.

IX. SETTLEMENT CONFERENCE PROCEDURE AND FOLLOW-UP

As previously noted, in the screening process of the MCA/ED, the Settlement Judge reviews the statement of the case on appeal and either the list of issues on appeal or the motion for new trial. Review of this information provides the basis for the selection of the case for the Settlement Docket and the foundation of the Settlement Judge's knowledge of the facts of the case and the issues on appeal at the Settlement Conference.¹⁸⁵

On appeal, the facts of the case are the facts contained in the record.¹⁸⁶ Reversal of the trial court will depend on whether these facts fit the applicable legal rule or the requirements of the legal defense of the case.¹⁸⁷ The applicable standard of review dictates "what an appellate court must find in the record before

181. See, e.g., Kaufman, *supra* note 73 at 760.

182. See, e.g., Satz, 1988 Settlement Docket, *supra* note 27, at 5-6. Judge Satz has suggested that the Settlement Judge should know or be acquainted with most attorneys, and should have (1) a good general knowledge of the law, (2) experience on the bench, and (3) a good reputation with the bar for being fair, discreet, and knowledgeable. *Id.*

183. See *supra* note 162.

184. See, e.g., Note, *supra* note 160, at 1230; see also BRAZIL, *supra* note 132, at 3 (the type of client most likely to reject what his or her lawyer deems to be a fair settlement is also the type of client most likely to be persuaded by a judge's opinion that a settlement is fair).

185. See Satz, 1986 Secrets, *supra* note 27, at 1-2.

186. See, e.g., MARVELL, *supra* note 172, at 157-58.

187. See, e.g., Dennis J.C. Owens, *Initial Considerations: Evaluating a Case for Appeal; Ethical Considerations on Appeal; New Counsel on Appeal?*, in 1 MISSOURI APPELLATE PRACTICE AND EXTRAORDINARY REMEDIES, *supra* note 69, §§ 1.14-15.

it will provide relief to an appellant."¹⁸⁸ In the appellate settlement process, the participants have the advantage of working with fixed facts — an advantage which, aside from some summary judgment matters and stipulations of the parties, cannot exist before trial.

In the MCA/ED, the conduct of the settlement conference will depend upon the personal style of the Settlement Judge.¹⁸⁹ After introductions and general explanation of the process, the Settlement Judge will establish his understanding and appreciation of the issues and his familiarity with the case.¹⁹⁰ Starting with the appellant's attorney, the Settlement Judge may ask each side for an evaluation of the case on appeal, focussing primarily on the three main issues. The Settlement Judge may then provide a "reality check"¹⁹¹ for the attorneys by, *inter alia*, giving his own evaluation of each issue and his reading of how other members of the court would view the issues, projecting the likelihood of either side prevailing on appeal and exploring the reality of "victory on appeal." These assessments should cause the parties to question the validity of their respective positions and promote movement toward settlement.¹⁹² This may be loosely described as a rights-based approach to mediation, the goal of which is to provide the attorneys with the non-binding evaluation of an experienced neutral as to the likely outcome of the case on appeal.¹⁹³

The Settlement Judge may also refer counsel to specific opinions of the court which may affect the outcome of the case.¹⁹⁴ Counsel may be unfamiliar with the cited cases or may be unaware of how the court is likely to interpret and apply the cited case to their appeal. This practice offers the benefit of either moving the parties to settlement or helping counsel shape a theory of the case on appeal.

In the alternative, after explaining the program, the Settlement Judge may proceed by immediately working to develop viable offers of settlement from each

188. *Id.* § 1.16.

189. Whatever the Settlement Judge's style may be, the MCA/ED Settlement Judges generally follow a classical mediation model. In general, the

mediator assists parties in discussing points of difference and agreement, in clarifying interests, in identifying alternative resolutions, and in accepting compromise, leaving to them the decision to accept or reject a settlement. . . . Mediation typically involves several overlapping stages: introduction of the process by the mediator; presentation of viewpoints by each of the parties; expression of emotions by parties; caucusing to discuss confidential information; exploration of alternative resolutions; and forging an agreement, when possible.

ROGERS & MCEWEN, *supra* note 118, at 8; *see also infra* note 211.

190. Satz, 1988 Settlement Docket, *supra* note 27, at 3.

191. *See, e.g.*, Stulberg, *supra* note 149, at 93-94.

192. *See, e.g.*, ROGERS & SALEM, *supra* note 134, at 33.

193. *See, e.g.*, GOLDBERG ET AL., *supra* note 14, at 243-44.

194. Satz Interviews, *supra* note 24; Gaertner Interview, *supra* note 26. The author's study of the MCA/ED Settlement Files also demonstrated this.

side rather than focussing on the merits of the appeal.¹⁹⁵ This may be loosely viewed as a type of an "interest-based" approach to mediation which focuses more on the underlying and practical needs of the parties and on the development of an objective rationale to support an offer.¹⁹⁶ This approach avoids the risk of erroneous predictions of the case outcome which may diminish the credibility of the Settlement Judge.¹⁹⁷ If the judge is able to refrain from outcome prediction, he also does not run the risk of alienating the "losing" attorney or of encouraging that attorney to attempt to convince the judge and the other side that the case is a winner.¹⁹⁸ Thus, that attorney will be less likely to engage in posturing or to become entrenched in a position.

It has been suggested that mediation may only be beneficial in interest-based controversies in which the parties have an ongoing relationship.¹⁹⁹ Thus, for example, a medical malpractice case based upon a question of rights stemming from a single encounter between the parties would be deemed inappropriate for mediation. Statistics from the MCA/ED dictate a contrary conclusion because the program has settled a significant number of, e.g., medical malpractice cases.²⁰⁰ The success of court-annexed mediation at the appellate level in such cases may stem from the fact that the trial court decision provides an objective starting point for settlement negotiations and the fact that after trial or summary judgment the parties share a sufficiently intense interest in avoiding a return to the trial court to motivate them "to collaborate in the mediational effort."²⁰¹

While the "rights-based" and "interest-based" approaches represent two different settlement styles, it must be noted that they are not mutually exclusive. Depending upon the case, the Settlement Judge may engage in rights-based and interest-based tactics to facilitate the settlement process. In developing offers, the Settlement Judge may explore the fact that "winning" the appeal may simply mean that the parties will proceed to trial or to a new trial, whereas settlement

195. Simon Interviews, *supra* note 26. Settlement Director John H. Martin employs a similar approach in the Eighth Circuit settlement program. If in the initial phone calls to the parties he sees little or no "movement" by the parties, he generally will not schedule a conference. John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, 40 J. MO. BAR 251, 252 (1984).

196. See, e.g., GOLDBERG ET AL., *supra* note 14, at 244; John H. Martin & Joseph G. Stewart, *Alternative Dispute Resolution*, in MISSOURI LITIGATION SETTLEMENTS § 15.8 (Missouri Bar Ass'n ed., 1991).

197. One view holds that while case evaluation is appropriate, it is generally inappropriate for a Settlement Judge to engage in outcome predictions.

198. Simon Interviews, *supra* note 26.

199. Nelle, *supra* note 92, at 292-93.

200. In this study of the MCA/ED Settlement Program, there were 22 medical malpractice cases, 10 of which settled; this represents a settlement rate of 45.45 percent.

201. Fuller, *supra* note 97, at 330; see also Martin & Stewart, *supra* note 196, § 15.8 (suggesting that in cases where no ongoing relationship exists, a bargaining relationship may still be established in a suit for damages).

obviously would finally resolve the matter.²⁰² The Settlement Judge also may explore underlying problems such as personal hostility between clients or inability to pay²⁰³ and engage in problem solving.²⁰⁴ In classic *Getting to Yes* style, the judge may attempt to focus counsel on the issues and on the underlying interests so that they may successfully negotiate an acceptable settlement.²⁰⁵

In the process, the Settlement Judge may engage in "caucuses," individual meetings with each side, to move the parties closer to settlement. In the caucus, the individual attorney may be perfectly frank with the Settlement Judge, who will not divulge to the other side any confidences without authorization to do so. Through caucusing, the judge also serves as "translator"²⁰⁶ for the parties in presenting ideas, offers and demands on their behalf.

In private mediation²⁰⁷ and in other appellate settlement programs,²⁰⁸ caucusing is an integral part of facilitating negotiations between the parties because it enables the parties to communicate freely, to the extent of their trust in the mediator, uninhibited by the presence of the other side. This encourages brainstorming to explore various settlement options and also provides an opportunity for the mediator to offer a candid assessment of that party's case. Caucuses further allow the mediator to engage in shuttle diplomacy, carrying and translating offers between the parties.²⁰⁹ It is noteworthy that the ABA Model Code of Judicial Conduct Canon 3(7)(d) specifically provides that judges "may confer separately with the parties and their lawyers in an effort to mediate or settle matters."²¹⁰

202. For example, if the grant of a motion to dismiss or a motion for summary judgment is reversed on appeal, the parties are back to square one. If the trial court sets aside a judgment for plaintiff and the appellate court upholds it, the parties are still back to square one but with a jury's evaluation of the case. Satz, 1988 Settlement Docket, *supra* note 27, at 3.

203. Satz, 1988 Settlement Docket, *supra* note 27, at 3.

204. Cf. Riskin, *supra* note 118, at 1083-85.

205. *Getting to Yes* suggests the following steps to successful negotiation: separate the people from the problem; focus on interests not positions; invent options for mutual gain; insist on using objective criteria; and know your best alternatives to a negotiable agreement. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 21-96 (1983).

206. Stulberg, *supra* note 149, at 92-93.

207. See, e.g., ROGERS & SALEM, *supra* note 134, § 2.04, at 37-38.

208. See, e.g., Martin, *supra* note 195, at 254-55 (Eighth Circuit); Aemmer Interview, *supra* note 90 (Tenth Circuit).

209. See, e.g., Martin & Stewart, *supra* note 196, § 15.8.

210. MODEL CODE OF JUDICIAL CONDUCT Canon 3(7)(d) (1990). Canon 3 provides:

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

....

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the

In the MCA/ED, the amount of caucusing done depends on the individual Settlement Judge.²¹¹ Because active judges conduct the MCA/ED conferences, increased concern exists for fairness and for the appearance of fairness. Although the Settlement Judge is acting as a mediator (and will not participate in deciding the case or otherwise discuss it with the court),²¹² there may still be the perception that a caucus is an *ex parte* meeting with all of the attendant concerns for unfair procedure.

In general, it appears that the MCA/ED mediation conference follows the pattern of a model of private mediation.²¹³ However, caucuses with individual parties and particularly repeated caucuses which appear to be the rule in private mediation are not the norm in MCA/ED mediation. The relative brevity of the MCA/ED settlement conference further suggests that even when there is a caucus with individual attorneys, one of the roles of a private mediator — to be a messenger, interpreter, and facilitator of communication of understandings and sentiments of each side — may, depending upon the judge, be secondary to the role of the judge-mediator as evaluator of issues and of each side's chances of success on appeal. While the MCA/ED program possesses prominent features of "neutral evaluation,"²¹⁴ which are accentuated by the fact that, as a rule, only attorneys directly interact with the Settlement Judge, its basic mediation features should not be underestimated. The author's evaluation is that the MCA/ED settlement conference well fits the broad and varied concept of mediation.²¹⁵

Following the stated purpose of the conference, the Settlement Judge will attempt to obtain an agreement by counsel at the settlement conference.²¹⁶ If this cannot be achieved, the Settlement Judge will try to have the parties develop

judge.

Id.

211. For example, Judge Simon and Judge Gaertner rarely engage(d) in individual caucusing, while Judge Satz routinely caucused with the attorneys.

212. See, e.g., ROGERS & MCEWEN, *supra* note 118, at 9 (mediation caucus does not raise the same ethical problems as an *ex parte* hearing with a judge because a mediator cannot bind the parties).

213. It may again be noted that various descriptions of mediation and various videotapes of mediation suggest that mediation "proceedings" follow similar patterns and that basic mediation techniques are very similar, with the understanding of the importance of the personality of each mediator. Professor Stephen B. Goldberg, who leads the Mediation Research and Education Project, Inc. (MREP), and the author's colleagues, Professors Dunsford and Rohlik, who are members of MREP, have shared with the author some MREP circulars and issues, which demonstrate approaches and concerns similar to those of the MCA/ED Settlement Judges and participants.

214. In a Neutral Evaluation (or Informal Evaluation) process, the parties generally choose a neutral, present their positions to the neutral for his or her evaluation, and then use that evaluation as the basis of further negotiation with or without the assistance of the neutral. See Martin & Stewart, *supra* note 196, § 15.13.

215. Commentators Rogers and Salem have noted that "[t]here is no 'best' way to mediate a dispute" and that while, for example, mediators of collective bargaining disputes will spend considerable time caucusing with the parties, divorce mediators or insurance claims mediators may instead choose to work with the parties together. ROGERS & SALEM, *supra* note 134, § 2.01, at 7.

216. Satz, 1986 Secrets, *supra* note 27, at 4. As previously noted, clients may be present at the courthouse or available by telephone.

offers which may be explored with their clients.²¹⁷ Although the attorneys are supposed to participate in the conference with authority to settle and with their client available for consultation, the MCA/ED Settlement Judges realize that if completely new or unexplored offers develop, more time may reasonably be needed to assess them.²¹⁸

In many cases, the real work of the settlement program begins after the conference. In this phase, the Settlement Judge will "follow up" on cases in which settlement was achieved but not reduced to writing and on cases in which settlement is still a possibility. Within two to three weeks and at similar intervals thereafter, the Settlement Judge calls the attorneys or has the attorneys call him to discuss the progress in writing the agreement or in negotiations.²¹⁹ By this regular contact with counsel, the Settlement Judges continue to work with counsel to achieve settlement and to create deadlines which may motivate the parties to persevere in or to complete the settlement process. The follow-up calls may also be viewed as "telephone caucuses" because they provide an opportunity for the Settlement Judge to explore settlement progress and possibilities with the attorneys individually. Both the deadline and communication functions of the follow-up calls serve to maintain, insofar as possible, the momentum to settle.²²⁰ Only in unusual cases will the MCA/ED Settlement Judge hold follow-up in person conferences.²²¹ This activity expands the private mediation model (although not, e.g., the FMCS model) and arguably improves the chances for settlement. When counsel and the parties have achieved settlement, they dispose of the case by filing either a motion to dismiss or a motion to remand.²²² In further demonstration of the program's design to assist attorneys and facilitate settlement, the Settlement Judge may provide attorneys with appropriate forms to file to dispose of the case.²²³ On an annual basis, the Settlement Judge makes a report to the court of the number of cases settled and the number of conferences held.²²⁴

217. Satz, 1986 Secrets, *supra* note 27, at 4; Simon Interviews, *supra* note 26.

218. Simon Interviews, *supra* note 26.

219. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26.

220. It is noteworthy that Eighth Circuit Settlement Director John H. Martin believes that the momentum to settle is essentially lost once the parties leave the settlement conference without having reached an agreement. Martin Interview, *supra* note 180.

221. Simon Interviews, *supra* note 26. Judge Satz occasionally held follow-up conferences in multi-party cases where the parties were close to settlement. Satz Interviews, *supra* note 24. Judge Gaertner generally held second conferences in cases in which new problems warranting additional mediation arose. Gaertner Interview, *supra* note 26.

222. Satz, 1986 Secrets, *supra* note 27, at 1.

223. Copies of sample forms are on file with the author.

224. Satz Interviews, *supra* note 24.

X. SETTLEMENT PROGRAM PARTICIPANTS

As previously noted, the MCA/ED Settlement Judge conducts the conference with counsel for the parties to the appeal. Clients are invited to be present at the court but not at the conference unless all parties agree to client attendance.²²⁵ If the client does not come to the court, he or she should be available by telephone.²²⁶ The MCA/ED program excludes clients from attending the settlement conference mainly because they are not likely to be as objective and dispassionate as their attorneys, because they lack familiarity with the intricacies of the appellate process,²²⁷ and because counsel may be more guarded in settlement negotiations with their clients present.²²⁸

Perhaps domestic relations matters best exemplify the type of cases in which client participation may be counterproductive to settlement.²²⁹ In other types of cases, the assumption that clients will not contribute to the settlement process because of their emotional involvement in either winning or losing below may be challenged on the ground that the attorneys may have a similar emotional stake in the trial court ruling. While in some instances this may be true, the fact that counsel must understand the appellate process and general considerations of legal professionalism may be an argument for the proposition that the process will be more objective if only attorneys participate. These same factors of appellate knowledge and professionalism may also expedite the settlement conference procedure or, to view it from another perspective, may justify its relatively short scheduled duration. Counsel familiar with the case and the appellate procedure may immediately begin settlement discussions without the need for extended procedural or substantive legal explanations.²³⁰ An efficient settlement

225. Satz Settlement Letter, *supra* note 107; Simon Settlement Letter, *supra* note 107.

226. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26.

227. Satz Interviews, *supra* note 24.

228. Gaertner Interview, *supra* note 26.

229. Domestic relations cases represented 26 percent of the total cases selected for settlement in the cases studied. See *infra* p. 108 (Table I).

In such cases, the clients may be too emotionally invested in the situation and the outcome and unable to remain objective or even rational. Judge Satz observed that he would be reluctant to have divorcing parties participate in a settlement conference even if counsel agreed to client attendance. Satz Interviews, *supra* note 24. Another view is that direct party communication in the settlement process could help them to understand each other better and/or their situation and, thus, to achieve settlement. See Riskin, *supra* note 118, at 1101. For example, Judge Satz has noted that it may be very productive to include parties in the settlement conference in cases of partnership dissolution. Satz Interviews, *supra* note 24.

230. Professor Leonard Riskin, who favors active client participation in judicial settlements, has articulated additional possible reasons for excluding clients from the settlement process including: a fear of damaging disclosures by the client; the fact that the attorneys' role may be reduced or superfluous if the clients settle the matter; that the client's presence poses a threat to the traditional hierarchy of the attorney client relationship; or that the Settlement Judge might prefer the more predictable behavior of attorneys to that of clients who might question or challenge the judge. See Riskin, *supra* note 118, at 1103-05. In response, it must first be noted that these concerns seem to be more applicable to a pre-trial settlement procedure. Second, there is no evidence that these reasons

conference is particularly important to the MCA/ED because the time of an active judge is consumed in the process. Expeditious process is obviously also important to the parties who generally wish to resolve the matter as quickly as possible.

State and federal appellate settlement programs have handled the question of who participates in the process in a number of ways: some, like the MCA/ED, generally exclude clients from the process, unless the parties agree to their attendance;²³¹ some allow clients to attend but not to participate in the process;²³² some urge client attendance;²³³ some require client attendance;²³⁴ and some even provide for the attendance and participation of *non-parties* if they may aid the settlement process.²³⁵

Contrary to the MCA/ED approach, SPIDR has recommended that mandatory settlement programs allow party and attorney participation in the process.²³⁶ The SPIDR Recommendations generally appear to address pre-trial settlement programs. Obviously, if such pretrial settlement programs are mandatory and final, they eliminate the trial if there is in fact a settlement. The MCA/ED program may be distinguished on two grounds: (1) while the process requires attorney participation, it is designed not to be coercive toward settlement; and (2) because this is an appellate program the parties already have some ruling from the trial court. In this context, it must be reemphasized that the goal of the MCA/ED program is to devise a settlement acceptable to the clients. As such, exclusion of the client from the settlement conference does not translate somehow into exclusion of the client from the settlement decision. In light of these distinctions and this program goal, SPIDR's recommendations of client participation in court-sponsored settlement programs may be viewed as less compelling in the context of the MCA/ED program.

Nevertheless, the practical exclusion of clients from the conference by the MCA/ED program (with the exception of all parties agreeing to the contrary) stands in stark contrast to a model of private mediation and to such institutional mediation as that by FMCS. It is suspected that this difference in approach, although explainable by the very nature of the appellate process, may be rooted

led to the exclusion of clients from the MCA/ED settlement program, particularly in view of Judge Simon's statement that he is willing to hold conferences in *pro se* matters.

231. See, e.g., GA. CODE ANN. § 24-3652(III)(6); Evans & Ramage, *supra* note 69, at 5. The Missouri Court of Appeals, Western District, allows attorneys to invite clients to participate. Lowenstein & Martucci, *supra* note 69, § 7.4.

232. See SEIDMAN, *supra* note 69, at 6.

233. Martin Interview, *supra* note 180 and Martin, *supra* note 195, at 258-59 (Eighth Circuit).

234. See, e.g., CAL. CT. APP., 3D DIST., R. 7; CAL. CT. APP., 4TH DIST., R. 4(c); CAL. CT. APP., 5TH DIST., R. 2(g).

235. See, e.g., CAL. CT. APP., 4TH DIST., R. 4(f)(4); CAL. CT. APP., 5TH DIST., R. 2(c). The Tenth Circuit also allows for the attendance and participation of non-parties. Aemmer Interview, *supra* note 90.

236. SPIDR, *supra* note 99, at 43-44. SPIDR recommendation 4 provides, in pertinent part: "Mandatory participation should be used only when a high quality program . . . permits party participation." *Id.* at 43.

in the personal experience of those who design and practice in the particular appellate settlement program. For example, client participation in appellate settlement is strongly recommended by Eighth Circuit Settlement Director, John H. Martin, who believes that client involvement significantly enhances the settlement process by minimizing the posturing of attorneys, by generating additional settlement options, by avoiding the delay of communicating offers, and by educating the client about the process.²³⁷ In sum, Mr. Martin asserts that client participation substantially contributes to building momentum to settle.²³⁸ Mr. Martin's strong views on client involvement reflect his 11 years of experience as Settlement Director, but, in this context, it is still noteworthy that he also has had many years of experience as a labor mediator of the Federal Mediation and Conciliation Service.

Professor Leonard L. Riskin, who is the Director of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law and who is also a mediator, shares this enthusiasm for client participation in court-annexed settlement conferences to the extent that he recommends that Settlement Judges should require client attendance and encourage their full participation in the process.²³⁹ In making this recommendation, Professor Riskin catalogues the possible risks and benefits which may flow from client participation in settlement conferences,²⁴⁰ and he notes that evaluation of the asserted risks and benefits may depend on whether or not the client is viewed as a reasonably intelligent individual capable of standing firm for his or her interests.²⁴¹ He argues that a decision to exclude clients from the settlement may reflect a view of the settlement process grounded upon "a traditional lawyer-client relationship, adversarial negotiation, and coercive intervention by the judicial host,"²⁴² while a decision to include clients may reflect a view of the settlement process based on "a participatory lawyer-client relationship, problem solving negotiation, and facilitative intervention by the judicial host."²⁴³ Professor Riskin believes that the possible benefits of client inclusion outweigh the possible risks, and that clients' interests are best served by allowing them to participate fully in the settlement negotiations.²⁴⁴ Professor Riskin further asserts that in the

237. Martin, *supra* note 195, at 258-59; see also Martin & Stewart, *supra* note 196, §§ 15.16, .19.

238. Martin & Stewart, *supra* note 196, §§ 15.9, .19. It should be noted that the Eighth Circuit Settlement Program is completely voluntary, and the Settlement Director initiates settlement discussions with parties if one of them has indicated an interest in pursuing settlement. Martin, *supra* note 195, at 252.

239. See Riskin, *supra* note 118, at 1106. Professor Riskin asserts that Settlement Judges should "routinely require attendance of represented clients, and representatives of organizational clients with full settlement authority, in the absence of a suitable, and suitably presented objection." *Id.* (footnotes omitted).

240. *Id.* at 1098-1103.

241. *Id.* at 1103.

242. *Id.*

243. *Id.*

244. *Id.* at 1106-07.

conference the Settlement Judges should encourage full client participation and should enhance that participation by focussing on underlying interests, thus providing an opportunity for problem-solving negotiations.²⁴⁵

While the MCA/ED program generally excludes clients from the settlement process, it must be emphasized that the program still offers the opportunity to engage in problem-solving mediation, the noncoercive assistance of the Settlement Judge, and great respect for attorneys and clients. But beyond that it is quite apparent that Professor Riskin's risks and benefits imply societal and social judgments about justice and the dispensation of justice; they are in the sphere of ideas and formulate social goals (e.g., participatory relationships). The correlation between these ideas and the current (perhaps more pedestrian) goals of court-annexed ADR are unclear because the line between "justice" and the "dispensation or administration of justice" is, of course, fluid. On one hand, social or societal goals are implicit in positive law and, as such, are likely to play a role in any process in which the frame of reference is law, i.e., in the resolution of a legal dispute. On the other hand, it is submitted that pursuit of the mediator's own view of social or societal goals (or, in the extreme, his or her own broad ideological goals) is antithetical to the role of a mediator whether in a strictly private or a court-annexed setting. Suffice it to say that this Article is premised on the desirability of non-coercive intervention of the mediator, whether by overt or subtle means. Whenever the mediator follows his or her own agenda and employs means to further that agenda (e.g. through subtle suggestion to the parties), there is a significant deviation from the classical mediation model.

Allowing and encouraging voluntary client participation in settlement conferences must be distinguished from mandating attendance, which raises a host of different concerns,²⁴⁶ including the court's authority to issue such an order,²⁴⁷ and the question of whether it is efficient to require client attendance routinely in settlement conferences.²⁴⁸ While there is conflicting evidence on this point, at least one study has revealed that a majority of attorneys who participated in an appellate settlement program opposed mandatory client participation in the process.²⁴⁹ Expressing concern for courts' mandating client

245. *Id.* at 1108. Professor Riskin distinguishes problem solving negotiations from adversarial negotiations. *See id.* at 1078-81.

246. Full discussion of these concerns is beyond the scope of this Article. *See generally id.*; *Heilman*, 871 F.2d at 651-53 (judge or magistrate may order party/client to settlement conference); *SPIDR*, *supra* note 99 (discussing the report of the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution).

247. *See, e.g., Heilman*, 871 F.2d at 650-55.

248. *See, e.g., Menkel-Meadow*, *supra* note 4, at 21-22; *see also infra* notes 250-51 and accompanying text.

249. *EAGLIN*, *supra* note 73, at 9. "[T]he majority of attorneys [responding to the survey] did not favor changing the program to require client participation in the conferences." *Id.* Similarly, a different study of attorney attitudes toward judicial involvement in settlement revealed that the majority of attorneys responding to the survey did not favor bringing clients to judicially-hosted settlement conferences or judicial use of "client-oriented" settlement techniques, such as, having the judge point out the strengths and weaknesses of the case to the client or personally attempt to persuade the client

attendance at Settlement Conferences, Seventh Circuit Judge Richard Posner has cautioned "that in their zeal to settle cases judges may ignore the value of the other people's time."²⁵⁰ Similarly, Seventh Circuit Judge Frank Easterbrook has asserted that clients should be entitled to designate their attorneys to handle settlement negotiations, so that they may avoid the time and expense of being away from business.²⁵¹ The traditional right to designate an agent indeed seems to provide a cogent argument against *compelling* a client's participation at the settlement conference. The general exclusion of clients from participation in the MCA/ED program may be viewed as comporting with the arguable clients' and explicitly expressed (at least in one study) counsel's preferences by not requiring the clients' attendance at the conference. Attorney and client interests are also served by the MCA/ED program's focus on developing offers which may be acceptable to clients after more detailed explanations by attorneys.

XI. TIMING, PLACE, AND COST OF SETTLEMENT

The MCA/ED initiates the settlement conference procedure early in the appellate process to facilitate settlements and to avoid, as much as possible, costs of transcripts and briefs. To this end, the Settlement Judge screens eligible cases for assignment to the Settlement Docket approximately within one week of the filing of the appeal. The study of MCA/ED cases chosen for settlement demonstrated that conference notices were generally sent within three weeks of the filing of the appeal and that the conferences were generally held within seven weeks of the filing of the appeal.²⁵² There is widespread agreement that more momentum and opportunity exists to settle matters at the earliest possible stage of the case because the parties have invested less in the process and they and their attorneys tend to be less entrenched in their positions.²⁵³ In the MCA/ED,

to accept a settlement. Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 176-77 (1988). A contrary conclusion was reached in Magistrate Brazil's study of litigators' views of the role of federal judges in pretrial settlement. Magistrate Brazil found that 55 percent of attorneys surveyed believed settlement conferences would be more productive if clients were required to attend them. BRAZIL, *supra* note 132, at 102. It is noteworthy that the percentage of Missouri attorneys surveyed who agreed with this proposition was only 42 percent. *Id.* at 103-05. In light of the aforementioned studies and the fact that the clear focus of the questionnaire was pretrial settlement conferences, *id.* at 130-34 (Appendix B) (questions 11-13, 21, 28-49), this study does not dictate the conclusion that mandatory client attendance is preferred or preferable in appellate settlement conferences.

250. *Heilman*, 871 F.2d at 657 (Posner, J., dissenting).

251. *Id.* at 663 (Easterbrook, J., dissenting).

252. *See infra* p. 110 (Table IV), p. 111 (Tables V and VI).

253. Based on this conclusion, the Sixth Circuit Pre-Argument Program will not schedule a settlement conference in cases in which briefs have already been filed because the parties will already be too financially and psychologically invested in the process. EAGLIN, *supra* note 73, at 17-18. Concurring in this conclusion, John Martin has further noted that "[b]riefs seldom persuade opposing counsel and may exacerbate an otherwise cooperative atmosphere." Martin, *supra* note 195, at 257.

depending on the Settlement Judge, transcript preparation will automatically be stopped by the court²⁵⁴ or will be stopped at counsel's request.²⁵⁵

The MCA/ED further encourages participation in the settlement process by suspending the briefing schedule. While it may be argued that a settlement process should operate quickly enough not to interfere with regular case scheduling,²⁵⁶ this is less true at the appellate level where cases proceed to oral argument much faster than lower court cases proceed to trial. Further, if briefs are due, the attorneys are likely to focus on writing them and on devising "winning" arguments for their clients, rather than on settlement possibilities.

As to setting, the vast majority of MCA/ED settlement conferences are conducted in-person in the judge's chambers or, occasionally, in a conference room at the court.²⁵⁷ In some cases, the Settlement Judge has waived attendance at the conference but has required the attorneys to call and consult with the judge by telephone.²⁵⁸ The current Settlement Judge allows some conferences to be conducted over the telephone, and they mainly occur in cases involving out-state attorneys.²⁵⁹ Generally attorneys must request and arrange such telephone conference calls. It is interesting to note that following the successful lead of the Sixth Circuit, the Tenth Circuit has implemented a settlement program that holds conferences almost exclusively by telephone.²⁶⁰ A survey of attorneys in the Sixth Circuit who participated in the settlement program revealed a strong preference for the telephone conference procedure.²⁶¹ While this technique would seem to be particularly convenient for attorneys (and clients) who would not have to leave their offices, attorneys in the Tenth Circuit who practice in the court's locale (Denver) have responded in questionnaires that they would prefer an in-person conference.²⁶² On one hand the telephone conference may be sufficient to provide clues of the thinking of the settlement judge or attorney and so to provide the final "push" for settlement. But it is doubted overall that it can be as effective as face-to-face discussion between the parties or their attorneys and the mediator. The telephone conference method certainly does not draw upon the methods of mediation which precede court-annexed ADR and which rely heavily upon interaction among participants.

254. Satz Settlement Letter, *supra* note 107; Gaertner Interview, *supra* note 26.

255. Simon Settlement Letter, *supra* note 107; *see also* EAGLIN, *supra* note 73, at 19 (stating that the Sixth Circuit Pre-Argument Program extends the briefing schedule for cases which have settlement possibilities after the conference if the parties do not object).

256. *See, e.g.*, Folberg et al., *supra* note 10, at 396-97. This assertion that participation in ADR should not affect other court time tables is directed more to pretrial settlement efforts in California courts.

257. Satz Interviews, *supra* note 24; Simon Interviews, *supra* note 26.

258. *See* author's notes on Judge Satz and Judge Gaertner's settlement files (on file with the author).

259. Simon Interviews, *supra* note 26. "Out-state" attorneys are those who practice in counties outside the immediate vicinity of St. Louis, where the court is located.

260. Aemmer Interview, *supra* note 90; *see also* EAGLIN, *supra* note 73, at 21.

261. EAGLIN, *supra* note 73, at 9.

262. Aemmer Interview, *supra* note 90.

In line with SPIDR's recommendations, the cost of the settlement process is the same as for the appellate process.²⁶³ No additional charges are assessed so that, in essence, the only cost of the settlement program is the attorney's time preparing for and participating in the settlement conference and follow-up process. Arguably, participation in the program yields a benefit (rather than a cost) even if the case does not settle because the attorneys gain some insight into their case or into the court from the settlement discussions with an active judge of the court.²⁶⁴ Moreover, participation in the settlement conference program may contribute to settlement between the parties outside of the program.²⁶⁵ The program is completely administered by the court, thus giving the court full control of the process.²⁶⁶

XII. FAIR PROCESS

Fairness in mediation has come to be defined as a process which preserves the parties' choice to settle.²⁶⁷ Whether a mediation process satisfies this definition of fairness may be determined by evaluation of its procedures (i.e., the safeguards discussed above which include the essential features of this process as a voluntary one with no coercive authority of the judge) and of the results.²⁶⁸

The safeguards of the integrity of the MCA/ED Settlement Program provide the answer to a variety of concerns for fairness in mediation in general and in mandatory, court-annexed settlement programs in particular. The MCA/ED process preserves the parties' choice to settle by mandating mediation, a process which does not impose a resolution on the parties, e.g., as a binding arbitration decision would. The program requirement that attorneys attend the settlement conference eliminates concerns that the Settlement Judge may intimidate one or both parties into settlement and obviously assures that the parties' interests are adequately represented in the settlement process by their professional

263. SPIDR, *supra* note 99, at 42-43.

264. ROGERS & MCEWEN, *supra* note 118, at 24. Also, in a survey conducted regarding the Sixth Circuit Pre-Argument conference program, a majority of attorneys responded that participation in the program resulted in a net savings in the time expended on submitted appeals. See EAGLIN, *supra* note 73, at 39, 57 (Table 17).

265. This conclusion may be drawn from the fact that 72 of the MCA/ED cases studied were not counted as settled by the program but eventually were voluntarily dismissed by the parties. See *infra* p. 109 (Table II).

266. Only one appellate settlement program was found to be administered outside the court itself: the Texas Court of Appeals, 1st Judicial Circuit, Settlement program is co-administered by the Houston Bar Association. See Evans & Ramage, *supra* note 69, at 5.

267. See, e.g., ROGERS AND MCEWEN, *supra* note 118, at 234 ("With some exceptions, the evolving definition of 'fairness' in mediation is the preservation of choice by the parties."); see also, e.g., Menkel-Meadow, *supra* note 4, at 44 (mediation should be evaluated "by whether the process is conducted sensitively or 'coercively'"); Note, *supra* note 99, at 1098 (equating fairness with lack of coercion to settle).

268. See, e.g., Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 348.

representatives. Disqualification of the Settlement Judge from subsequently participating in resolving the case on the merits, confidentiality provisions, and the absence of sanctions or costs are procedures which further assure the attorneys and the parties that they are free to settle the matter or to pursue a full appeal with no fear of prejudice to the case. Moreover, so long as sufficient procedures exist to avoid coercion by the Settlement Judge, as they do in the MCA/ED, a settlement process conducted by a judge supplies a public policy orientation of a judge as a judge which some claim to be missing from private mediation.²⁶⁹

The additional concern that the process will settle cases somehow intrinsically better resolved by full appellate review is alleviated by the categorical exclusion of some such cases (e.g., criminal and juvenile cases) and by the selection of other cases for the program by an experienced judge of the court who may screen out cases which are inappropriate for mediation.

In addition to the public interest aspect, all private settlement procedures are also subject to the criticism that the process lacks judicial procedures designed to rectify possible imbalances of power between the parties.²⁷⁰ To the extent that the MCA/ED program safeguards and, indeed, promotes the consensual nature of settlement, it may be open to these criticisms. However, this concern is alleviated by the fact that the parties have already had a day in court, that they are represented by attorneys, and that the MCA/ED mediator is an active judge of the court who has expert knowledge and experience in resolution of appellate disputes and who is committed to devising a fair settlement acceptable to the parties.²⁷¹ Of course, the mere existence of imbalance of power between parties should not dictate the conclusion that any settlement reached between them is automatically unfair.²⁷² This criticism of private settlement also suffers from the obvious fact that power imbalances exist and may be outcome-determinative in trial and appellate proceedings as well.²⁷³

There is also a general concern that private settlement processes will ignore or improperly burden unrepresented third parties.²⁷⁴ The MCA/ED screening procedure may eliminate this concern by removing these cases from the procedure.²⁷⁵ But even if cases implicating third party interests reach the

269. For example, D.C. Circuit Judge Harry T. Edwards has noted that in court-annexed ADR programs, "there is little likelihood that we will see the creation or development of public law by private parties." Edwards, *supra* note 98, at 675.

270. See, e.g., Fiss, *supra* note 3, at 1076-78.

271. For example, Judge Simon stated that if the attorneys were to propose a settlement which struck him as unconscionable, he would advise them of his concern. However, Judge Simon noted that he has never had such a problem. Simon Interviews, *supra* note 26.

272. The contract doctrine of unconscionability requires consideration of the substantive fairness of the agreement as well as the inequality of bargaining power between the bargaining parties. See EDWARD A. FARNSWORTH, CONTRACTS § 4.28 (2d ed. 1990).

273. Fiss admits this to a degree. See Fiss, *supra* note 3, at 1077-78; see also Kaufman, *supra* note 101, at 28.

274. See, e.g., Kaufman, *supra* note 101, at 30.

275. For example, the Settlement Judges routinely screen out zoning cases which implicate third party interests.

settlement program, the oversight of the process by the Settlement Judge certainly offers more possibility of consideration and protection of unrepresented third parties than a completely private settlement might.²⁷⁶

The argument that private settlement processes harbor great potential for unfair procedure and outcome because they produce final, unreviewable results is far less compelling in a court-annexed settlement program like the MCA/ED, which supplies an active judge to mediate between attorneys representing parties who have already had a day in court.²⁷⁷ Professor Resnick recognized the significance of the distinction between pretrial and appellate settlement programs and expressed more confidence in the fairness of judicially mandated appellate settlement procedures because, at that level, there are likely to be fewer issues, the process is more straight-forward and predictable, and the roles of the players in the appellate process (i.e., judges, attorneys, and parties) are clearly defined.²⁷⁸ Again, as has been noted, one may assert that active appellate judges are, by the nature of their daily work, constantly mindful of public policy and interest.

Questions as to whether the MCA/ED process produces fair outcomes are more difficult to answer because the settlement results are not made public and are not recorded in the court's settlement files. Even if the results were available, their fairness would be hard to evaluate because, depending on one's point of view, either there is no standard or there are too many standards by which to measure the fairness of settlement outcomes. For example, some commentators argue that fair results must be measured against the likely outcome of a judicial proceeding.²⁷⁹ If the attorneys and the MCA/ED Settlement Judge take a strictly rights-based approach to the process, they may meet this standard. But to measure the fairness of mediated settlements only by likely judicial results ignores a great possible benefit of mediation — the opportunity to fashion a settlement out of a variety of interests (personal, community, etc.) which are ignored in rights-based judicial processes.²⁸⁰ The MCA/ED program offers the opportunity to reach settlement based only on legal rights or to broaden the negotiations to include other interests. On this point of fair outcomes, the only conclusion which may be drawn is that the MCA/ED program produces results

276. See, e.g., Edwards *supra* note 98, at 675; Kaufman, *supra* note 101, at 30-31.

277. See, e.g., Resnick, *supra* note 75, at 380 (raising concern for lack of procedural safeguards and the quality of results of judicial pretrial settlement); *id.* at 418-19 (distinguishing appellate settlement procedures).

278. *Id.*

279. See, e.g., Maute, *supra* note 268, at 366 (suggesting that the fairness of a mediated agreement should be judged by whether it "approximate[s] or improve[s] upon the probable outcome of litigation").

280. See, e.g., ROGERS & MCEWEN, *supra* note 118, at 236-37 (measuring fairness in mediation by assessing whether the same result would be achieved if court devalues settlement based on other values). Noting that many settlement conference commentators assume that the results of litigation are just and therefore call for a similar result in settlement, Professor Riskin asserts that the Settlement Judge may also and perhaps more productively focus parties on their underlying interests and broaden the dispute beyond narrow legal and factual issues. Riskin, *supra* note 118, at 1081-85.

"acceptable" to the parties who are free to reject any settlement and to obtain full appellate resolution of the dispute.

In view of the fact that the parties' representatives bargain with the assistance of an active judge of the court and that the Settlement Judges and the program are committed to offering a fair dispute resolution procedure and achieving results acceptable to the parties, it may be concluded that the MCA/ED program provides a fair alternative both to full appellate review and to purely private negotiations or mediation.

XIII. REVIEW OF MCA/ED SETTLEMENT DATA AND FINDINGS

In preparing this Article, the author collected available information from 1,350 cases selected for and processed in the settlement program in order to evaluate how the program works in fact. From the data collected, the author primarily sought to determine whether the MCA/ED Settlement Program was achieving its stated goal of settling cases. The data were also reviewed to determine which types of cases were likely to be chosen for the settlement program, which cases, of those so chosen, were most likely to settle, and the length of time which the settlement process took.

Information and statistics in the following tables were drawn from the 1,350 cases selected for and processed in the Settlement Program from June 1983 through June 1989.²⁸¹ Due to incomplete information, cases on the settlement docket from September 1986 through December 1986 were excluded from the study.²⁸² Data concerning these 1,350 cases were collected from the court's docket sheets and from the separately maintained settlement files and settlement notebooks of the two judges who served as Settlement Judge for this period.²⁸³ The judges retained these files and notebooks for the sole purpose of having data

281. The settlement files reviewed were those of Judge Satz, who was the Settlement Judge during the studied period from May 1983 through August 1986, and Judge Gaertner who served as Settlement Judge from September 1986 through June 1989. It should be noted that during this time period the judges actually selected more than 1,350 cases for the program. The author found approximately 166 such cases which were not counted in this study because, for various reasons, these cases did not go through the settlement procedure. The reasons for this "deselection" of cases ranged from the fact that the parties had already settled or decided not to pursue the matter to situations in which the parties convinced the judge that the matter could not be settled. Over the six years studied (minus the four-month lapse in available data in 1986, *see* text accompanying note 282), this figure reflects two or three cases per month selected but not processed in the program.

Eighth Circuit Settlement Director John H. Martin engages in a somewhat similar "deselection" of cases. If, at the outset, counsel tell Martin that they are working on settling the case and will call him if they fail to settle, Martin encourages counsel to continue their negotiations and not to consider using the program. Martin thus effectively excludes these cases from the program on the theory that counsel will either achieve settlement on their own or reach a complete impasse. Martin Interview, *supra* note 85.

282. Only 3 cases were counted during this time period. In addition, 20 other cases conferred between July 1987 and June 1989 were excluded from the study due to incomplete information as to the case outcome.

283. The Settlement Judges during that time were Judge Satz and Judge Gaertner.

for a study of the program. It is noteworthy that these settlement files and notebooks were maintained in the judges' offices and were physically separate from the court's regular active docket files. After the data was collected, the cases were categorized and the number of days between significant events was calculated and all data was computerized to generate the following information and charts.²⁸⁴

In general, the Settlement File for a case contained copies of the notice on appeal, a statement of the case, a list of issues on appeal or the motion for a new trial, as well as copies of the correspondence concerning the settlement program including letters notifying counsel that the case had been selected for a settlement conference, advising the court reporter to stop (or to resume) transcript preparation, advising counsel that the case was being returned to the active docket and specifying a new due date for the transcript, legal file or briefs, or thanking counsel for settling the case. The Settlement Judge's notebooks were maintained in order of settlement conference date on notebook sheets which listed, *inter alia*, the case caption and docket number, the judge's impressions and description of follow-up work, and whether the case had settled or not.²⁸⁵ Each judge also maintained a separate listing of settled cases with cases listed according to the month in which the case actually settled.

As previously noted, the Settlement Judges make an annual report to the court of the number of conferences held and the number of cases settled. It must be emphasized that the Settlement Judges only counted as settled cases which settled as a result of the program. The settlement count included settled cases in which attorneys personally attended settlement conferences as well as cases settled by telephone consultation, and excluded cases which ultimately were redocketed.²⁸⁶

Review of the settlement files and the judges' settlement notes generally yielded the following information: the type of case (if discernable), the date the appeal was filed, the date on which the settlement notice letter was sent to counsel, the date on which the settlement conference was held, the date the case was returned to the active docket based upon the date on which the transcript, legal file or briefs were due, and/or the approximate date of settlement. It must be emphasized that the settlement files and the Settlement Judges' notebooks and monthly listings provided the only information as to which cases settled in the program.

Subsequent review of the court's regular docket sheets for each of these cases confirmed the filing date of the appeal, and often confirmed or described the case type. The final disposition of unsettled cases and the disposition date for all cases were also taken from the court's docket sheets. The final dispositions

284. Obviously the author does not claim true statistical significance of the collected data because there was no control group. The data thus merely provide a factual analysis of the program.

285. The notebook sheets also listed the attorneys of record and their telephone numbers. *See, e.g.,* Satz, 1986 Secrets, *supra* note 27, at 3.

286. *See, e.g.,* Satz, 1986 Secrets, *supra* note 27, at 6.

of the cases were categorized as follows: settled by the MCA/ED program, disposed of by judicial opinion, transferred to the Missouri Supreme Court,²⁸⁷ voluntarily dismissed by the parties, remanded to the trial court, or dismissed for procedural default on motion either of the court or of a party. For purposes of this study, a case was counted as settled on the date the court granted whatever motion the parties filed to dismiss the matter (e.g., voluntary dismissal, remand, procedural default, etc). If a case was transferred to the Missouri Supreme Court, the date that the transfer was granted was listed as the date of disposition. For all other dispositions — by opinion, by voluntary dismissal, by remand, by procedural default on motion of the court or of a party — the date of the court's mandate indicating that all activity in the case had ceased was listed as the disposition date.

The cases reviewed were classified by case type. When neither the settlement file nor the docket sheet indicated the case type, the actual opinion was consulted for this information. If no opinion existed, the case type was listed as "none." Cases were assigned to one of the following six categories: Administrative, Contract, Domestic Relations, Property, Tort, and Other, which includes all other types of cases as well as cases for which case type information could not be found.

After all of the data were collected for the study and the preliminary charts and statistics were generated, the overall settlement rate was lower than expected. This prompted a review of some of the data to insure an accurate count of settled cases. A comparison of the monthly listing of settled cases with the Settlement Judge's notes disclosed that the notation of "settled" or "not settled" on the notebook sheets which had been used to determine which cases were settled was not always accurate and that a number of cases listed as "not settled," had in fact, settled. In a number of cases, it appears that the Settlement Judge concluded that the case would not settle and marked it as such on the notebook sheet. When counsel actually did settle these cases, they were counted as settled on the monthly listing of settled cases but the notebook entry was not changed. The discrepancy was not discovered initially because it often was not clear from the notebook entry *when* the case settled (actual disposition dates were collected subsequently from the court's docket sheets) so that a cross check of the monthly case settlement listings was not feasible. The problem was corrected by properly reclassifying the cases in question as settled, changing the disposition date from the mandate date to the date on which the "settlement" motion was granted and recomputing the number of days from filing to settlement. It must be emphasized that this problem did not affect the accuracy of the collection of any other data (such as the time from filing to notice of settlement conference).

287. In all but "truly exceptional cases," the Missouri Supreme Court transfers to itself cases *after* the court of appeals hands down an opinion. Dennis J.C. Owens, *Rehearings, Transfers and Certiorari — Missouri and Federal*, in 2 Missouri APPELLATE PRACTICE AND EXTRAORDINARY REMEDIES, *supra* note 69, § 9.9.

The information derived from the study is illustrated by the following Tables which are reprinted at the end of the text. **Table I** demonstrates that 28 percent of the cases on the Settlement docket were tort cases, that 26 percent of the cases were domestic relations cases, and that 23.6 percent of the cases were contract cases.

Table II demonstrates that the Settlement Program settled a total of 554 cases for a settlement rate of 41 percent. The number and percentage of cases settled demonstrates that the MCA/ED is successfully achieving settlements. The settlement rate may also be viewed as evidence that settlements achieved in the MCA/ED program are voluntary, even though attendance is mandatory. The settlement number and rates are a precise reflection of the program's effect because only those cases actually settled within the program were counted as settled. Some appellate settlement programs count as settled any case which is not disposed of by a judicial opinion.²⁸⁸ If the MCA/ED figures were so adjusted, the program could boast of a 54.6 percent rate of settlement.²⁸⁹ It must be noted that the MCA/ED Settlement Conference and follow-up, in fact, may have led to or at least contributed to the number of voluntary dismissals, remands and cases dismissed by procedural default, but when the Settlement Judge finally removed these cases from the Settlement Docket and returned them to the active docket, they were no longer counted as settled by the program.²⁹⁰

As to the settlement rate by type of case, it is noteworthy that tort cases had a higher than average settlement rate of 45.2 percent (4.2 points above the average), while domestic relations cases settled at a rate slightly below the average, 38.2 percent, and the contract case settlement rate of 36.1 percent was 4.9 points below the average. The higher-than-average settlement rates of administrative and property cases are not significant because each category represented such a small number and percentage of cases.

Table III demonstrates that the cases which settled did so quickly — in an average of 130 days, or approximately four months. Within case-type categories, there were some, but not great, differences in the average settlement times. On average, contract cases settled 19 days under the average and tort cases settled six days under the average, while domestic relations cases took 13 days over the average time to settle.

The MCA/ED Settlement Conference program also processed cases on the Settlement Docket in a timely fashion. On the average, settlement notices setting the case for conference were mailed within 19 days of the filing of the appeal (**Table IV**). This is particularly impressive because it means that the Settlement Judge was able to screen all of the eligible cases filed and to dispatch notice of

288. See, e.g., EAGLIN, *supra* note 73, at 27.

289. Compare this figure to the percentage of cases studied which were disposed by opinion — 45.4 percent. See *infra* p. 109 (Table II).

290. The author has anecdotal evidence from an attorney who went through the MCA/ED settlement program and recalled that the case eventually settled but not until long after the settlement conference. The author checked the settlement file of the case and found that the Settlement Judge had returned the case to the court's active docket and had not counted the case as settled.

the conference to the parties in less than three weeks. The data further indicate that the Settlement Conferences were held promptly thereafter — on average, within 26 days of the Settlement Notice (Table V). Thus, if it could be clearly determined at the Settlement Conference that a case had no chance of settling, the case could be returned to the regular docket with the parties having lost, on average, only 44 days (Table VI).²⁹¹ In view of the fact that the program offers 41 percent of the cases selected the opportunity to completely resolve the dispute in approximately four months, the average 44-day delay for cases which do not settle does not seem burdensome.

Table VII lists the average number of days elapsed from the filing of appeals which did not settle to the date the case was returned to the active docket, which was drawn from the due date of either the legal file, transcript, or briefs. These data indicate that it took approximately 64 days for these cases to be returned to the regular appellate process. This figure reflects the additional time which elapsed after conference during which it appeared that the matter still had settlement possibilities.

If this time (64 days) from filing to return to the active docket is deducted from the average time in which settlement program cases were disposed of by opinion (396 days — Table VIII), the average time for case resolution by opinion is 332 days. Even if this figure is somewhat inflated, it still may be inferred that a party may wait as long as ten months for an opinion resolving a case to be issued. By comparison, the Settlement Program offers the opportunity to resolve a case in less than half that time (130 days).

The following comparison demonstrates the success of the MCA/ED Settlement Program from the court's perspective. For fiscal years 1983 through 1989, the average number of appeals disposed of per judge per year was 92.8 in the MCA/ED.²⁹² For the period studied herein, the settlement judges settled an average of 97.8 cases annually in only two-thirds to one-half of their time.²⁹³

291. The discrepancy between the average of 44 days and the total of the filed-to-notice and notice-to-conference averages (45 days) reflects the fact that in some cases the only information available was the time from filing to conference. It should also be noted that in Tables IV, V, and VI the minimum, maximum, average, and deviation figures are based upon the cases for which this information was available (and it was available in most cases).

292. This figure was reached by dividing the total number of civil and criminal appeals in the MCA/ED disposed of in fiscal years 1983-1989 (9090) by seven for the seven fiscal years thus represented and dividing that subtotal by 14, the constant number of judges on the MCA/ED for this time period. See MISSOURI JUDICIAL REPORT 1983, *supra* note 68, at 41 (Table 35); MISSOURI JUDICIAL REPORT 1984, *supra* note 68, at 31 (Table 27); OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1985, at 35 (Table 33); OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1986, at 35 (Table 32); OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1987, at 5 (Table 7); OFFICE OF STATE COURTS ADMINISTRATOR, STATE OF MISSOURI, MISSOURI JUDICIAL REPORT 1988, at 50 (Table 11); MISSOURI JUDICIAL REPORT 1989, at 28 (Table 12).

293. This figure was reached by dividing the total number of cases settled (554; Table II, *infra* page 108) by 68 months (June 1983 through June 1989 minus September 1986 through December 1986) and multiplying that monthly figure by 12 for an annual rate.

In sum, the statistics show the efficiency and success of the MCA/ED settlement program from the point of view of the parties and the court.

XIV. PROPOSAL OF A NATIONAL REPORTING SYSTEM

In light of the national push for various forms of court-annexed ADR, it is important to establish some measure of the efficiency of these programs. Currently, there are at least 19 active²⁹⁴ appellate settlement programs in intermediate appellate courts in 12 states.²⁹⁵ In addition, the majority of federal appellate courts have instituted or are contemplating institution of settlement programs.²⁹⁶ At least a part of the value of these programs could be demonstrated by establishment of a national reporting system of cases settled by each of these appellate programs.

The suggested approach for such a national reporting system would involve creation of a national definition of "settlement" by the court-annexed programs and maintenance²⁹⁷ of a current profile of each court's program including: identification of who conducts the settlement conference (e.g., an active judge, a retired judge, a staff attorney); the number of such mediators (e.g., one full-time; two half-time etc.); and the case-selection procedure (e.g., random, all, all civil, categorical exclusions, screened and by whom). This information would establish a basis for comparisons and distinctions between programs. Each court would then be requested to furnish on an annual basis: the total number of cases settled by the program and a breakdown of the settled cases by broad categories such as contract, tort, property, domestic relations, administrative, etc. No additional information should be requested or maintained²⁹⁸ because it would be too intrusive on the mediation process and could prompt the settlement facilitators to become too concerned with the number or percentage of settlements, particularly in comparison with other programs. Comparisons of the number of

294. A 1989 survey by the Institute of Judicial Administration lists 15 programs which are now inactive. See IJA SURVEY, *supra* note 71. Since that survey, the program in the Florida Court of Appeals, 4th District, has been abandoned.

295. See *supra* note 17.

296. See *supra* note 17. The Fourth Circuit and Seventh Circuit are considering implementing settlement programs. Telephone Interview with John Martin, Settlement Director of the Eight Circuit Court of Appeals Settlement Program (Jan. 22, 1993).

297. Ideally this information would be collected and published by the National Center for State Courts for state court programs and by the Administrative Office of U.S. Courts for federal appellate programs. The author's research revealed that this information is not currently being collected.

298. By contrast, MREP requires mediators to submit a fairly detailed report of the mediation process including information as to whether the mediator made a prediction to either party as to the likely outcome if the grievance had been arbitrated and, if so, what was the mediator's prediction and what was the basis of the prediction. MREP mediators also report, *inter alia*, the length of time of the mediation session, whether the grievant was present, whether the mediator held any caucuses and whether the mediator encouraged compromise as a method to settle the grievance. See Mediation Research and Education Project, Inc. Reporting Requirements (on file with the author). Obviously such detailed reporting requirements are appropriate for evaluation of specific individual programs.

cases settled with the total number of cases filed, the total number of civil cases filed, or the number of opinions written could then be drawn to assist in general evaluation of the settlement programs.

XV. CONCLUSION

Law which includes rules governing administration of justice evolves, more or less, in step with the evolution of society. It cannot be doubted that changes in law and, with respect to the subject under consideration, changes in the administration of justice are accomplished by gradual modification of and additions to the existing body of rules, by reliance on tradition and experience, by integrating the new into the whole existing system. Court-annexed ADR is a simple and predictable response to the increased use of litigation to resolve disputes and to solve societal problems. It builds on proven and traditional methods of extra-judicial settlement; it reflects the fact that parties frequently settle their differences even after they resorted to court and commenced litigation. At the same time, court-annexed ADR alleviates the need for a vast amount of new judges or for new, specialized tribunals, that is, for a wholesale change in the existing system and tradition. ADR and court-annexed ADR are simply given facts. Court-annexed ADR has withstood the test of a sufficiently long time and its existence has not generated any opposition from the public. Any theoretical attacks on the very existence of court-annexed ADR miss the point that it is a given fact. Such attacks also miss the point that perceptions of public interest and public policy by courts change and that, for instance, courts do not follow a straight line toward greater regulation or expansion of rights along the lines of once stated goals. The Senate Judiciary Committee hearings on several Reagan-Bush appointees to the Supreme Court, and a variety of judge-made law modifying previous precedents are a reminder that once existing rights may be modified by a court action as well as by a private settlement.

In the current developmental stage of court-annexed ADR, it is quite clear that different forms of ADR are used, including those that fit only the very broad notion of ADR, such as small claims courts. However, when the ADR form used is one which results in a private settlement which is final in the sense that it is enforceable as such, the analysis of that form must follow a two-pronged inquiry. One inquiry is whether the chosen form of the court-annexed ADR is what it is meant to be. In the case of court-annexed mediation, the question is whether it is a process leading to a consensual settlement or whether it is an unstated process of coercion which would deprive the parties either of the right to have a day in court or of the right to dispose freely of their dispute by other means. The other inquiry is whether the court annexed mediation satisfies the stated purpose, i.e., whether it is efficient and results in a fair number of settlements.

The MCA/ED Settlement Program is unquestionably a consensual process which follows a private mediation model in its techniques and in substance, and which is free of coercion. It does not compromise the right of parties to proceed with the appeal or to settle the appeal as they wish. It is indeed nothing more and

nothing less than mediation, albeit with prominent features of "neutral-expert evaluation." The mandatory aspect of the process — its instigation by the court — does not in its effects differ appreciably from proven mandatory resorts to mediation based on a clause in a contract, or on an institutional initiation of mediation by FMCS based upon the expiration of a collective bargaining agreement. The Settlement Judge's interventions in the process are free of sanctions and do not differ from interventions by private or institutional mediators. To the extent that one may seek to uncover various subtle forms of authority in the judge's initiation of the process or interventions during the process, the wide use of the process, and the increasing familiarity of the bar with the process which functions as it is supposed to function, should eliminate any fears in this respect.

The practical exclusion of clients from participation in the MCA/ED Settlement Process represents a rational component of the MCA/ED program design. It is clear that, in general, client presence during and participation in mediation can substantially contribute to building consensus and achieving settlement. But the MCA/ED experience demonstrates that, at least at the appellate level, the exclusion of clients does not detract from success in the settlement process in part because on appeal the issues are likely to be better defined and to involve more technical legal questions than at the pre-trial stage. Consequently, issues presented may be addressed more expeditiously by the attorney representatives and the Settlement Judge, whose time is a precious commodity. Thus, in the appellate process which deals mostly with issues of law, the attorneys are in fact in a similar position with respect to familiarity with the client's interests and thinking as, for example, middle level managers would be in a typical interest mediation designed to reach a bargain quite different from a bargain about already developed isolated legal issues.

The settlement rate proves the efficiency of the process and accommodates the basic purpose formulated by the court and by the national discussion on court-annexed ADR and is a measure of the objective and significant success of the program. From the point of view of the parties, and their attorneys, the MCA/ED Settlement Program appears to satisfy all the virtues of private ADR, and may also promote clients' interests vis-a-vis their attorneys as mentioned above. In addition, it must be noted that the legal profession has grown dramatically and no longer is the small, closely knit community that it once was. By providing attorneys the opportunity to interact and negotiate with the assistance of a judge in a situation in which the attorneys are not manifestly subordinate to the judge and by emphasizing a truly voluntary consensual agreement, the MCA/ED Settlement Program may be viewed as offering a humanizing element to the administration of justice.²⁹⁹

The MCA/ED Settlement Program is a successful program which does not compromise the public interest or the traditional dispensation of justice by the courts or the freedom of parties to resolve their disputes as they wish.

299. Cf. Galanter, *supra* note 11.

TABLE I

CASES BY TYPE	NUMBER	%
Administrative	19	1.4
Contract	319	23.6
Domestic Relations	351	26.0
Property	108	8.0
Tort	378	28.0
Other	175	13.0
TOTAL	1350	100

	Admin	%	Contract	%	Dom.Rel	%	Property	%	Tort	%	Other	%	Total	%
Total Cases	19		319		351		108		378		175		1350	
Settled Cases	10	52.6	115	36.1	134	38.2	49	45.4	171	45.2	75	42.9	554	41.0
Opinions	8	42.1	159	49.8	167	47.6	49	45.4	157	41.5	73	41.7	613	45.4
Voluntary Dismissals	0	0.0	21	6.6	18	5.1	3	2.8	19	5.0	11	6.3	72	5.3
Transferred to Sup. Ct.	0	0.0	6	1.9	2	0.6	2	1.9	13	3.4	7	4.0	30	2.2
Proc. Def. Ct.*	0	0.0	16	5.0	25	7.1	4	3.7	16	4.2	6	3.4	67	5.0
Proc Def. Pty.**	0	0.0	0	0.0	4	1.1	1	0.9	1	0.3	3	1.7	9	0.7
Remand	1	5.3	2	0.6	1	0.3	0	0.0	1	0.3	0	0.0	5	0.4

TABLE II

* Dismissed for procedural defect by motion of the court.
 ** Dismissed for procedural defect by motion of a party.

TABLE III
Time To Settle By Case Type

	Cases	Minimum	Maximum	Average	Deviation
Administrative	10	27	175	84	47
Contract	115	8	456	111	70
Domestic Relations	134	16	663	143	102
Property	49	15	339	134	79
Tort	171	10	407	124	80
Other	75	9	441	155	85
All Cases as a group	554	8	663	130	86

TABLE IV
Filed to Settle Notice in Days

	Cases	Minimum	Maximum	Average	Deviation
Administrative	19	5	154	23	34
Contract	319	1	342	17	27
Domestic Relations	351	2	524	21	42
Property	108	1	222	21	33
Tort	378	1	261	15	23
Other	175	1	217	22	35
All Cases as a group	1350	1	524	19	32

TABLE V
Settle Notice to Conference in Days

	Cases	Minimum	Maximum	Average	Deviation
Administrative	19	9	38	22	11
Contract	319	1	185	23	18
Domestic Relations	351	1	262	28	26
Property	108	7	137	25	19
Tort	378	2	214	25	18
Other	175	1	123	28	18
All cases as a group	1350	1	262	26	20

TABLE VI
Filed to Conference in Days

	Cases	Minimum	Maximum	Average	Deviation
Administrative	19	16	173	47	37
Contract	319	7	366	40	33
Domestic Relations	351	8	588	48	49
Property	108	16	254	47	40
Tort	378	10	321	40	33
Other	175	1	269	50	39
All cases as a group	1350	1	588	44	39

TABLE VII
 Filed to Transcript, Legal File, or Brief Due in Days

	Cases*	Minimum	Maximum	Average	Deviation
Administrative	8	42	87	55	13
Contract	190	7	399	65	38
Domestic Relations	203	4	249	66	32
Property	57	11	237	65	36
Tort	195	15	160	61	22
Other	95	10	162	63	28
All cases as a group	748	4	399	64	31

* Excludes cases which settled or which lacked this information.

TABLE VIII
 Time to Opinion By Case Type

	Cases	Minimum	Maximum	Average	Deviation
Administrative	8	165	371	278	60
Contract	159	116	1089	398	129
Domestic Relations	167	83	753	384	100
Property	49	153	661	397	97
Tort	157	111	884	406	134
Other	73	115	701	403	104
All cases as a group	613	83	1089	396	118